

No.

IN THE SUPREME COURT OF THE UNITED STATES

ROSA MIRIAM DELLA PORTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether, in a federal criminal trial, a district court can allow the parties to present supplemental closing arguments on the facts of the case as a response to a jury's declaration of deadlock.

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United States v. Della Porta,
653 F.3d 1043 (9th Cir. Nov. 2011)

Order Denying Rehearing, January 11, 2012

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OPINION BELOW

The opinion of the court of appeals was published at *United States v. Della Porta*, 653 F.3d 1043 (9th Cir. 2011).

JURISDICTION

The opinion of the court of appeals was filed on August 8, 2011. The court of appeals denied rehearing and rehearing *en banc* on January 11, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides: “No person shall . . . be deprived of life, liberty, or property, without due process of law”

Federal Rule of Criminal Procedure 29.1 provides: “Closing arguments proceed in the following order: (a) the government argues; (b) the defense argues; and (c) the government rebuts.”

STATEMENT OF THE CASE

Petitioner was charged in the Central District of California with one count of embezzlement and theft of labor union assets under 29 U.S.C. § 501. *See Della Porta*, 653 F.3d at 1045. The evidence and argument portion of her trial lasted approximately three days. On the second day of deliberations, the jury revealed a factual dispute at issue regarding the correlation, if any, between the allegedly embezzled funds and petitioner’s bank account and requested the

exhibits entered into evidence during the testimony of the investigating agent, the only witness who testified about that issue. *Id.* at 1046. The district court and the parties immediately identified the factual issue presented by the jury's note, and the district court declined the jury's request for the exhibits entered during the agent's testimony. *Id.* at 1046.

On the third day of deliberations, the jury continued to focus on the correlation issue and asked for and received a read-back of the agent's testimony, thereby acquiring the exhibit numbers it requested the previous day. *Id.* at 1046. At the end of this third day of deliberations, the jury reported a deadlock. *Id.* at 1046. The district court suggested whether additional read-backs would be of assistance, and upon receiving a negative response, suggested additional argument by the attorneys. *Id.* at 1046-47. The jury responded that it "would like to hear the attorneys' argument again, as you just suggested[,]” and the district court, over petitioner's objection, ordered supplemental arguments, with the prosecution splitting 15 minutes between supplemental opening and rebuttal, and the defense using 15 minutes in between. *Id.* at 1047. Thereafter, the jury deliberated for 20 minutes before returning a guilty verdict. *Id.* at 1047.

On appeal, petitioner continued to challenge the supplemental argument procedure used in response to the jury's declaration of a deadlock. The

Ninth Circuit rejected her contention. The Ninth Circuit reasoned that this case was different from *United States v. Ayeni*, 374 F.3d 1313 (D.C. Cir. 2004), where the D.C. Circuit reversed a conviction because a district court allowed supplemental closing arguments in response to a deadlocked jury. The Ninth Circuit explained that, in *Ayeni*, “the district court asked the deadlocked jury to identify areas of disagreement, the jury identified specific factual matters on which it disagreed, and the parties were permitted to tailor their supplemental arguments to the jury’s specific concerns.” *Della Porta*, 653 F.3d at 1050. The Ninth Circuit reasoned that, here, the “district court did not extract from the jury information about its fact-finding process[,]” and [a]lthough the parties may have speculated about the issue hanging up the jury based on its earlier notes to the court,” the same “specter of coercion” was not present. *Id.* at 1051. The Ninth Circuit recognized that the district court did not issue any cautionary instructions in conjunction with the supplemental arguments and that the jury returned its verdict quickly after the arguments, but nonetheless concluded that there was no improper coercion. *Id.* at 1051.

ARGUMENT

This Court should grant this petition for two reasons. First, the Ninth Circuit’s decision in this case conflicts with the D.C. Circuit’s opinion in *Ayeni*.

This Court should grant this petition to resolve this conflict. Second, the Ninth Circuit's decision represents the first reported opinion approving of supplemental closing arguments as a response to a jury's declaration of deadlock. Under trial procedure established over the course of more than 200 years, the parties are not given the opportunity to reargue the facts of their case after the jury retires to deliberate. Federal courts should not stray from this established procedure and create new rules on an ad hoc basis. Accordingly, this Court should hold, pursuant to its supervisory powers, that such supplemental closing arguments are forbidden.

**A. This Court Should Resolve The Conflict
Between The Ninth Circuit's Decision In This
Case And The D.C. Circuit's Opinion In *Ayeni***

In *Ayeni*, 374 F.3d at 1314, the jury sent a note stating that it was deadlocked. The district court invited, but did not require, the jurors to identify areas of disagreement stating that perhaps the court or counsel could help them resolve those disagreements. *Id.* at 1314. The jury responded with multiple questions, and, over the defendant's objection, the district court allowed each side ten minutes of argument, with defense counsel going first. *Id.* at 1314. The district court instructed the jury not to place undue emphasis on the arguments but to consider them together with the evidence, instructions, and other arguments they had heard. *Id.* at 1314. The jury returned a guilty verdict.

The D.C. Circuit reversed. The D.C. Circuit held that it did not have to decide whether such supplemental arguments are ever permissible because the district court abused its discretion in that particular instance. *Id.* at 1315. The D.C. Circuit explained that the jury’s questions could have been easily answered without supplemental arguments, and “it was an abuse of discretion for the district court to adopt an approach that, 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 targeted precisely to those concerns.” *Id.* at 1316.

