No. 11-9771

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

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Following a three-day trial, Petitioner's jury deliberated for three days before declaring a deadlock. The jury then returned a guilty verdict a mere 20 minutes following the challenged supplemental arguments. *See* ER 21, 37; *see also United States v. Della Porta*, USCA Case No. 10-50168, Dkt. 34 at 3-4.[1] Those supplemental arguments—not sanctioned by any rule of procedure, and indeed, in derogation of Federal Rule of Criminal Procedure 29.1—were delivered when the parties well knew the factual issue dividing the jury. Petitioner claims the district court's use of supplemental arguments coerced the jury's verdict, and that the Ninth Circuit's approval of supplemental arguments in these circumstances conflicts with *United States v. Ayeni*, 374 F.3d 1313 (D.C. Cir. 2004). She also contends that the Court should exercise its supervisory powers and forbid the use of supplemental arguments to overcome a jury deadlock.

The Government offers a handful of reasons to dissuade the Court from issuing the writ. None has merit.

The Government first tries to distinguish *Ayeni* by denying that the parties knew the factual issue dividing the jury, characterizing the claim as a "speculative

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[1]Petitioner cites to the Excerpts of Record filed with the appellate court as "ER".

assertion[.]" Brief for the United States in Opposition ("BUS") at 10. But the Government ignores that its trial and appellate counsel conceded the point at oral argument when he responded as follows:

> Court: Of course, the colloquy [about supplemental arguments] came after the jury sent out the note and after the testimony of the labor department agent was reread.
>
> USA: That's correct.
>
> Court: So you knew they [the jurors] were focusing on if she took the money, what did she do with it.
>
> USA Yes.

See http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000007439 at 13:01-13:16.[2]

This concession was well taken. The jury's notes and the on-the-record interpretation of those notes establish the district court's and the parties' knowledge of the factual dispute dividing the jurors. ER 57-63. So does the Government's abrupt shift in its presentation of the correlation issue: in its initial summation and rebuttal, the Government respectively dedicated 3% and 14% to this issue, but then led with this issue in supplemental argument, and dedicated

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[2]As below, Petitioner refers to the issue regarding the correlation, if any, between the stolen funds and Petitioner's bank statements as the "correlation" issue.

nearly half of its supplemental opening, and then 60% of its supplemental rebuttal, to it. *See United States v. Della Porta*, USCA Case No. 10-50169, Dkt. 21 at 8-9. Most simply, the Government cannot avoid the plain conflict between *Ayeni* and *Della Porta* by pretending the parties were clueless as to the dispute dividing the jury.

With that factual issue out of the way, the Government's next attempt to distinguish *Ayeni* fails as well. In sum, the Government asserts that the critical difference between *Ayeni* and this case is that in *Ayeni*, the parties learned about the factual dispute dividing the jurors by inquiring of the jurors, whereas in Petitioner's case, the jury volunteered the information. BUS at 9-10. Respectfully, this distinction makes no difference.

Whether the jury revealed the factual dispute dividing it in response to a judicial inquiry or simply volunteered it does not change the fact that the district court and the parties then knew the factual issue dividing the jury. It can hardly matter how the parties learned this information; the Government tailored its supplemental argument to the identified issue just the same. In other words, the coercive effect of supplemental arguments flows from the parties' knowledge of the jurors' dispute and their participation in the deliberations by advocacy regardless of whether the factual information was volunteered or disclosed in

response to inquiry.[3] Just as in *Ayeni*, the supplemental arguments "allowed the lawyers to hear the jury's concerns and then, as if they were sitting in the jury room themselves, fashion responses precisely tailored to those concerns." *Ayeni*, 374 F.3d at 1316.

The Government also tries to distinguish *Ayeni* by noting the district court did not give an *Allen*[4] charge to Petitioner's jury. BUS at 7. But that circumstance supports Petitioner, for two reasons. One, *Ayeni* condemned the use of supplemental arguments by emphasizing the other permissible, non-coercive alternatives available to the district judge. *Ayeni*, 374 F.3d at 1315-17. Notably,

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[3]The coercive effect can be measured by the speed with which the jury then returns a verdict; in this case, 20 minutes.

[4]As then-Judge Kennedy explained in *United States v. Mason*, 658 F.2d 1263, 1265 n.1 (9th Cir. 1981):

> The term 'Allen charge' is the generic name for a class of supplemental jury instructions given when jurors are apparently deadlocked; the name derives from the first Supreme Court approval of such an instruction in *Allen v. United States*, 164 U.S. 492, 501-02, 17 S.Ct. 154, 157-58, 41 L.Ed. 528 (1896). In their mildest form, these instructions carry reminders of the importance of securing a verdict and ask jurors to reconsider potentially unreasonable positions. In their stronger forms, these charges have been referred to as 'dynamite charges,' because of their ability to 'blast' a verdict out of a deadlocked jury. The charge has also been called the 'third degree instruction,' 'the shotgun instruction,' and 'the nitroglycerin charge.' See Marcus, The Allen Instruction in Criminal Cases: Is the Dynamite Charge About to be Permanently Defused?, 43 Mo.L.Rev. 613, 615 (1978).

the D.C. Circuit prohibits the use of an *Allen* charge,[5] thus that option was not available there. Here, in contrast, the Ninth Circuit maintains a carefully-worded *Allen* charge entitled "Deadlocked Jury." Ninth Circuit Model Criminal Jury Instruction 7.7. The reasonable response—short of exercising its discretion to declare a mistrial—was to employ the model instruction approved by the court of appeals.[6]

