No. _____

In the Supreme Court of the United States

LAWRENCE E. WARNER AND GEORGE H. RYAN,
PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI
VOLUME I of II

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QUESTIONS PRESENTED

1. Whether a trial court violates the Fifth and Sixth Amendments when it allows the removal and substitution of a deliberating criminal juror (here, after eight days of deliberations) where there is an objective possibility that the juror's removal was prompted by the juror's view on the merits.

2. Whether a trial court commits structural error in permitting a jury verdict where more than half the jurors are interrogated in the middle of deliberations about their own misconduct in the presence of a prosecutor.

3. Whether the Fifth and Sixth Amendment rights to a fair trial before an impartial jury are violated when a reviewing court refuses to conduct a cumulative error analysis despite "a flood" or "cascade of errors" that turns "a trial into a travesty," and where the defendant has complained on appeal not only of individual errors, but also of an "avalanche of errors" that together violated his constitutional rights.

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INTRODUCTION

This case, which arises from one of the highest-profile public corruption prosecutions in recent memory, presents three important questions of recurring concern to courts, prosecutors and defendants throughout the Nation. The first concerns the appropriate standard for determining when a deliberating juror in a criminal trial can be removed and replaced with an alternate: May a trial court remove and replace such a juror even where there is an objective possibility that the removal was prompted by the juror's views on the merits? The second issue arises somewhat less frequently but is equally important: Does a trial court commit structural error in permitting a jury verdict where more than half the jurors are interrogated in the middle of deliberations about their own misconduct in the presence of a prosecutor? And the third issue, like the first, is one that can and does arise in a wide variety of criminal proceedings: whether a reviewing court must assess trial errors not only for their individual effects, but also for their cumulative effect on the trial proceedings. All of these issues are the subject of widespread confusion and disagreement among the lower courts, and all are worthy of this Court's review.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh Circuit are reported at 498 F.3d 666 (Wood, J., joined by Manion, J.) (Kanne, J. dissenting) (reprinted at App. 1a-91a) and 506 F.3d 517 (Posner, J., joined by Kanne and Williams, J.J., dissenting from the denial of rehearing en banc) (reprinted at App. 92a-107a). The opinions of the United States District Court for the Northern District

of Illinois (Pallmeyer, J.) can be found at 2006 WL 2583722 (reprinted at App. 108a-243a) and 2004 WL 1794476 (reprinted at App. 244a-316a).

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2007. Petitioners filed a timely petition for rehearing and rehearing en banc on August 28, 2007. These petitions were denied on October 25, 2007. App. 93a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * .

Federal Rule of Criminal Procedure 24 provides in relevant part:

> The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

STATEMENT

This case arises from the criminal prosecution of George H. Ryan, Sr., the former Governor of Illinois, and his longtime friend, Lawrence E. Warner. They were charged with "honest services" mail fraud and other federal crimes.

1. Following six months of trial testimony, the jury retired to deliberate. Eight days into deliberations, the *Chicago Tribune* revealed that certain jurors had given untruthful or inaccurate answers related to prior criminal arrests or convictions on the juror questionnaire used six months earlier in voir dire. This news broke after the district court and counsel had spent days struggling to respond to a series of notes from the jury, including questions about substantive legal instructions, requests for transcripts and, most significantly, a serious conflict that developed between a group of jurors and Juror Evelyn Ezell — a juror later revealed to be inclined to acquit. Juror Ezell had complained about verbal abuse and intimidation in the deliberations. The group of jurors responded by asking the district court to remove Juror Ezell for failing to deliberate in good faith, and requested that the court empanel an alternate.

The district court suspended deliberations in response to the information disclosed by the *Tribune* and conducted its own inquiry. The investigation initially focused on two jurors, including Juror Ezell, but soon expanded once it was learned that over half the deliberating jurors had failed to disclose arrests, convictions or other significant contact with the court system. For three days, eight jurors were questioned by the district court in the presence of federal prose-

cutors and defense counsel about their undisclosed arrests, convictions and other misstatements or omissions in voir dire. The district court and counsel discussed the necessity of advising jurors of their rights, and, upon consultation with the United States Attorney, Patrick Fitzgerald, the prosecution informed the district court that it was willing to offer immunity to jurors on a going-forward basis. App. 77a-78a.

