No. 07A373

IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE E. WARNER and GEORGE H. RYAN, SR., *Applicants*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Application From The United States Court Of Appeals
For The Seventh Circuit, Nos. 06-3517 & 06-3528.
There On Appeal From The United States District Court
For The Northern District Of Illinois, Eastern Division, Nos. 02-CR-506-1, 4.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR CONTINUED BAIL ON APPEAL PENDING CERTIORARI

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Dated: November 5, 2007

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Rule

This case arrives as a wolf in sheep's clothing: guilty verdicts on all counts and a summary declaration that the lengthy record of this six-month trial supports the verdicts. But there is a fundamental, foundational defect: the very thing that permits confidence in jury verdicts is absent here — a fair and impartial jury determination. And it is absent because the district court adopted a process — now affirmed in a published opinion of the Court of Appeals — that reconfigured the jury after eight days of deliberations, pervasive jury misconduct, interrogation of the entire jury panel and removal of a defense holdout. And the trial ran six months in length because it was a trial en masse — not of 30 different defendants[1] — but of more than 30 distinct events and transactions occurring over 12 years swept into a single RICO conspiracy and mail fraud scheme predicated on a legal fiction — the state of Illinois as the RICO enterprise.

The trial was "a travesty" and Judge Posner rightly concluded that it failed to meet the "minimum standards of procedural justice" guaranteed to every criminal defendant. 10/25/07 7th Cir. Order at 5-6 (Posner, J., dissenting, joined by Kanne and Williams, JJ.) (Ex. B). What is left of meaningful appellate review or the fundamental rights to a fair trial before an impartial jury under the decision of the panel majority? *Nothing* — so long as there is sufficient evidence for *judges* to declare the defendants "guilty." That is a staggering and unprecedented departure from the fundamental principles that have informed the American criminal justice

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[1] *Cf. Kotteakos v. United States*, 328 U.S. 750, 775 (1946) (a defendant has a substantial "right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others").

system and the decisions of this Court for two centuries. *See, e.g., United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977) (a judge is prohibited from directing a verdict in a criminal case); *Edwards v. Balisok*, 520 U.S. 641, 647 (1997) ("[A] criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him.").

The government's response to all this is that the case is not worthy of Supreme Court review — the conflicts are not important, the jury issues are fact-intensive, and the inquiry is complicated by supposed waiver, forfeiture and a lengthy record. But what is more important in our criminal justice system than the bedrock constitutional guarantees to a fair trial before an impartial jury? There are important conflicts here not just on issues on which there are competing lines of authority within the Circuits (and there are), but perhaps more importantly, because the panel majority's decision itself is so outside the main — "*has so far departed from the accepted and usual course of judicial proceedings*" — that it warrants review. Sup. Ct. R. 10 (emphasis added). Most every criminal case turns on a given set of facts and particularly so after a long trial — those are not reasons to deny review where there is such compelling need to vindicate fundamental trial rights. Indeed, the district court itself expressed profound doubts about the correctness of its decisions, and the Seventh Circuit granted and extended bail in recognition of the significance of these issues. The sharp divisions in the Seventh Circuit on the merits, on rehearing and on whether to extend bail pending certiorari further underscore the substantial issues presented here.

The government's response relies heavily on claims of waiver and forfeiture. Those claims are inaccurate and contradicted by the record.[2] Two factual errors require response. *First*, the defense repeatedly raised the issue of the fearful jurors both in the district court and on appeal. Before the district court reconstituted deliberations, the defense argued that the jurors "may well be terrified that the U.S. government is looking at them":

> DEFENSE COUNSEL: [T]hese jurors now are under investigation . . . . And there is not a chance in the world that they are going to vote for defendant when they think that the federal government is looking at them the way that they looked at these others.
>
> They have sat there for six months and watched a defendant be prosecuted and going to be sent to jail, in the government's view, because he did exactly what they might have done, and they know they did. And they are not going to put themselves in that position by going against the government, even if they feel in their heart that they should. That's the realistic outcome.
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> And these jurors were visibly frightened. And if you think for one minute that that fear is going to help the defense, I beg to differ with you.
>
> When a jury is afraid, they vote with the prosecution . . . .

3/28/06 Tr. at 24700, 24692, 24698. Indeed, the district court acknowledged the objection on the record: "The . . . argument you are making is that we now have a bunch of fearful jurors. *I just don't know how to address that.*" *Id.* at 24699 (Pallmeyer, J.) (emphasis added). Significantly, the district court made repeated

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[2] In a supplemental addendum accompanying this filing, the Defendants are submitting the complete briefing filed in the Court of Appeals. The issues raised in the Application were fairly presented.

findings that none of the parties caused or prompted the inquiry into the jury. Tr. at 24377 ("it's nobody's fault"); Tr. at 24796 ("this set of circumstances, is not the fault or responsibility of anybody involved in this case"). It was never a defense strategy to question deliberating jurors, and the district court's inquiry was prompted by the media and the jurors' false questionnaires.

