No. 11-9771

IN THE SUPREME COURT OF THE UNITED STATES

ROSA MIRIAM DELLA PORTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in permitting the parties to present supplemental closing arguments in response to the jury's reported deadlock where no Allen charge had been given and no inquiry had been made as to the issues dividing the jury.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–10) is reported at 653 F.3d 1043.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2011. A petition for rehearing was denied on January 11, 2012 (Pet. App. 11). The petition for a writ of certiorari was filed on April 6, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of embezzlement of labor union assets, in violation of 18 U.S.C. 501(c). She was sentenced to 21 months of imprisonment, to be followed by three years of supervised release. Judgment 1. The court of appeals affirmed. Pet. App. 1–10.

1. Petitioner worked as a bookkeeper for the International Longshoremen's and Warehousemen's Union Local 26 between 1996 and 2003. Pet. App. 3. Starting no later than 2003, she carried out a scheme to embezzle cash from the union by preparing two sets of deposit slips for cash deposits. Ibid. One set, which stayed with the union's books, showed the full amounts of cash taken from union headquarters and matched log books recording cash receipts. Id. at 3-4. The other set, used at the bank, reflected substantially less cash but approximately the same total deposit amounts. The difference –- more than $100,000 -- was made up from dues checks from members' employers. Ibid. During the same time frame, though not on dates corresponding exactly to those on the deposit slips, petitioner deposited amounts totaling more than $15,000 in cash and $13,000 in money orders into her personal bank accounts. Ibid.

2. In 2008, a grand jury in the Central District of California indicted petitioner on a single count of embezzlement of labor union assets, in violation of 18 U.S.C. 501(c). Indictment 1-2.

At petitioner's trial, the government introduced evidence of the dual deposit slip scheme and the deposits into petitioner's personal bank account, primarily through the testimony of Department of Labor investigator Roberto Gonzalez. Pet. App. 4. After hearing the evidence and argument, and after deliberating for three hours, the jury sent a note asking for "the numbers of the exhibits where the Government showed the dual deposit slips and then showed the relationship of deposits into [petitioner]'s account" and identifying Gonzalez as the witness who testified about those exhibits. Ibid. Because the relationship between the dual deposit slips and the deposits into petitioner's account was a matter of inference, the court -- with both parties' approval -- told the jury that it was "unable to respond to this specific request as worded." Ibid. After deliberating for the rest of the day, the jury requested and received a read-back of Gonzalez's testimony the next morning. Ibid.

After deliberating for another three hours, the jury sent a note indicating that it could not reach a unanimous decision. Pet. App. 4. The court brought the jury into the courtroom and

spoke with the foreperson, beginning with an admonishment to "listen carefully and only answer the questions that I ask and don't volunteer or give me any additional information." Ibid. The court asked if the jury was deadlocked and, after receiving an affirmative response, asked whether there was "anything the Court could do to further assist in [the jury's] deliberations." Id. at 5. The court offered, as examples, to read back a portion of trial testimony or to allow the attorneys some additional argument time. Ibid. The foreperson said rehearing testimony would not be useful, but did not know whether additional argument would help. Ibid. The court returned the jury to its deliberations, and, after about ten minutes, the jury sent a note requesting supplemental argument. Ibid.

The government suggested that the court ask the jury what issues it would like addressed. Pet. App. 5. Defense counsel objected, and the court declined to make the inquiry. Ibid. Defense counsel also objected to supplemental argument in general, but the court overruled that objection. Ibid. The following morning, each side presented 15 minutes of additional argument, following the format provided in Federal Rule of Criminal Procedure 29.1. Ibid. After less than an hour of further deliberations, the jury returned a unanimous guilty verdict. Ibid.

3. The court of appeals affirmed. Pet. App. 1–10. The court rejected petitioner's contention that the district court either unconstitutionally coerced the jury or abused its discretion in ordering the supplemental arguments. Id. at 7. The court held that supplemental argument here raised no "specter of coercion" because the court had neither given an Allen charge[1] before allowing the parties' supplemental arguments nor asked the jury to identify its areas of concern. Id. at 8. Those facts, the court found, distinguished this case from United States v. Evanston, 651 F.3d 1080 (9th Cir. 2011), and United States v. Ayeni, 374 F.3d 1313 (D.C. Cir. 2004), each of which had reversed a conviction after the district court ordered supplemental argument. Pet. App. 8. The court also rejected the suggestion that the district court could have employed other, less coercive options: the jury had already reheard the key witness's testimony and had indicated that additional read-backs would be unhelpful; and, without invading the jury's