Ultimately, the district court removed two jurors — Pavlick and Ezell — for being untruthful. The district court substituted two alternates over defense objection, reasoning that while its decision might be error, the court wanted to reach a verdict after such an "enormously burdensome and expensive" trial. 3/24/06 Tr. at 24343-46. Then, eighteen days after the conclusion of closing arguments, the court told the remaining jurors to start "all over" and to "pretend you have never had a discussion about the case at all." App. 19a; 3/28/06 Tr. at 24650, 24805. The reconstituted jury returned guilty verdicts on all counts against both Petitioners after ten days of deliberations free from conflict.

2. Following post-verdict revelations that a juror brought extrinsic legal research into the jury's deliberations, the district court held a hearing. Interviewed by phone, Juror Ezell testified that during the second week of deliberations Juror Peterson brought a piece of paper into the jury room and read from it that "a juror could be dismissed for not deliberating in good faith." App. 211a; 5/5/06 Tr. at 11-12. Juror Ezell initially believed Juror Peterson to be reading a legal instruction from the court and started searching for it in her copy of the instructions, but Peterson stopped her and said, "No, it's not in there. You need to listen." 5/5/06 Tr. at 11. According to Juror Ezell,

after Juror Peterson finished reading from the paper, Juror Losacco said, "No, read the one to her on bribery, because George Ryan was taking bribes and so are you." App. 207a; 5/5/06 Tr. at 12. According to Juror Ezell, Juror Peterson responded, "No, we don't need to" — "We've got her. We've got her right there. We've got her where we want her," and she laughed at Juror Ezell. 5/5/06 Tr. at 12. Another juror (Jesse Davis) defended Juror Ezell, and Davis told Ezell to watch her back — a warning that made her "even more afraid." App. 207a; 5/5/06 Tr. at 12. Juror Ezell testified that she was in tears, and when she tried to leave the jury room, another juror blocked the door. App. 207a; 5/5/06 Tr. at 13.

Represented by legal counsel, Juror Peterson was interviewed by the district court by telephone and confirmed the substance of Juror Ezell's account. Juror Peterson explained that after a discussion concerning Juror Ezell during the first week of deliberations, other jurors encouraged her to conduct extraneous research, telling her, "Teacher, do your homework." App. 85a; 5/5/06 Tr. at 80. Ignoring district court instructions forbidding legal research, Juror Peterson then did a Google search and found articles on dealing with difficult people. App. 10a, 217a; 5/5/06 Tr. at 68, 80. The next night, she found an American Judicature Society article on the removal and substitution of jurors. Juror Peterson is certain that she showed that article to other jurors and cut out the following paragraph:

> But other bases for substitution raise serious questions about the sanctity of the deliberative process, primarily allegations by some jurors that another juror is unwilling or unable to meaningfully

> deliberate, or is unwilling to follow the law. Such an allegation requires a hearing where the judge must decide the tricky question whether the juror is truly unfit to serve, or is merely expressing an alternative viewpoint that will likely result in a hung jury. Only if the judge concludes that the challenged juror is truly unfit to serve, will the judge be authorized to dismiss that juror and substitute an alternate juror.

App. 12a; 5/5/06 Tr. at 59-60, 76. Juror Peterson testified that the next day she read the paragraph to Juror Ezell and every other member of the jury. App. 10a; 5/5/06 Tr. at 77-78. In connection with her extrajudicial research, Juror Peterson also crafted her own instruction on good-faith deliberation and read that instruction to Juror Ezell and other jurors repeatedly during the deliberations. App. 10a, 208a-209a; 5/5/06 Tr. at 63, 79-81.

The district court made an express finding that Juror Ezell was intimidated by the use of the AJS article in deliberations. 5/5/06 Tr. at 31-32. The court concluded that Juror Peterson's external legal research was regrettable, but characterized it as "a really innocent mistake" before denying defense requests to interview other jurors. 5/5/06 Tr. at 94.

The district court concluded that "in spite of difficulties generated by this very lengthy, high-profile trial," the Petitioners received a fair trial before an impartial jury. App. 193a. Accordingly, the district court denied repeated defense motions for mistrial as well as the posttrial motion seeking a new trial, and sentenced Warner to 41 months' imprisonment and

Ryan to 78 months' imprisonment. App. 242a, 319a, 330a.

3. In their opening brief on appeal, the Petitioners argued that an "avalanche of errors" related to the jury, its deliberations and the questioning, removal and substitution of jurors midway through deliberations deprived the Petitioners of their constitutional rights to a fair trial before an impartial jury. App. 2a. The Seventh Circuit, however, issued a sharply divided opinion affirming the convictions.