On appeal, in a separate section of the opening brief — under the heading "Background Checks On Deliberating Jurors Prejudiced The Defense" — Defendants specifically raised the issue of the jurors' potential fear of perjury prosecutions:

> It is well established that there is a significant risk that jurors who are the subject of law enforcement scrutiny during deliberations in a criminal case will seek to please the prosecution and vote to convict. *See, e.g., Remmer I*, 347 U.S. at 229 ("The sending of an F.B.I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder.").

Br. at 42 (Ex. I). Relying on *Remmer I*, the Defendants then argued that legal point and recounted with citations to the record how "over half of the deliberating jurors made misstatements on their questionnaires" and "were questioned about those misstatements by the district court in the presence of federal prosecutors." *Id.* The issue was fairly presented, and the government understood the defense argument and argued extensively in response. Gov't Br. at 50-52 (Ex. J). The issue was never waived and deserves consideration by this Court.

Second, the government's claims relative to cumulative error are misguided. The briefs on appeal are replete with the language of cumulative error from the statement of issues, Br. at 1-3, summary of argument, *id.* at 17-19 ("an avalanche of errors . . . deprived Warner and Ryan of a fair trial before an impartial jury"), to the individual jury arguments themselves where the Defendants argued at length that the possibility of prejudice had to be assessed in light of the totality of the circumstances, *id.* at 27-29, 41, 42-43, 47-48; Reply Br. at 1, 5-6, 9-10, 14, 24 (Ex. K). "Avalanche of errors" is cumulative error language borrowed directly from Judge Posner's decision in *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000).

There is nothing talismanic about the word "cumulative." It is an error that in combination with another error or the record as a whole so infected the jury's deliberations as to deny a defendant a fair trial.[3] That was and is the essence of the Defendants' arguments relative to the jury and its deliberations, and extended as

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[3] The Circuits are divided as to whether a finding of a "single" error precludes cumulative error analysis, but even a single error can violate a defendant's right to a fair trial. Indeed, in contrast with the Seventh Circuit, other circuits have considered whether prejudicial circumstances — in addition to errors — imperiled the fundamental fairness of the trial. *Compare United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001), *with United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993) ("Even if a particular error is cured by an instruction, the court should consider any 'traces' which may remain" when reviewing for cumulative error); *United States v. Rivera*, 900 F.2d 1462, 1471 n.8, 1477 (10th Cir. 1990) (noting that courts have found fundamental unfairness when error is considered in conjunction with other prejudicial circumstances, but declining to explore the outer parameters of when prejudicial circumstances are included in a cumulative impact analysis); *and United States v. Diharce-Estrada*, 526 F.2d 637, 642 (5th Cir. 1976) ("Based upon the combination of errors and prejudicial circumstances recited, this court is left with the definite and firm conviction that [defendant] did not receive a fair trial.")

well to the evidentiary, instructional and other trial errors raised. Br. at 49-71. The Defendants raised the cumulative nature of these errors on appeal in the very same terms advanced in the district court. Indeed, "harmlessness is not the test for reversible error when a cascade of errors turns a trial into a travesty." 10/25/07 Order at 6 (Posner, J., dissenting, joined by Kanne and Williams, JJ.).

Finally, this Court plainly has the power to consider issues that were not raised in the lower courts, particularly where — as here — the issues implicate core constitutional rights and call into question the fairness and integrity of the judicial proceeding. *See, e.g.*, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984); *Wood v. Georgia*, 450 U.S. 261, 266 n.5 (1981); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980); *see also Unitherm Food Sys., Inc. v. Swift-Ekrich, Inc.*, 546 U.S. 394, 408 (2006) (Stevens, J., dissenting). Indeed, the institutional need for such review is even more compelling where the right in question is "structural."

Respectfully submitted,

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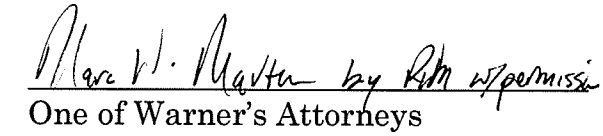

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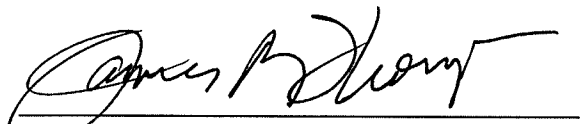

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