The court further stated that it did not have to resolve whether such supplemental arguments were ever permissible but noted its “uneasiness with any use of supplemental arguments in response to a jury’s factual questions.” *Id.* at 1317. The court explained: “In addition to being almost unheard of . . . the use of such arguments is . . . troubling. Accordingly, we strongly discourage the use of this innovation by the trial judges of this circuit.” *Id.* at 1317. Judge Tatel concurred and expressed the view that such arguments should never be allowed, or, at the very least, should not be allowed until a formal rule of procedure is adopted governing their usage. *See Ayeni*, 374 F.3d at 1325 (Tatel, J., concurring) (“given the extent to which [such arguments] intrude into the jury’s role as exclusive fact-finder, and given the nation’s two-hundred-plus-year history of

conducting trials without them, I believe they should be adopted, if at all, not by individual judges in the middle of trials, but through some formal procedure, such as legislation or amendments to the rules of criminal procedure”).

The Ninth Circuit’s decision in this case conflicts with *Ayeni*. The Ninth Circuit appeared to reason that *Ayeni* was distinguishable because the parties in that case knew the factual areas of interest to the jury, whereas in this case the district court did not ask the jury for any specific indications about their disagreement. *See Della Porta*, 653 F.3d at 1050-51. This is not a significant distinction with *Ayeni*, either factually or legally. As a factual matter, the parties in this case knew the issue hanging up the jury. Given the notes that the jury had previously sent, the parties knew that the “correlation” between the money embezzled and petitioner’s bank account was the focus of the jury’s dispute. Indeed, when pressed at oral argument before the Ninth Circuit panel, the government responded affirmatively when asked: “You knew they were focusing on if she took the money, what did she do with it.” Consistent with its concession at oral argument, although the government only dedicated 3% and 14% of its initial closing arguments to the “correlation” issue, it led with this issue in its supplemental arguments and spent almost 50% of its first supplemental argument and then 60% of its supplemental rebuttal on this issue.

As a legal matter, the main concern in *Ayeni* was that there were other alternatives that the district court could have employed rather than the supplemental closing arguments, and therefore it was an abuse of discretion to utilize this previously unheard-of supplemental argument procedure. *See Ayeni*, 374 F.3d at 1316. Similarly, here, the district court could have easily given an instruction under *Allen v. United States*, 164 U.S. 492 (1896) if it wanted the jury to attempt to work through its deadlock. As in *Ayeni*, it was an abuse of discretion for the district court to implement the drastic step of supplemental arguments.

Actually, the situation in this case was more coercive than *Ayeni* because at least the district court in that case gave cautionary instructions about the supplemental argument procedure, *see Ayeni*, 374 F.3d at 1314, while the district court here gave no such instructions. *See Della Porta*, 653 F.3d at 1051. And, there can be little doubt that petitioner was harmed by the improper supplemental arguments because the jury returned its guilty verdict a mere 20 minutes after the arguments. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 462 (1978); *see also Lowenfield v. Phelps*, 484 U.S. 231, 240 (1988).

In sum, the Ninth Circuit unprecedented decision in this case conflicts with the D.C. Circuit's opinion in *Ayeni*. Accordingly, this Court should grant review to resolve the conflict.

B. This Court Should Hold, Pursuant To Its Supervisory Powers, That Supplemental Closing Arguments Are Forbidden As A Response To A Deadlocked Jury

A jury's declaration of deadlock is one of the most important and sensitive parts of a criminal trial. The jury's deadlock generally demonstrates that the case was close enough for jurors to disagree on the outcome, and therefore a fine line separates a defendant from all of the heavy burdens that come with a criminal conviction. Given the sensitive circumstances surrounding a jury's declaration of deadlock, this Court has not hesitated, under supervisory powers, to craft per se rules to govern a district court's conduct under these delicate circumstances. *See Brasfield v. United States*, 272 U.S. 448 (1926) (district court cannot inquire as to the numerical division of the jury).

This Court should establish a similar per se rule and prohibit supplemental closing arguments as a response to a jury's declaration of deadlock. In *Ayeni*, the lead opinion strongly discouraged the use of supplemental arguments, and Judge Tatel expressed the view that such arguments should never be allowed, or, at the very least, should not be allowed until a formal rule of procedure is adopted governing their usage. *See Ayeni*, 374 F.3d at 1317, 1325. There is a simple reason why such a rule of criminal procedure has not yet been adopted and why this is the first reported federal case ever approving of such

supplemental closing arguments – they are a bad idea.¹

The only reason advanced for supplemental arguments in response to a jury deadlock is that they may trigger a verdict, thereby avoiding a retrial and saving judicial resources. *See Ayeni*, 374 F.3d at 1324 (Tatel, J., concurring). However, it has long been established that “a mistrial . . . plays an important and healthy role in our criminal justice system.” *Id.* at 1324-25 (collecting authority). What’s more, there is no empirical data demonstrating that judicial resources are actually saved by attempting to induce a verdict under an ad hoc supplemental argument procedure. A large portion of cases that end in a hung jury ultimately settle, and therefore there is never a retrial. This is not surprising, as a deadlocked jury often leads parties to reevaluate their negotiation positions and thereby reach a compromise. On the other hand, if a guilty verdict is triggered by the supplemental arguments, a new trial motion, contested sentencing hearing, and, of course, an appeal challenging the propriety of the supplemental arguments is the likely result. Given these circumstances, it is far from clear that approving of supplemental arguments on an ad hoc basis will actually save judicial resources.

¹ There is authority for allowing supplemental arguments when the jury is instructed on a new *legal* theory after closing arguments have concluded. *See Ayeni*, 374 F.3d at 1320-21 (Tatel, J., concurring). But that is not the situation presented by this petition. Petitioner is advocating a per se rule in the context of supplemental arguments in response to a deadlocked jury.

On the other side of the coin, there are numerous reasons why such a procedure should not be allowed. The opinions in *Ayeni* have detailed how such arguments taint the sanctity of the jury's deliberative process and implicate a defendant's constitutional rights to a fair trial and an impartial jury. And there are other policy considerations weighing against this novel procedure.