The majority held that extensive juror misconduct and the district court's unprecedented decision to substitute two jurors after eight days of deliberations did not violate the Petitioners' constitutional rights to a fair trial and impartial jury because each error considered in isolation was harmless. App. 10a-33a, 36a-42a. As to removal and substitution, the majority concluded that the trial court's instructions to the reconstituted jury were sufficient to prevent the chilling of deliberations in the new jury. App. 32a. In the majority's view, the removal and substitution of two jurors did not constitute error because the district court complied with the literal requirements of Rule 24(c). App. 38a. The majority further held that the district court's interrogation of jurors during deliberations did not compromise the jury's impartiality and did not constitute a structural error because the defense had requested that at least some jurors be questioned about their misconduct. App. 66a. Finally, the majority expressly declined to consider the cumulative nature of the issues raised by the defense. App. 3a. The majority opined that "the fact that the trial may not have been picture-perfect is, in itself, nothing unusual." App. 2a.

Judge Kanne voiced strong disagreement in dissent. He concluded that "the dysfunctional jury deliberations" deprived the Petitioners of a fair trial. App. 69a. Judge Kanne summarized the remarkable developments in 18 bullet points, later quoted verbatim by Judge Posner in the dissent from the denial of rehearing en banc. App. 69a-72a, 93a-96a. A mere sampling of these points includes:

- jurors interrogated by the district court for days in the presence of federal prosecutors midway through deliberations about their own false statements in voir dire;
- an astonishing effort by jurors to force the removal of a juror with whom they disagreed, and a juror's extrinsic legal research into the basis for seeking such removal;
- the removal of two deliberating jurors in the middle of deliberations (including a defense juror) for bias;
- a raft of other juror misconduct that included among other things repeated violations of the court's instructions, *ex parte* communications, and exposure to media coverage about the trial; and
- the unprecedented substitution of two alternates and reconfiguration of the jury weeks after closing arguments.

App. 69a-72a, 93a-96a.

According to Judge Kanne, the district court's interrogation of jurors in the middle of deliberations about their own misconduct constituted a structural error because it created "irreconcilable conflicts of interest" in which the jurors themselves were poten-

tially subject to criminal prosecution. App. 72a. Further, Judge Kanne concluded that a "flood of errors" required reversal of these convictions:

> To describe the circumstances surrounding the jury . . . as "nothing unusual" is to simply turn a blind eye to the realities of what occurred – in order to save the efforts expended during a six month trial.

App. 72a. As Judge Kanne concluded, the "breadth and depth of both structural and nonstructural errors" presented are "astounding" and "egregious" such that "a mistrial was the only permissible result." App. 90a-91a.

The Seventh Circuit denied rehearing and rehearing en banc, but that decision was far from unanimous: of the nine judges who participated, three dissented in an opinion written by Judge Posner, which concluded that "a cascade of errors turn[ed] a trial into a travesty." App. 97a. Indeed, as Judge Posner observed, the government's offer to immunize deliberating jurors during interrogations related to their own false statements "suggests the proceedings were broken beyond repair." App. 99a.[1]

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[1] In a dissent from the panel majority's decision to deny continuing bail pending certiorari, Judge Kanne further noted:

> I dissent because I disagree with the in chambers opinion's characterizations of the dissent from the panel opinion and the dissent from the rehearing *en banc*; the in chambers opinion's emphasis and reliance on forfeiture; and that opinion's conclusion that the appellants have not demonstrated a reasonable probability of success on the merits. The trial was riddled with errors

REASONS FOR GRANTING THE PETITION

Public confidence in our jury system depends upon the willingness of courts to police and redress serious and pervasive errors that affect the essential fairness of a trial and jeopardize a jury's impartiality. Yet here, as we explain in more detail below, the lower courts simply refused to do that, and their refusal raises three issues warranting this Court's review.

First, the lower courts are in conflict over the standards governing the removal and substitution of deliberating jurors. The decision below effectively eliminates any constitutional limitation on a district court's ability to substitute a deliberating juror provided that the court complies with express requirements of the recently amended Rule 24(c). Review is imperative because there is genuine confusion on this recurring issue of enormous practical importance.

Second, the interrogation of deliberating jurors about their own misconduct presents the type of structural defect that defies harmless error analysis. Jurors in jeopardy themselves cannot fairly and freely determine the outcome of a case after having been questioned in the presence of federal prosecutors about their own false statements. This constitutional error is of such a magnitude that it defeats the essential feature of the jury trial — impartial jurors.

Finally, the last issue raised in this Petition goes to the heart of a reviewing court's obligation to en-

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> that ultimately rendered the proceedings manifestly unfair and unjust . . . .