[1] An Allen charge is a jury instruction encouraging a deadlocked jury to reach a verdict, first approved by this Court in Allen v. United States, 164 U.S. 492, 501-502 (1896).

province by ascertaining the source of its confusion, no supplemental instruction could be crafted. Id. at 9.[2]

ARGUMENT

Petitioner asserts that the district court erred by allowing the supplemental arguments in response to the jury's reported deadlock, in conflict with the D.C. Circuit's decision in United States v. Ayeni, 374 F.3d 1313 (2004). The court of appeals correctly rejected that contention, and the decision below does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly concluded that the district court committed no error in allowing the supplemental arguments. A district court enjoys substantial discretion in conducting a trial, including in responding to a jury's questions and its declarations of deadlock. See, e.g., Renico v. Lett, 130 S. Ct. 1855, 1863 (2010) (noting that a trial judge enjoys "broad discretion" in responding to a jury's declaration of deadlock and determining whether to declare a mistrial); Lowenfield v. Phelps, 484 U.S. 231, 236–237 (1988) (examining the trial judge's exercise of discretion in giving an Allen

[2] The court of appeals also rejected petitioner's contention that the district court committed plain error by not providing, sua sponte, a jury instruction on the defense of authorization. Pet. App. 10. Petitioner does not renew that contention before this Court.

charge in response to a deadlocked jury). The court may not, however, invade the jury's province as the sole fact-finder or coerce the jury into reaching a verdict. See United States v. Martin Linen Supply Co., 430 U.S. 564, 572–573 (1977) (noting that a judge may not enter a guilty verdict before the jury returns one even when the evidence is overwhelming); Brasfield v. United States, 272 U.S. 448, 449–450 (1926) (prohibiting trial courts from inquiring into a deadlocked jury's numerical division).

As the court of appeals determined (Pet. App. 7-8), the district court here did nothing to invade the jury's sanctity or usurp its role as fact-finder. The court "expressly rejected" a request to ask the jury what issues were dividing it and "scrupulously" avoided ascertaining those issues inadvertently. Id. at 8. The court gave no Allen charge, and the jury had reported its difficulty in reaching unanimity only once. Those circumstances do not support the conclusion that the court sought to pressure the jury into reaching a verdict at all costs. See United States v. Evanston, 651 F.3d 1080, 1091 (9th Cir. 2011) (reversing conviction where court had given Allen charge and then ordered supplemental argument after jury again reported being deadlocked).

As the court of appeals further explained (Pet. App. 8-9), the district court had few alternatives available to respond to

the jury's deadlock. The court had already read back the key witness's testimony, and the foreperson stated that additional read-backs would not be helpful. Id. at 9. The court could not have fashioned useful supplemental instructions without (impermissibly) first asking the jury to identify its difficulties. Ibid. And in the Ninth Circuit, even a single Allen charge stands "at the brink" of coercion. United States v. Seawell, 550 F.2d 1159, 1163 (1977). The district court therefore cannot be faulted for cautiously pursuing a more effective alternative in response to the jury's reported deadlock.[3]

2. Contrary to petitioner's argument (Pet. 4–7), no conflict exists between the decision below and the D.C. Circuit's decision in Ayeni, supra, which is the only decision on this issue from another circuit court.[4] In Ayeni, after a

[3] Although this case does not involve a supplemental jury instruction, supplemental argument in such cases is permissible and, in some circuits, required. See, e.g., United States v. Fontenot, 14 F.3d 1364, 1368 (9th Cir. 1994) (requiring supplemental argument if a supplemental instruction introduces a new legal theory); United States v. Horton, 921 F.2d 540, 546-548 (4th Cir. 1990) (same); Loveless v. United States, 260 F.2d 487, 488 (D.C. Cir. 1958) (per curiam) (same); United States v. Civelli, 883 F.2d 191, 196 (2d Cir. 1989) (supplemental argument for supplemental instructions is sometimes, but not always, required).