Supplemental arguments in this context create the danger that a verdict may be based more on the ability of the lawyer rather than on the merits of a particular case. Moreover, the verdict may often boil down to how quick a given lawyer is on his or her feet. Presumably, such supplemental arguments will have to be delivered on the fly, without the days and weeks of preparation that often go into a typical closing argument. Similarly, the result of the trial may unfairly depend on the resources of a particular party, which may allow one side to present a slicker or otherwise more effective supplemental argument under the time constraints. Of course, resources and quality of representation are always factors in a case, but supplemental arguments unduly emphasize these random factors in the closest of cases.

Similarly unfair is the Ninth Circuit's reasoning that supplemental arguments were permissible in this case because the parties did not know what was dividing the jury (a point that petitioner disagrees with, as explained above).

Even assuming the Ninth Circuit were correct in this regard, that hardly seems like good policy grounds *for* supplemental arguments. Once again, there is the danger that the outcome of the trial may be determined by which attorney is clever enough to figure out the facts dividing the jury so that those become the points of focus in the supplemental argument. In other words, the fact dividing the jury may only be discussed by one of the parties in the supplemental arguments, giving that party the advantage. At least where the parties know the issue dividing the jury, they both have an opportunity to address it. And if the parties do not know the issue dividing the jury, what is the point of supplemental argument? There would seem to be no need for the attorneys to reargue their case in general terms.

Because, unlike Fed. R. Crim. P. 29.1, there is no established procedure for supplemental closing arguments, it is not clear how they should be conducted. The district judge in this case believed that it was appropriate to give the government a rebuttal; thus, the government was allowed to deliver *four* closing arguments in this case. Perhaps other judges will disagree, such as the one in *Ayeni* who only gave each side one argument with the defense going first. *See Ayeni*, 374 F.3d at 1314. Obviously, rebuttal is a tremendous advantage to the prosecution that creates the possibility that the fact dividing the jury is only addressed by the government when it receives its last word. Of course, somebody

always has to have the last word, but a defendant's ability to deal with this disadvantage is greater when a more thought-out closing argument can be made.

If this Court adheres to the Ninth Circuit's view and approves of this novel approach, it will likely face an array of questions, questions that are better answered by a formal rule of procedure rather than case-by-case analysis. For example, by the time of supplemental arguments, the attorneys will often know the identity of the foreperson. Do special rules need to be created to prevent attorneys from focusing on the foreperson during their supplemental arguments? Similarly, what if the identities of the holdouts are known; can a district judge allow supplemental argument if the holdouts are aware that the judge or the attorneys know their identities? Can a district court give an *Allen* charge, if, after hearing supplemental argument, the jury again announces a deadlock? What if, after hearing supplemental argument, the jury requests argument on other factual issues? What if, after supplemental arguments, the jury then wants to hear more evidence? Can a district judge allow supplemental argument if the jury has revealed how it is numerically divided? Of course, this is just a sampling of the questions that will arise, and rather than making up new rules on an ad hoc basis, it would be better to adhere to the practice that has governed for more than two centuries – the parties do not get to reargue facts after the jury retires to deliberate.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'E. Balogh', with a stylized, cursive flourish extending to the right.

Dated: April 6, 2012

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APPENDIX

653 F.3d 1043, 11 Cal. Daily Op. Serv. 9982, 2011 Daily Journal D.A.R. 11,883

(Cite as: 653 F.3d 1043)

C

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.

Rosa Miriam DELLA PORTA, AKA Rosa Miriam
Galan–Lopez, AKA Rosa Miriam Lopez, Defendant–Appellant.

No. 10–50168.

Argued and Submitted May 4, 2011.

Filed Aug. 8, 2011.

Background: Defendant was convicted in the United States District Court for the Central District of California, Philip S. Gutierrez, J., of embezzlement and theft of labor union assets, and she appealed.

Holdings: The Court of Appeals, Silverman, Circuit Judge, held that:

(1) district court's decision to permit supplemental closing argument did not result in impermissible coercion and was not an abuse of discretion, and (2) court did not plainly err by failing to instruct jury on defendant's purported defense that her actions were authorized by union's president.

Affirmed.

West Headnotes

[1] Criminal Law 110 ¶1152.11

110 Criminal Law

110XXIV Review

110XXIV(N) Discretion of Lower Court

110k1152 Conduct of Trial in General

110k1152.11 k. Right to open and close. Most Cited Cases

The court of appeals reviews the district court's decision to allow supplemental argument in a criminal case for abuse of discretion; under this standard, the district judge's discretion should be pre-

served unless its exercise could deprive the defendant of a constitutional right or otherwise prejudice the defendant's case.

[2] Criminal Law 110 ¶1030(1)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1030 Necessity of Objections in General

110k1030(1) k. In general. Most

Cited Cases

To reverse a criminal conviction under the plain error standard, there must be: (1) error; (2) that is plain; and (3) that affects substantial rights; and if those conditions are satisfied, the court of appeals may exercise its discretion to reverse, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

[3] Criminal Law 110 ¶645

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k645 k. Right to open and close. Most Cited Cases

In prosecution for embezzlement and theft of labor union assets, district court's decision to permit supplemental closing argument after jury notified court that it was deadlocked did not result in impermissible coercion and was not an abuse of discretion; because court never gave jury an *Allen* charge, there was no suggestion that court believed jury had not accorded proper deference to a prior encouragement to reach a verdict, and court did not pressure jurors to surrender their conscientiously-held beliefs for sake of securing a unanimous verdict, and court did not ask jury to identify areas or issues of

disagreement, but only asked if anything would further assist jury in its deliberations, such as reading back testimony or hearing further argument, and jury elected to hear further argument.