United States v. *Warner*, 507 F.3d 508, 511-12 (7th Cir. 2007). Justice Stevens subsequently denied an application for continued bail.

sure that errors, individually and in combination, do not deprive a defendant of his constitutional rights to a fair trial, unanimous verdict and impartial jury. The decision below is in conflict with decisions in other Circuits in its refusal to review for cumulative error, and is inconsistent with the precedent of this Court.

I. This Court Should Clarify The Constitutional Limitation On A District Court's Power To Remove And Substitute Deliberating Jurors In Light Of Amended Rule 24 And Should Resolve Conflicts Over The Removal Standard

Here, for the first time in the history of American jurisprudence, a federal district court significantly changed the composition of a jury over defense objection eight days into deliberations at a time when the parties knew the jurors' likely views of the evidence. What made this possible was a 1999 amendment to Federal Rule of Criminal Procedure 24(c)(3), which now authorizes the substitution of deliberating jurors if the alternate does not discuss the case prior to replacing an original juror and the reconstituted jury is instructed to "begin deliberations anew." The Seventh Circuit concluded that so long as the bare requirements of the rule are satisfied, there is no limitation (constitutional or otherwise) on a district court's ability to substitute deliberating jurors. App. 35a-36a. As a legal standard, however, that effectively insulates all but express rule violations from appellate review — even in a situation where, as here, a defendant expressly argued that the substitution violated his constitutional rights to a fair trial, unanimous verdict and impartial jury. App. 33a-34a.

1. The constitutional danger inherent in substituting a deliberating juror is that it can defeat an "essential feature" of the jury trial by compromising "group deliberation." See *Williams* v. *Florida*, 399 U.S. 78, 100 (1970); *Claudio* v. *Snyder*, 68 F.3d 1573, 1575 (3d Cir. 1995); *Henderson* v. *Lane*, 613 F.2d 175, 177 (7th Cir. 1980). Further, "[u]nanimity is one of the indispensable features of the *federal* jury trial." *Johnson* v. *Louisiana*, 406 U.S. 356, 369-70 (1972) (Powell, J., concurring) (emphasis in original).

Earlier authorities recognize the inherent difficulty in asking jurors to start deliberations anew, and the significant risk of coercion to the new alternates who enter deliberations after other jurors have already formed strong conclusions about the evidence. See, *e.g.*, *United States* v. *Quiroz-Cortez,* 960 F.2d 418, 420 (5th Cir. 1992). Further, there is a risk in high-profile cases that the alternate jurors, exposed to media and other outside influences, may inject extraneous information into deliberations. All these risks increase the longer the first jury deliberates. See *United States* v. *Virgen-Moreno*, 265 F.3d 276, 289 (5th Cir. 2001). That is why no case in American jurisprudence has ever permitted the substitution of multiple jurors over a defendant's objection after eight days of deliberations. Yet after the decision below, courts, particularly those in the Seventh Circuit, will be free to do just that, and worse.

2. Nothing in the text, commentary or history of the Federal Rules of Criminal Procedure suggests that the 1999 amendment to Rule 24 altered the constitutional confines. Quite the contrary, the commentary to its counterpart, Rule 23, expressly recognizes the great potential for prejudice in substitution:

> The central difficulty with substitution, whether viewed only as a practical problem or a question of constitutional dimensions (procedural due process under the Fifth Amendment or jury trial under the Sixth Amendment), is that there does not appear to be any way to nullify the impact of what has occurred without the participation of the new juror. Even were it required that the jury "review" with the new juror their prior deliberations or that the jury upon substitution start deliberations anew, it still seems likely that the continuing jurors would be influenced by the earlier deliberations and that the new juror would be somewhat intimidated by the others by virtue of being a newcomer to the deliberations.

Fed. R. Crim. P. 23(b) advisory committee's note. As amended, Rule 24(c)(3) is best construed to permit substitution of deliberating jurors *only* if that can be accomplished without compromising a defendant's constitutional right to a unanimous verdict from an impartial jury. See Fed. R. Crim. P. 24(c)(3); U.S. Const. amend. VI. In rejecting this view, however, the Seventh Circuit essentially held that the Rule authorizes a violation of the Constitution.