In addition, the procedure adopted below—injecting partisan advocacy focused on the factual issue dividing the jury, providing the Government two supplemental arguments to Petitioner's one, and failing to provide any cautionary instruction regarding the purpose of supplemental arguments, *e.g.*, cautioning jurors *not* to abandon their conscientiously held beliefs just to reach a verdict—lacked the safeguards provided by an *Allen* charge. As then-Judge Kennedy explained in *Mason*, an *Allen* charge is permissible where it "remind[s] jurors not to surrender their honest and conscientiously held beliefs to the

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[5]*See United States v. Thomas*, 449 F.2d 1177, 1186 (D.C. Cir. 1971) (en banc)

[6]Notably, at Petitioner's trial, the district judge demonstrated his interest in using supplemental arguments in response to the jury's first note, which merely requested "the numbers of the exhibits" introduced during the case agent's testimony, but which the district court characterized as "asking for a mini closing[.]" ER 57-62.

majority's desire for a verdict." *Mason*, 658 F.2d at 1266; *see also* Ninth Circuit Model Criminal Jury Instruction 7.7. As he further observed, "[i]f cases grappling with [responses to deadlocked juries] have a common thread, it is this: the integrity of individual conscience in the jury deliberation process must not be compromised." *Mason*, 658 F.2d at 1268. Here, the district court ordered supplemental arguments but offered neither guidance as to how the arguments should be received in the context of the trial as a whole nor an admonishment that each juror not change an honest belief as to the weight or effect of the evidence solely because of the opinions of his or her fellow jurors or for the mere purpose of returning a verdict. Rather, the trial judge employed partisan advocacy that compromised the integrity of individual conscience in the jury deliberation process.

Thus, the Government's reliance on *Renico v. Lett*, — U.S. —, 131 S.Ct. 1855, 1863 (2010), *see* BUS at 6, misses the mark. The Government uses *Renico* to trumpet a district court's "substantial discretion in conducting a trial, including in responding to a jury's questions and its declaration of deadlock." *Id.* But in *Renico,* after the Court reviewed the "clearly established Federal law" regarding the "great deference" to a trial judge's declaration of mistrial in response to a deadlock, it then reemphasized that:

> [i]n the absence of such deference, trial judges might otherwise employ coercive means to break the apparent deadlock, thereby creating a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.

Renico, 131 S.Ct. at 1863. In other words, while a district court has broad discretion to declare a mistrial upon a declaration of deadlock, it is afforded that discretion so as to avoid the use of coercive means to obtain a verdict, *viz.*, the very occurrence in Petitioner's case.

In the end, the Government urges that this case does not provide an appropriate occasion to evaluate the issue because "federal courts rarely employ supplemental arguments in response to deadlocked juries[.]" BUS at 11 (noting that only the D.C. and Ninth Circuits have addressed the issue). But that is exactly Petitioner's point: this unprecedented procedure presents an anomaly that has never been sanctioned by any federal court for more than two and a quarter centuries until this case. Considering the black-and-white nature of the question presented, permitting district courts throughout the nation to follow the Ninth Circuit's lead will only threaten the trueness of verdicts reached in those cases; but those occurrences will not provide further guidance on how to address this challenged procedure. Indeed, the facts presented in Petitioner's case present an excellent vehicle to assess the coerciveness attendant to using supplemental

arguments in response to a declared jury deadlock. In short, this coercive, ad-hoc procedure should not be permitted in the Ninth Circuit or elsewhere, and should be halted now.[7]

The policy that the Government advocates—the use of supplemental arguments as "a more effective alternative in response to [a] jury's reported deadlock[,]" BUS at 8—is dangerous and wrong. *See e.g.*, *Brown v. Louisiana*, 447 U.S. 323, 332-33 & nn.10, 12 (1980) (recognizing value of hung juries).[8] This Court has made plain that however "effective" mechanisms are for coercing verdicts, they are not permitted. *See e.g.*, *Jenkins v. United States*, 380 U.S. 445 (1965); *Bucklin v. United States*, 159 U.S. 682, 686-87 (1895). The Court should thus issue the writ to assess the coercive nature of the mechanism employed by the district court at Petitioner's trial. *See Brasfield v. United States*, 272 U.S. 448

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[7]Petitioner respectfully disagrees with the Government's contention that she did not advance the bases for this petition below. BUS at 11; *see United States v. Della Porta*, USCA Case No. 10-50169, Dkt. 9 at 24-37 (relying on *Ayeni* to challenge procedure employed here); Dkt. 42 (noting circuit split with *Ayeni* and urging court of appeals to prohibit pursuant to its supervisory powers the use of supplemental arguments to break jury deadlocks).

[8]*See also Ayeni*, 374 F.3d at 1324 (Tatel, CJ., concuring) (collecting authority reflecting that "a mistrial. . . plays an important and healthy role in our criminal justice system.")

(1926) (forbidding district courts from inquiring about the numerical division of a sitting jury).

CONCLUSION

Before the court of appeals, the Government conceded that "supplemental argument in response to specific factual questions posed by a deliberating jury presents a danger of invading the jury's deliberative and fact-finding processes[.]" *United States v. Della Porta*, USCA Case No. 10-50169, Dkt. 15 at 27. The Government's concession naturally extends to supplemental arguments delivered after a deliberating jury volunteers the factual issues dividing it and then announces a deadlock. For the reasons presented, Petitioner Rosa Miriam Della Porta respectfully asks the Court to issue a writ of certiorari so this Court may consider the important question presented by her case.

Respectfully submitted,

Dated: August 24, 2012

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