[4] Criminal Law 110 ⚡865(1.5)

110 Criminal Law

110XX Trial

110XX(J) Issues Relating to Jury Trial

110k865 Urging or Coercing Agreement

110k865(1.5) k. "Allen," "dynamite," or "hammer," etc., charge. Most Cited Cases

It is per se error to give a second *Allen* charge where the jury has not asked for one, because doing so conveys a message that the jurors have acted contrary to the earlier instruction as that instruction was properly to be understood and that message serves no purpose other than impermissible coercion.

[5] Criminal Law 110 ⚡645

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k645 k. Right to open and close. Most Cited Cases

The rule of criminal procedure setting forth the required order for closing arguments following a criminal trial neither sanctions nor prohibits the use of supplemental closing arguments in all cases. Fed.Rules Cr.Proc.Rule 29.1, 18 U.S.C.A.

[6] Criminal Law 110 ⚡1038.2

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1038 Instructions

110k1038.2 k. Failure to instruct in general. Most Cited Cases

In prosecution for embezzlement and theft of

labor union assets, the evidence did not support a finding that the union ever authorized defendant's actions, and thus, district court did not plainly err by failing to instruct jury on defendant's purported defense that her actions were authorized by union's president; defendant testified that union president instructed her to withhold cash from deposits into union's bank accounts so that union could donate the cash to overseas charities, but there was no evidence that collective union membership ever instructed or authorized defendant to withhold cash from union's deposits for purpose of donating it to overseas charities, and union officials testified unequivocally that union never discussed or authorized donations to overseas charities. Labor-Management Reporting and Disclosure Act of 1959, § 501(c), 29 U.S.C.A. § 501(c).

[7] Criminal Law 110 ⚡770(2)

110 Criminal Law

110XX Trial

110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k770 Issues and Theories of Case in General

110k770(2) k. Necessity of instructions. Most Cited Cases

Criminal Law 110 ⚡824(4)

110 Criminal Law

110XX Trial

110XX(H) Instructions: Requests

110k824 Necessity in General

110k824(4) k. Special issues and defenses. Most Cited Cases

A district court in a criminal case must instruct the jury on a theory of defense if the defendant actually presents and relies upon that theory at trial, even when she does not request such an instruction.

[8] Labor and Employment 231H ⚡1002

231H Labor and Employment

231HXII Labor Relations

231HXII(B) Labor Organizations

231Hk1002 k. Property and funds in general. Most Cited Cases

Labor and Employment 231H 3270

231H Labor and Employment

231HXX Offenses and Penalties

231HXX(A) In General

231Hk3268 Offenses

231Hk3270 k. Misuse or misappropriation of union funds. Most Cited Cases

In the context of a prosecution for embezzlement or theft of the assets of a labor union, the owner of the property is the union itself, its collective membership, not individual union officials who are not vested with power to dissipate union funds unilaterally; an appropriation or expenditure of union funds is therefore unauthorized if it is done without the permission of the union, even if it is approved by a superior union official. Labor-Management Reporting and Disclosure Act of 1959, § 501(c), 29 U.S.C.A. § 501(c).

***1044 Ethan Balogh** (argued) and Jay Nelson of Coleman & Balogh LLP, San Francisco, CA, for the appellants.

***1045 Andre Birotte Jr., Robert E. Dugdale, Dennis Mitchell** (argued) and Elana Shavit Artson of the U.S. Attorney's Office for the Central District of California, Los Angeles, CA, for the appellees.

Appeal from the United States District Court for the Central District of California, Philip S. Gutierrez, District Judge, Presiding. D.C. No. 2:08-cr-00942-PSG-1.

Before: BARRY G. SILVERMAN, RICHARD C. TALLMAN, and RICHARD R. CLIFTON, Circuit Judges.

OPINION

SILVERMAN, Circuit Judge:

In *United States v. Evanston*, we recently held

that a district court abuses its discretion and impermissibly coerces a jury verdict where, “over defense objection and after the administration of an unsuccessful *Allen* charge, [the court] inquire[s] into the reasons for a trial jury's deadlock and then permit[s] supplemental argument focused on those issues, where the issues in dispute are factual rather than legal.” 651 F.3d 1080, 1082 (9th Cir.2011). In this case we also address the use of supplemental closing arguments to assist a deadlocked jury, but under significantly different circumstances: where the district court never gave an *Allen* charge and never inquired into the reasons for the jury deadlock. We hold today that under these circumstances, unlike those at issue in *Evanston*, the district court's decision to permit supplemental closing argument did not result in impermissible coercion and did not constitute an abuse of discretion meriting reversal. Nor do we find any plain error in the district court's jury instructions.

I. BACKGROUND

Between 1996 and 2006, Rosa Della Porta worked as a bookkeeper for the International Longshoremen's and Warehousemen's Union Local 26 in Los Angeles. As the union's bookkeeper, Della Porta was responsible for maintaining the union's receipt books and depositing various cash and check payments received by the union into its two bank accounts. In the spring of 2005, the union's internal auditor discovered that thousands of dollars in cash payments received by the union had not been deposited into its bank accounts. A Department of Labor investigation ensued, and Della Porta was charged with one count of embezzlement and theft of labor union assets under 29 U.S.C. § 501(c).