This manipulation of the jury's composition deprived the Petitioners of the fundamental right to a fair trial by an impartial jury. Indeed, before the district court took the unprecedented step of substituting two alternate jurors after eight days of deliberations, it recognized the enormous potential for prejudice, calling the decision "difficult," "extraordinary,"

"tough," "an extremely close call," and one that can be "very, very, very legitimately criticized." 3/28/06 Tr. at 24725, 24803. The jurors already had spent eight tumultuous days in heated arguments about the evidence. They already had sought the court's guidance in repeated confusion about the instructions. The jurors already had deliberated to verdict on several counts. They already had witnessed an effort to purge a juror through extrinsic legal research and a request for her removal. The jurors already were questioned about falsity in their questionnaires, and heard of the tremendous media scrutiny focused exclusively upon them.

3. This Court has never addressed the constitutionality of Rule 24 or the correct standard governing the removal and substitution of deliberating jurors. There is a compelling need for guidance.

For one thing, the Circuits are in open conflict over the standard governing the removal of a holdout juror. The Second, Ninth and District of Columbia Circuits have held that it is improper and unconstitutional to remove a juror if there is an objective *possibility* that the juror's dismissal was prompted by the juror's doubts as to the defendant's guilt. See *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987) ("[I]f the record evidence discloses any possibility that the request to discharge stems from the juror's views of the sufficiency of the government's evidence, the court must deny the request."); *United States* v. *Thomas*, 116 F.3d 606, 622 (2d Cir. 1997) ("adopt[ing] the *Brown* rule as an appropriate limitation on a juror's dismissal"); *United States* v. *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999) ("[I]f the record evidence discloses any reasonable possibility that the impetus for the juror's dismissal stems from the juror's views

on the merits of the case, the court must not dismiss the juror."). The Eleventh Circuit, for its part, has held that a district court may dismiss a juror unless the record demonstrates a "substantial basis" that dismissal stemmed from the juror's view of the evidence. *United States* v. *Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001).

In this case, the Seventh Circuit has articulated a conflicting standard and held that the "defendants have the burden of demonstrating on appeal that there was no legitimate basis in the record" for the removal of the original jurors and substitution of alternates. App. 36a. The Fifth Circuit has adopted a similar view. *United States* v. *Edwards*, 303 F.3d 606, 633-34 (5th Cir. 2002). According to the Seventh Circuit, the prosecution's motivation for seeking the removal of a juror is irrelevant so long as there is a basis in the record to support the district court's action. App. 31a.

While there are few cases addressing substitution, the Circuits are in disarray on that question as well. Some older cases have held that the potential for prejudice from the substitution of an alternate must be analyzed for a *reasonable possibility of prejudice* — not actual prejudice. See, *e.g.*, *United States* v. *Register*, 182 F.3d 820, 843 (11th Cir. 1999) (the pertinent inquiry is "whether the record indicates a reasonable possibility of prejudice to the defendants"). Other courts have analyzed substitution of deliberating jurors in light of objective criteria to evaluate actual prejudice, such as the risk of external influence on alternates prior to substitution and the length and apparent extent of the original deliberations. See *United States* v. *Josefik*, 753 F.2d 585, 587 (7th Cir. 1985). But now, the Seventh Circuit has departed

from that approach by concluding that prejudice stemming from the substitution of an alternate is of no consequence absent an explicit violation of the amended Rule 24. App. 34a.

This conflict over the proper application of Rule 24 and the removal and substitution of jurors should be resolved by this Court. The conflicting appellate court opinions demonstrate real confusion, and the removal issue is one that has recurred with some frequency.

II. The Seventh Circuit's Holding That The Interrogation Of Deliberating Jurors About Their Own False Statements In Front Of Prosecutors Does Not Irreparably Taint The Verdict Warrants This Court's Review

The Seventh Circuit's holding on the second question presented — sustaining the verdict despite the interrogation of deliberating jurors about their misconduct in front of prosecutors — also merits review. The Sixth Amendment guarantees an accused the right to a trial before an impartial jury. U.S. Const. amend. VI. Certain constitutional errors, by their nature, "defy analysis by 'harmless-error' standards." *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991). "Each of these constitutional deprivations is a . . . structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310.

1. As this Court has said, "[a]mong those basic fair trial rights that 'can never be treated as harmless' is a defendant's 'right to an impartial adjudicator, be it judge or jury.'" *Gomez* v. *United States*, 490 U.S. 858, 876 (1989) (citation omitted). Any attempt to apply harmless-error analysis would amount to

"pure speculation" as to what would have occurred in the absence of the error. *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993).

Moreover, the hallmark of impartiality is, as Judge Learned Hand observed, that jurors "are in no wise accountable, directly or indirectly, for what they do." *United States ex rel. McCann* v. *Adams*, 126 F.2d 774, 775 (2d Cir. 1942). Indeed, the practice of punishing jurors related to their service was abandoned more than three centuries ago: since "the famous opinion in *Bushnell's Case*, 124 Eng. Rep. 1006 (C.P. 1680) . . . jurors have been protected from being called to account for their verdicts." *United States* v. *Thomas*, 116 F.3d 606, 615 (2d Cir. 1997).