[4] Petitioner does not assert any conflict between the decision below and the Ninth Circuit's prior decision in Evanston, supra, and none exists for the reasons explained in the opinion below (Pet. App. 7-9). In any event, any intra-

reported deadlock, the district court "invited, but did not require, the jurors to identify areas of disagreement." 374 F.3d at 1314. Then, after the jury identified several questions, the court ordered supplemental arguments to address two of those questions. Ibid. The D.C. Circuit determined that, under those particular circumstances, the district court abused its discretion in allowing the supplemental arguments. Id. at 1315–1317.

The Ayeni court reasoned that the district court, "in effect, allowed the lawyers to hear the jury's concerns and then, as if they were sitting in the jury room themselves, fashion responses." 374 F.3d at 1316. That process, it concluded, invaded the jury's sanctity. Ibid. As the D.C. Circuit noted in a subsequent decision, Ayeni's animating concern was the district court's inquiry of the jury, which "openly invites an intrusion into the basic functions of the jury and does so in a manner that is rife with the potential for coercion." United States v. Yarborough, 400 F.3d 17, 21 (2005) (reversing conviction where district court had asked jury whether it had questions and jury responded with legal question, prompting supplemental instructions but no additional argument).

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circuit tension between the decision below and Evanston would not warrant resolution by this Court. See, e.g., Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

Here, by contrast, the district court never asked the jury to identify the issues dividing it and expressly rejected a request to do so in advance of the supplemental arguments. Pet. App. 8 (contrasting this case with both Ayeni and Evanston, in which such an inquiry had been made). Indeed, the court "scrupulously instructed the foreperson to only answer the questions asked and to not volunteer any additional information, and none was." Ibid. Petitioner asserts that the parties nevertheless "knew the issue hanging up the jury." Pet. 6. But that speculative assertion ignores the uncertainty created by the sequence of events during the jury's deliberations: between the jury's first note (requesting the exhibit numbers that linked the union's missing money to the deposits in petitioner's personal account) and the parties' supplemental arguments, the jury had heard a full read-back of Gonzalez's testimony and had had a further opportunity to examine the exhibits identified in it. And if the parties had definitively known the precise issue dividing the jury, they presumably would have devoted far more than half their supplemental time addressing it. See ibid.; Pet. C.A. Reply Br. 10.

In the end, petitioner seeks (Pet. 8-12) a per se rule prohibiting supplemental closing arguments in response to a jury's declaration of deadlock. But no court of appeals has ever adopted any such per se bar. See Pet. App. 8-9; Evanston,

651 F.3d at 1088 ("we do not foreclose the possibility that supplemental argument treating factual matters could ever be used"); Ayeni, 374 F.3d at 1316–1317 ("we need not address [defendant's] contention [that supplemental arguments are never permissible] given our resolution of [his] narrower claim that the supplemental arguments were an abuse of discretion under the circumstances of this case"). Accordingly, the decision below does not create any conflict among the courts of appeals, let alone one warranting this Court's review.

3. Additionally, this case presents a poor vehicle for resolving the issue presented. Petitioner did not advance in the court of appeals the precise argument pressed in her petition, i.e., that this Court should ban supplemental arguments under its supervisory powers. Compare Pet. 8-12, with Pet. C.A. Br. 17–42 (arguing that supplemental closing arguments violate due process and Federal Rule of Criminal Procedure 29.1).[5] And federal courts rarely employ supplemental arguments in response to deadlocked juries; indeed, only two courts of appeals have had the opportunity to address their propriety.

[5] In any event, the courts of appeals have supervisory authority to formulate reasonable and appropriate procedural rules in matters not addressed by statute or the promulgated rules. See Thomas v. Arn, 474 U.S. 140, 147-148 (1985). This Court's intervention to create a uniform practice, as to ban the use of supplemental argument under any and all circumstances, is not warranted. Cf. Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993) (declining to "mandate[] uniformity" in fugitive dismissal rules).

See pp. 8-10, supra; see also Ayeni, 374 F.3d at 1317, 1323 (Tatel, J., concurring) (noting rarity of the practice). If district courts make greater use of supplemental arguments, that would allow further development of the issue in the courts of appeals.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Several states provide trial courts with the option of conducting further proceedings in response to a deadlocked jury, and California specifically permits supplemental closing arguments in that situation. Cal. R. Ct. 2.1036(b)(3); see Ariz. R. Crim. P. 22.4; N.D. R. Ct. 6.9; Ind. Jury R. 28. Allowing more time for implementation of those state court procedures could provide beneficial data to the federal court system.