At trial, the government sought to prove that Della Porta used a dual deposit slip method to conceal her theft of the union's cash. Under this system, she prepared two sets of bank deposit slips when she made deposits into the union's accounts—one for the bank and one for the union's records. The union's deposit slips reflected that all of

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(Cite as: 653 F.3d 1043)

the cash payments had actually been deposited in the union's bank accounts, but the deposit slips submitted to the bank showed that either less or no cash had been deposited. In order to account for the difference in the cash value between the two sets of deposit slips, Della Porta substituted dues checks received from the union members' employers in place of the cash missing from the bank deposits. The dues checks did not appear on the union's deposit slips. There was a discrepancy of over \$100,000 between the cash received by the union and the cash deposited into the union's bank account between 2003 and 2006. The government also presented evidence that, during the same approximate period, Della Porta deposited more than \$15,000 in cash and more than \$13,000 in money orders into her personal bank account. The government introduced evidence of both the dual deposit scheme and the cash and money order deposits into Della Porta's account *1046 through Roberto Gonzalez, the lead investigating agent from the Department of Labor.

Della Porta testified in her defense. She admitted using the above-described dual deposit system but denied taking the union's cash for her personal use. She claimed that Luisa Gratz, the union's president, instructed her to withhold certain amounts of cash from the deposits into the union's bank accounts so the union could donate the cash to overseas labor-related charities and organizations. As for the influx of deposits into her personal checking account between 2003 and 2006, Della Porta claimed that her sister gave her some of the money to help her pay her household expenses, and that she also earned income on the side through part-time work with Mary Kay and Avon. When called as a witness by the government, however, Della Porta's sister denied ever giving Della Porta cash for any household or related expenses.

After deliberating for approximately three hours over two separate days, the jury sent the court a note that read as follows:

Jury requests the numbers of the exhibits where

the Government showed the dual deposit slips and then showed the relationship of deposits into Rosa's account. This was done during Roberto Gonzalez's testimony. He showed money orders, deposit slips, into Rosa's account. We need the numbers of the exhibits.

The court and the parties debated how to best respond to the jury's request. The court stated that it viewed the jury's request as "almost asking for a mini closing again" where the government would juxtapose the evidence of the cash taken from the union's bank deposits with the evidence of the cash and money orders deposited into Della Porta's bank account, and Della Porta would argue that such a relationship could not be circumstantially inferred. The government offered to stipulate to such a process, but the court concluded that a "mini closing" wasn't necessary at that juncture. With both parties' approval, the court ultimately responded to the jury that it was "unable to respond to this specific request as worded." The jury deliberated for the remainder of the day.

The following morning, the jury sent out a second note asking if it could have copies of "the transcripts of Roberto Gonzalez's testimony." With the parties' approval, the court responded: "No. However, you may have the testimony of Roberto Gonzalez read to you in open court." After the court reporter read back Gonzalez's testimony, the jury returned to deliberations for about three hours. It then sent a third note to the court that stated: "The jury cannot come to a unanimous decision." The court proposed bringing the jurors out to conduct a direct inquiry of the foreperson, and potentially the other individual jurors, to determine whether it was "hopelessly deadlocked." Neither party objected to the proposal. The following exchange between the court and the foreperson ensued in the courtroom:

THE COURT: ... Please listen carefully and only answer the questions that I ask and don't volunteer or give me any additional information beyond what I ask.

You have indicated that the jury is deadlocked; is that correct?

THE FOREPERSON: Yes.

THE COURT: Is there anything the Court could do to further assist in the deliberations?

THE FOREPERSON: What do you mean like providing is [sic] with some extras?

THE COURT: I'm sorry?

***1047** THE FOREPERSON: Do you mean by providing us with some other information?

THE COURT: Let me give you some specific examples to follow up on that question. For example, would it be helpful to read a portion—read testimony back to you? Read testimony back to the jurors?

THE FOREPERSON: No, I don't think so.

THE COURT: Would it be helpful, for example, to allow the attorneys five or ten more minutes to argue each particular side?

THE FOREPERSON: I don't know if that would help us.

THE COURT: All right. Go back to the jury room and—I don't know if you want to discuss any particular issues as to whether or not something else would help you come to a decision. Let me know your view that you're still deadlocked. Thank you.

After the court excused the jury, it asked the parties whether they would object if the jury came back and asked for “five minutes of argument on a point or just five more minutes of argument on either side.” The government stated that it had no objection. The defense objected to any further argument, arguing that “it's in [the jurors'] hands at this point.”

About ten minutes later, the jury sent the court

a fourth note. The note stated: “We would like to hear the attorneys' argument again, just as you suggested.” The government proposed asking the jurors if there was a particular issue they wanted to hear argument on. Della Porta's counsel objected that such an inquiry would invade the process of independent juror deliberations. The court sided with Della Porta on the issue and declined to make inquiry of the jury. It ruled that each side would be allowed fifteen minutes of additional argument, and that the government could reserve a portion of that time for rebuttal.

The government argued first, followed by the defense. The government then closed with a brief rebuttal. The jury resumed deliberations and reached a unanimous guilty verdict in less than an hour. Della Porta now appeals that verdict. She argues that the district court's employment of supplemental arguments impermissibly coerced a guilty verdict, and that the district court committed plain error by failing to instruct the jury regarding her defense that her actions were authorized by the union's president. We have jurisdiction over this appeal under 28 U.S.C. § 1291.

II. STANDARD OF REVIEW

[1] We review the district court's decision to allow supplemental argument for abuse of discretion. *Evanston*, 651 F.3d at 1083–84. Under this standard, “ ‘the district judge's discretion should be preserved unless its exercise could deprive the defendant of a constitutional right or otherwise prejudice defendant's case.’ ” *Id.* (quoting *United States v. Goode*, 814 F.2d 1353, 1355 (9th Cir.1987)). We review de novo, however, the question “ ‘[w]hether a judge has improperly coerced a jury's verdict.’ ” *Id.* (quoting *United States v. Berger*, 473 F.3d 1080, 1089 (9th Cir.2007)).