By contrast, where jurors fear repercussions from their deliberations — not to mention possible prosecution — they cannot fairly determine the outcome of the case. The threat of punishment works a coercive influence on the jury's independence, and jurors fearing possible prosecution for their own misdeeds during the trial cannot be impartial jurors. That is because of the 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.

That was the essence of this Court's holding in *Remmer* v. *United States*, 347 U.S. 227 (1954) ("*Remmer I*"), which questioned a juror's ability to deliberate freely when questioned by law enforcement during a trial:

> 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.

Id. at 229. *Remmer I* was decided before "structural error" came into this Court's lexicon. But significantly, while *Remmer I* ordered a remand for the purpose of establishing prejudice, this Court in subsequent proceedings ("*Remmer II*") ordered a new trial even over the lower court's finding of no prejudice. 350 U.S. 377, 381-82 (1956).

This is consistent with the Court's subsequent decisions related to the fundamental right to trial before unbiased jurors. *Gomez*, 490 U.S. at 876. Errors that implicate such a basic trial right — the right to an impartial jury — are structural defects that render a criminal trial fundamentally unfair and an unreliable vehicle for determining guilt or innocence.

2. Here, the Seventh Circuit adopted an unduly restrictive legal standard in failing to consider the government's offer of immunity during juror interrogations as error — structural or otherwise. App. 64a-68a. Indeed, the Seventh Circuit dismissed the issue raised in the Petitioners' opening brief on appeal as a "modest point" even as it struggled to distinguish *Remmer I*. App. 67a-68a. But *over half* the deliberating jurors had made misstatements in voir dire about prior arrests and convictions, and were questioned about those misstatements by the district court in the presence of federal prosecutors. App. 71a. At the time of those interrogations, local media in Chicago advocated perjury prosecutions of the jurors, and at least three jurors retained legal counsel in connection with their jury service. The district court's questioning of jurors in the presence of federal prosecutors

raised the specter of perjury prosecutions such that the court and counsel considered whether the jurors should be advised of their rights. App. 76a. Indeed, the United States Attorney on his own accord offered a grant of immunity to jurors "going forward."[2] App. 77a-78a.

There can be no confidence in a jury's verdict where the verdict was "delivered by a jury whose number included some who themselves faced potential criminal prosecution for their actions that occurred during this trial." App. 74a. As Judge Posner concluded, not only did the jurors' misrepresentations "cast doubt on the jurors' ability to serve, but the court's grilling of the jurors on this topic may have prevented them from performing their duty conscientiously and undistractedly":

> They faced potential prosecution by a *party* to the case — the federal government. They may have feared perjury charges, having seen first-hand in the trial that the government prosecutes people for making false statements. Had the government fully immunized the jurors from prosecution, and had the jurors known this, there is the considerable risk that they would have been biased in favor of the government. But even if the jurors did not know that any

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[2] Despite the prosecution's decision to grant blanket immunity, the offer was conveyed to only one juror. This selective disclosure of immunity is itself problematic, with the other jurors inevitably wondering why they were not afforded immunity when one of their peers was specifically guaranteed that "nothing that you say here is going to be used against you in any way." 3/27/06 Tr. at 24502.

> offer of immunity had been made, they may have decided to convict the defendants in order to avoid provoking the government's ire and inviting a retaliatory prosecution of them (the jurors). The government's attempt to immunize jurors itself suggests the proceedings were broken beyond repair.

App. 98a-99a (emphasis in original). Indeed, the entire process of removing and replacing deliberating jurors was so fundamentally flawed as to undermine the basic fairness of the proceedings. The inherently prejudicial interrogation of deliberating jurors, the extraordinary confusion over the standard for removing jurors and the notes revealing an apparent split on the jury made it impossible to fairly reconfigure the jury eight days into deliberations.