[2] Because Della Porta never requested a jury instruction on an authorization defense at trial, we review the district court's failure to give such an instruction for plain error. *See United States v. Bear*, 439 F.3d 565, 568 (9th Cir.2006). To reverse under this standard, “there must be (1) ‘error,’ (2) that is

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'plain,' and (3) that 'affect[s] substantial rights.' ” *Johnson v. United States*, 520 U.S. 461, 466–67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (quoting *1048 *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). If these conditions are satisfied, we may exercise our discretion to reverse, but “only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 467, 117 S.Ct. 1544 (internal quotation marks omitted).

III. DISCUSSION

A. The District Court Neither Abused Its Discretion Nor Coerced a Guilty Verdict By Ordering Supplemental Closing Argument.

In *Evanston*, we addressed, as a matter of first impression in this circuit, the use of supplemental closing arguments to assist a deadlocked jury in a criminal trial. The case involved charges of assault resulting in serious bodily injury occurring on an Indian reservation. 651 F.3d at 1082–83. After a two-and-a-half day trial, and after deliberating for five hours over two separate days, the jury advised the district court that it could not reach a verdict. *Id.* The court then gave Ninth Circuit Model Jury Instruction 7.7—often referred to as an *Allen*, or “dynamite,” charge^{FN1}—and asked the jury to continue deliberating. *Id.* After deliberating for almost another three hours, the jury again advised the court that it could not reach a verdict. *Id.* The court met with the parties and proposed “bring[ing] in the members of the jury, ascertain[ing] the issue on which they are deadlocked, and allow[ing] ten more minutes to each side to argue that point.” *Id.* The government welcomed the opportunity to reargue, but the defense objected to the proposed process. *Id.* The court then called the jury back into the courtroom. It admonished the jury that “[b]oth parties have a right to make sure that the judge and others do their very best to make sure that the jury empanelled [sic] to hear a case absolutely cannot decide it ... before they declare a mistrial or release the jury.” *Id.* at 1091 (first alteration added). It then asked whether “the procedure of, without adding

additional evidence, identifying particular points and rearguing those points might assist them in resolving the impasse.” *Id.* at 1083. The jury responded affirmatively and identified two issues on which it wished to hear further argument: witness credibility and how the victim's injuries were caused. *Id.* The court then excused the jury and allowed the parties to argue once more whether supplemental arguments should be permitted. The defense repeated its objections, but the court ultimately decided to allow reargument. *Id.* The government presented its argument first, followed by the defense. After two more hours of deliberation, the jury returned a unanimous guilty verdict. *Id.*

FN1. “The term ‘*Allen*’ or ‘dynamite’ charge is used to describe a supplemental instruction given by the court to encourage a jury to reach a verdict after that jury has been unable to agree after some period of deliberation. The original form of the instruction was approved by the Supreme Court in *Allen v. United States*, 164 U.S. 492, 501, 17 S.Ct. 154, 157, 41 L.Ed. 528 (1896).” *United States v. Nickell*, 883 F.2d 824, 828 (9th Cir.1989).

We reversed and remanded for a new trial. Specifically limiting our holding to the circumstances at issue in the case, we held that the district court's employment of supplemental argument “resulted in impermissible coercion, and consequently an abuse of discretion meriting reversal.” *Id.* at 1093 n. 15. We reasoned that the use of supplemental closing arguments under the circumstances infringed upon the traditional fact-finding role of the jury in two important ways: “(1) the judge's questioning as to the reasons for the deadlock required that the jury divulge the state of its unfinished deliberations, thereby violating the jury's deliberative secrecy,” and “(2) the parties' supplemental arguments, coupled with the judge's insistence on continuing *1049 after a second deadlock, injected the court and the attorneys into the jury's deliberative process, thereby raising the specter of jury coercion.”

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Id. at 1088. Furthermore, given the court's decision to order supplemental arguments after an *Allen* charge and after the jury reported a second impasse, "the lawyers' arguments were of perhaps increased coercive value: the implication was, as with a second *Allen* charge, that the judge believed the jury had not accorded proper deference to his prior encouragement to reach a verdict." *Id.* (citing *United States v. Seawell*, 550 F.2d 1159, 1163 (9th Cir.1977)). In sum, "[t]he compounded coercion resulting from the combined use of the deadlock instruction and supplemental arguments targeted to the jury's exact areas of dispute created a broad, impermissible opportunity for interference with the jury's role as sole fact-finder." *Id.* at 1093.

We also noted as influencing our decision the fact that the district court had available several less coercive alternatives to ordering supplemental argument, such as re-reading the original jury instructions relating to the jury's areas of concern, providing supplemental instructions regarding the relevant legal standard for causation, and allowing the jury to review portions of witness testimony. *Id.* at 1089–91. In reversing the district court, however, we took pains to note that our decision was limited to the circumstances presented, *id.* at 1093 n. 15, and declined to "foreclose the possibility that supplemental argument treating factual matters could ever be used" in a permissible fashion, *id.* at 1088. We also left open "the question of whether the use of supplemental arguments to address factual matters is necessarily or always an error of constitutional dimension, whatever the circumstances." *Id.* at 1093 n. 15.^{FN2}

FN2. We limited our holding in such a manner "because the Supreme Court's precedent on similar jury coercion issues has generally emanated from its supervisory powers over the federal courts, rather than any mandate from the federal Constitution." *Id.* at 1093 n. 15 (citing *Lowenfield v. Phelps*, 484 U.S. 231, 239 n. 2, 240 n. 3, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988)).

This is so "because the presence of coercion produced by the trial court's actions depends on the circumstances of each case, rather than any inherent coercive feature of the procedure itself, and due process would not be violated where no actual or likely coercion occurs." *Id.*

[3] Using *Evanston* as our guidepost, we hold that the district court neither coerced a guilty verdict nor abused its discretion by ordering supplemental arguments under the facts presented in this case. We so hold because the set of key circumstances rendering the use of supplemental arguments coercive in *Evanston* are simply not present here.

[4] First, unlike in *Evanston*, the district court in this case never gave an *Allen* charge. Nor did it indicate to the jurors that it had to satisfy itself that they "absolutely" could not reach a verdict before declaring a mistrial. *Id.* at 1091. These distinctions are crucial. As we alluded to in *Evanston*, see *id.* at 1084–85, "[a] single *Allen* charge, without more, stands at the brink of impermissible coercion." *Seawell*, 550 F.2d at 1163. Although we have upheld the use of the *Allen* charge under certain circumstances, "[e]ven slight deviations from the language and procedure approved by this court can result in reversible error based upon likelihood of coercion." *Evanston*, 651 F.3d at 1085 (citing *United States v. Mason*, 658 F.2d 1263, 1267–68 (9th Cir.1981)). It is per se error, for example, to give a second *Allen* charge where the jury has not asked for one, because doing so "conveys a message that 'the jurors have acted contrary to the earlier instruction as that instruction was *1050 properly to be understood ...' and that message serves no purpose other than impermissible coercion." *Id.* (quoting *Seawell*, 550 F.2d at 1163). It was against these background "core principles" that we viewed the district court's procedure in *Evanston*. *Id.* By ordering supplemental arguments after giving an *Allen* charge, "the implication was, as with a second *Allen* charge, that the judge believed the jury had not accorded proper

deference to his prior encouragement to reach a verdict.” *Id.* at 1088.

Moreover, the likelihood of coercion occasioned by the *Allen* charge in *Evanston* was exacerbated by the district court's later admonition to the jury after it reported it was deadlocked for a second time. Such commentary, coupled with the supplemental closing arguments, “risked the same type of coercion and prejudice contemplated by *Seawell*.” *Id.* at 1091 (citing 550 F.2d at 1163). It was very likely that, “having been admonished once with the *Allen* charge, and then admonished that the district court had to make sure the jury ‘absolutely’ could not reach a verdict before declaring a mistrial, the jurors in the minority might have been swayed to reach a verdict more readily, and against their honest beliefs, than if the supplemental arguments had not been given.” *Id.*

Here, none of the above concerns was implicated when the district court ordered supplemental closing arguments. Because an *Allen* charge was never given, there was no suggestion that “the judge believed the jury had not accorded proper deference to his prior encouragement to reach a verdict.” *Id.* at 1088. And because the court never made any additional statements to the jury encouraging it to reach a unanimous verdict, there was no risk that “the jurors in the minority might have been swayed to reach a verdict more readily,” as was the case in *Evanston*. *Id.* at 1091. The district court in no way pressured the jurors to surrender their conscientiously-held beliefs for the sake of securing a unanimous verdict, in stark contrast with the court's actions in *Evanston*.

A second key distinguishing feature of this case is that the district court never asked the jury to identify areas or issues of disagreement before ordering supplemental arguments. To the contrary, after the jury indicated it was deadlocked, the court scrupulously instructed the foreperson to only answer the questions asked and to not volunteer any additional information, and none was. The court then merely asked the foreperson if anything would

further assist the jury in its deliberations, such as reading back witness testimony or hearing further argument. After the jury elected to hear further argument, the court permitted the parties to readdress the jury without any specific guidance on the content of the argument. Siding with the defense on the issue, the court expressly rejected the government's suggestion to invite the jury to identify areas of factual disagreement.

All of these facts distance this case from *Evanston* and *United States v. Ayeni*, 374 F.3d 1313 (D.C.Cir.2004), the only other reported circuit decision discussing the practice of supplemental closing argument. In both *Evanston* and *Ayeni*, the district court asked the deadlocked jury to identify areas of disagreement, the jury identified specific factual matters on which it disagreed, and the parties were permitted to tailor their supplemental arguments to the jury's specific concerns. *See Evanston*, 651 F.3d at 1083; *Ayeni*, 374 F.3d at 1314. This, in turn, “permit[ted] the lawyers to effectively participate in the jury's deliberations, almost as if they were in the jury room itself.” *Evanston*, 651 F.3d at 1088 (alteration in original) (quoting *Ayeni*, 374 F.3d at 1320 (Tatel, J., concurring)). Here, there was no such issue. The district court did not extract from the jury *1051 information about its fact-finding process. Instead, it carefully framed its questions to the foreperson as suggestions of possible forms of assistance, rather than any requirement that the jury reveal the nature of the issues impeding deliberations. Although the parties may have speculated about the issue hanging up the jury based on its earlier notes to the court, the same specter of coercion present in *Evanston* is simply not present here because the court never asked the jury to reveal the nature of its deadlock in the first instance.

Della Porta argues that the district court in this case, as in *Evanston*, “had in its arsenal of permissible actions numerous less coercive alternatives, including doing nothing at all.” *See Evanston*, 651 F.3d at 1090. But that argument ignores the fact

that the district court in *Evanston* took the coercive step of asking the jury to disclose the nature of its factual disagreement. Because it took that step, it had the option of re-reading the original jury instructions relating to each area of concern or fashioning an appropriate supplemental instruction with the parties' input. *Id.* at 1089–91. Because the district court here never asked the jury to identify areas of disagreement, it was not clear what, if any, additional or repeated instructions might have been helpful in breaking the gridlock. The district court in *Evanston* also had the option of allowing the jurors to review witness testimony. *Id.* at 1090–91. But here the court had already read back the testimony of the government's main witness, at the jury's beckoning. The jury had also rejected the court's suggestion of reading back further witness testimony to assist it in its deliberations. These considerations only further distance the circumstances of this case from those at issue in *Evanston*.