The dissenting judges below concluded that structural error treatment was particularly appropriate — and that the majority's opinion to the contrary[3] squarely conflicted with this Court's precedent — because of the inability to quantitatively assess or discern actual prejudice. *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 n.4 (2006) (resting "con-

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[3] The majority's suggestion of waiver is questionable in itself. This Court expressly left open whether reversal is required when an error is structural but unpreserved. *United States* v. *Olano*, 502 U.S. 725, 735 (1993). Subsequent to *Olano*, some Circuits have suggested that certain structural errors may be unwaivable. See, *e.g.*, *United States* v. *Nelson*, 277 F.3d 164, 205 (2d Cir. 2002) (Calabresi, J.) ("[T]he right to an impartial fact finder might be inherently unwaivable."); *United States* v. *Vasquez*, 271 F.3d 93, 100 (3rd Cir. 2001). Other Circuits have taken a contrary view. See, *e.g.*, *United States* v. *Recio*, 371 F.3d 1093, 1100 n.4, 1101, 1103 n.7 (9th Cir. 2004); *United States* v. *David*, 83 F.3d 638, 647 (4th Cir. 1996).

clusion of structural error upon the difficulty of assessing the effect of the error"). Indeed, that was patently apparent in the district court's response to defense counsel's repeated objections on this very issue[4]: "The . . . argument you are making is that we now have a bunch of fearful jurors. I just don't know how to address that." 3/28/06 Tr. at 24699.

But the answer is simple. In a case such as this, in which jurors are questioned in the presence of prosecutors about the jurors' own conduct, the risk is simply too great that they will not be fair to the defendant. The Seventh Circuit's refusal to recognize

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[4] 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.
>
> ****
>
> 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 24692, 24698.

that reality, and the risk that it will escape recognition by that and other courts throughout the Seventh Circuit, warrants this Court's review.

III. The Seventh Circuit's Decision Refusing Cumulative Error Analysis Conflicts With The Law Of Other Circuits And Is Starkly Inconsistent With This Court's Precedent Concerning Fundamental Trial Rights

The Seventh Circuit's refusal to engage in cumulative error analysis likewise warrants this Court's review. Due process guarantees a criminal defendant a fair trial free from prejudicial error, U.S. Const. amend. V, and this necessarily extends to a trial free from *cumulative* error.

1. The Seventh Circuit, however, has adopted a minority view in refusing to consider the permeating effect of jury and other trial errors. With the decision below, the Seventh Circuit has now joined the Sixth Circuit in refusing cumulative error review. App. 3a; *United States* v. *Roach,* 502 F.3d 425, 443 (6th Cir. 2007).

In direct conflict, the First, Second, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits hold that a cumulative error analysis is an implicit and indispensable step in determining whether a defendant's trial was rendered fundamentally unfair. See *United States* v. *Sepulveda,* 15 F.3d 1161, 1196 (1st Cir. 1993) ("A reviewing tribunal must consider each such claim against the background of the case as a whole . . . ."); *United States* v. *Grunberger,* 431 F.2d 1062, 1064 (2d Cir. 1970) (holding that the cumulative effect of errors "when viewed in the light of the trial posture of the case as a whole requires a reversal . . . ."); *United States* v. *Munoz,* 150 F.3d 401, 418 (5th

Cir. 1998) ("[A]n aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal."); *United States* v. *Steffen*, 641 F.2d 591, 598 (8th Cir. 1981) (explaining that the court will reverse where "the case as a whole presents an image of unfairness" even though none of the claimed errors alone is sufficient to require reversal); *United States* v. *Wallace*, 848 F.2d 1464, 1475-76 (9th Cir. 1988) (finding that a "balkanized, issue-by-issue harmless error review" would not be "very enlightening in determining whether the appellants were prejudiced by the errors" because "[a]lthough each of the . . . errors, looked at separately, may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial to the appellants that reversal is warranted"); *United States* v. *Rivera*, 900 F.2d 1462, 1470, 1477 (10th Cir. 1990) (en banc) ("Unless an aggregate harmlessness determination can be made, collective error will mandate reversal, just as surely as will individual error that cannot be considered harmless."); *United States* v. *Vasquez*, 225 F. App'x 831, 836 (11th Cir. 2007) (unpublished decision) ("In addressing a claim of cumulative error, we must examine the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial.") (citation omitted).[5]

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[5] 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) ("[E]ven if we found it to be error, it would amount to the only error in

2. Nor can there be any doubt that this case provides a good vehicle for resolving the disagreement and confusion on the necessity of cumulative error review. In its desire to secure verdicts after such a lengthy trial, the district court here committed what the Petitioners in their brief on appeal termed "an avalanche of errors" that individually and collectively deprived the Petitioners of their constitutional rights to a fair trial before an impartial jury. And a litany of jury-related problems undoubtedly infected this trial: a group of jurors sought to remove a defense holdout; at the urging of others, a juror conducted legal research on the removal of jurors and used it in deliberations to threaten the holdout; the juror who brought extrinsic research into the jury room, and those who encouraged her to commit that misconduct, remained on the jury and deliberated until verdict; half of the jurors failed to disclose prior arrests and convictions on their questionnaires; for days, deliberations were halted and jurors questioned about their false answers in the presence of federal prosecutors; two jurors who had participated in eight days of deliberation were removed; and two alternate jurors

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this case, completely precluding a finding of cumulative error."), 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.); *Rivera*, 900 F.2d at 1471 n.8, 1477 (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.").

were substituted after a two-and-a-half-week absence from the courthouse (including one who had been questioned about his failure to disclose a criminal conviction).

In discarding a cumulative error analysis, the Seventh Circuit has impermissibly narrowed the scope of appellate review by considering each error in isolation and declining to consider their aggregate effect. App. 3a. The decision eviscerates a criminal defendant's basic rights to a fair trial and impartial jury by improperly circumscribing the scope of appellate review. As Judge Posner noted in dissent, "harmlessness" of an individual trial error viewed in isolation "is not the test of reversible error when a cascade of errors turns a trial into a travesty." App. 97a. Further, Judge Posner concluded, "the panel majority opinion, unless set aside, will be read as an endorsement of laissez-faire appellate review" and "will have the force of precedent in future cases." App. 83a.

3. The minority view adopted by the Seventh and Sixth Circuits is also in open tension with this Court's decision in *Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946), which described a reviewing court's obligation to consider claims of error "not singled out and standing alone, but in relation to all else that happened":

> But if one cannot say, with fair assurance, after *pondering all that happened without stripping the erroneous action from the whole*, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry cannot be merely whether there*

> *was enough to support the result, apart from the phase affected by the error.* It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. at 765 (emphases added). The Seventh Circuit's decision to limit its "review of the trial proceedings" to "particular" errors considered in isolation is incompatible with the clear and unambiguous statement of controlling law from *Kotteakos* and other decisions from this Court.

Indeed, this Court has since reaffirmed the principle that the right of an accused in a criminal trial to due process requires a cumulative error analysis. In *Chambers* v. *Mississippi*, the Court held that a trial was rendered fundamentally unfair as a result of the cumulative effect of several evidentiary rulings. 410 U.S. 284, 302-03 (1973). Similarly, the Court held in *Taylor* v. *Kentucky* that cumulative error could render a trial fundamentally unfair: "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness." 436 U.S. 478, 488 n.15 (1978). This precedent is predicated on the sound recognition that errors, while individually harmless when viewed in isolation, can nonetheless in the aggregate violate a defendant's due process rights just as much as a single reversible error. Due process requires a reviewing court to assess the harm done by the errors considered in the aggregate. As Judge Posner noted in his dissent, "harmlessness is not the test of reversible error when a cascade of errors turns a trial into a travesty." App. 97a.

4. The significance of the Seventh Circuit's failure to conduct a cumulative error analysis is particularly acute here because the errors in question directly related to the jury, the integrity of its deliberations and the impartiality of its members. There is, as Judge Posner described, "an independent judicial interest in the proper functioning of the adjudicative process" which is "at its zenith in a criminal jury trial." App. 97a. Indeed, two hundred years of precedent from this Court has assiduously guarded an accused's right to a fair trial and impartial jury. See, *e.g.*, *Blakely* v. *Washington*, 542 U.S. 296, 305-06 (2004) ("[T]he right of jury trial . . . is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."); *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1075 (1991) ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors . . . ."); *Smith* v. *Phillips*, 455 U.S. 209, 231 (1982) (Marshall, J., dissenting) ("The right to a trial by an impartial jury is too important, and the threat to that right too great, to justify rigid insistence on actual proof of bias. Such a requirement blinks reality."); *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968) ("[T]rial by jury in criminal cases is fundamental to the American scheme of justice . . . ."); *Sheppard* v. *Maxwell*, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences."); *Turner* v. *Louisiana*, 379 U.S. 466, 471-72 (1965) ("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."); *United States* v. *Cornell*, 25 F. Cas. 650, 655-56, No.14,868 (C.C.D.R.I. 1820) ("To insist on a ju-

ror's sitting in a cause when he acknowledges himself to be under influences . . . would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice."); *United States* v. *Burr*, 25 F. Cas. 49, 50, No. 14,692g (C.C.D. Va. 1807) ("The great value of the trial by jury certainly consists in its fairness and impartiality.").

This clear and express conflict in the law of the Circuits on a question as fundamental as the role of cumulative error analysis warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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