[5] We recognize that, as was the case in *Evanston*, the district court did not issue ameliorative instructions prior to the presentation of the supplemental arguments. *See id.* at 1092–93. We also acknowledge that, as in *Evanston*, the jury reached a unanimous verdict relatively quickly after the close of supplemental arguments. *See id.* at 1091. But these factors are by no means dispositive. *See United States v. Beattie*, 613 F.2d 762, 765 (9th Cir.1980) (in evaluating claims of coercion following an *Allen* charge, “the time elapsed between a charge and verdict is significant, [but] it is not dispositive of the issue.”). Furthermore, we considered them in *Evanston* only in the context of our discussion as to whether the defendant was prejudiced by the district court's error. *See* 651 F.3d at 1091–93. Just as we did in *Evanston*, we rest our holding today on the totality of the circumstances of the case presented. Given the circumstances in this case—where the district court never delivered an *Allen* charge and never asked the jury to identify areas of factual disagreement—we find no improper coercion or abuse of discretion warranting reversal.

FN3

FN3. We also reject Della Porta's related contention that the district court's employment of supplemental closing arguments violated Federal Rule of Criminal Procedure 29.1. That rule merely sets forth the required order for closing arguments following a criminal trial. *See* Fed.R.Crim.P. 29.1 advisory committee's note (West 2011) (stating that the “rule is designed to control the order of closing argument.”). It neither sanctions nor prohibits the use of supplemental closing arguments in all cases. *Cf. Evanston*, 651 F.3d at 1088 n. 11.

B. The District Court Did Not Commit Reversible Plain Error By Failing To Give An Authorization Instruction.

[6] We now turn to Della Porta's claim that the district court committed reversible plain error by failing to instruct the jury on her purported defense that her *1052 actions were authorized by Luisa Gratz, the union's president.

[7] A district court must instruct the jury on a theory of defense if the defendant “actually presents and relies” upon that theory at trial, even when she does not request such an instruction. *Bear*, 439 F.3d at 568. Although lack of authorization is not an essential element of § 501(c), it is nevertheless “likely to bear on the essential element of fraudulent intent.” *United States v. Thordarson*, 646 F.2d 1323, 1336 (9th Cir.1981). In a case where lack of authorization is “crucial in determining the defendant's intent,” a jury instruction concerning the defense is “likely to be appropriate.” *Id.*

[8] The district court did not plainly err by failing to instruct the jury on an authorization defense here. The crux of Della Porta's defense was not that Gratz or anyone else authorized her to take the union's funds. Rather, her defense was “that it was, in fact, Gratz who had embezzled the union funds, and that she did so by employing Ms. Della Porta as an unwitting dupe.” *See* Appellant's Brief at 52. A valid authorization defense required more than just a showing that Gratz instructed Della Porta to set

aside cash payments from the union's deposits. In the § 501(c) context, "the owner of the property is the union itself—its collective membership—not individual union officials who are not vested with power to dissipate union funds" unilaterally. See *United States v. Stockton*, 788 F.2d 210, 217 (4th Cir.1986). "An appropriation or expenditure of union funds is therefore unauthorized if it is done without the permission of the union, even if it is approved by a superior union official." *Id.*^{FN4} The evidence presented at trial did not support a conclusion that the collective union membership ever instructed or authorized Della Porta to withhold cash from the union's deposits for the purpose of donating money to overseas charities. Gratz and other union officials all testified unequivocally at trial that the union never discussed or authorized donations to overseas charities. Indeed, even Della Porta testified that no one on the board (other than Gratz) ever said anything to her about donations to overseas charities, and that Gratz tried to conceal the union's alleged donations to overseas charities from the other trustees. Because the evidence presented did not support a finding that the union ever authorized Della Porta's actions, the district court did not plainly err by failing to instruct the jury on an authorization defense.^{FN5}

FN4. See also *United States v. Floyd*, 882 F.2d 235, 241 (7th Cir.1989) ("a higher ranking union official's express approval of an appropriation is of little import to § 501(c) cases because the true owner of union property is the collective membership, not individual union officers" (citing *Stockton*, 788 F.2d at 217)); cf. *United States v. Mett*, 178 F.3d 1058, 1068 (9th Cir.1999) ("[T]hose who embezzle from ERISA pension funds cannot argue that their otherwise illegal transactions were 'authorized' by the plan participants because the participants themselves lack the legal power to 'authorize' such a diversion of pension monies.").

FN5. We also reject Della Porta's related argument that the district court committed reversible plain error by instructing the jury on fraudulent intent. In *United States v. Ford*, we held that the "[c]riminal intent necessary for theft offenses such as those enumerated in [18 U.S.C. §] 664 exists when a defendant knowingly acts wrongfully to deprive another of property." 632 F.2d 1354, 1361 (9th Cir.1980), *overruled on other grounds by United States v. DeBriht*, 730 F.2d 1255 (1984). Section 664 contains language identical to § 501(c)'s language on specific intent. See 18 U.S.C. § 664. Because § 501(c), like § 664, is a theft offense, and because the operative language of § 501(c) is identical to that of § 664, the district court did not plainly err by instructing the jury that fraudulent intent "means knowingly acting wrongfully to deprive another of property."

*1053 IV. CONCLUSION

The district court neither coerced a guilty verdict nor abused its discretion by ordering supplemental closing arguments under the circumstances presented in this case. The district court also did not commit reversible plain error by failing to instruct the jury on an authorization defense, as the evidence presented and relied on by Della Porta at trial did not support a finding that her actions were authorized by the union.

AFFIRMED.

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JAN 11 2012

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROSA MIRIAM DELLA PORTA, AKA
Rosa Miriam Galan-Lopez, AKA Rosa
Miriam Lopez,

Defendant - Appellant.

No. 10-50168

D.C. No. 2:08-cr-00942-PSG-1
Central District of California,
Los Angeles

ORDER

Before: SILVERMAN, TALLMAN, and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.