In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

Nos. 06-3517 and 06-3528

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 02 CR 506 — Rebecca R. Pallmeyer, *Judge*.

ANSWER OF THE UNITED STATES TO PETITION FOR REHEARING OR FOR REHEARING *EN BANC*

PATRICK J. FITZGERALD
United States Attorney
for the Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-5300

EDMOND E. CHANG
Assistant United States Attorney
Chief of Appeals, Criminal Division

STUART D. FULLERTON
Assistant United States Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

Introduction

The *en banc* petition advances arguments that are textbook examples of what should *not* be heard *en banc*: issues of fact and credibility, not questions of law, and arguments not only forfeited, but waived. It would be extraordinary, to say the least, to grant *en banc* review where the appellants must first overcome adverse factual findings by the district court as well as the procedural obstacles of forfeiture and waiver. The majority opinion has created no conflict with precedent, and this case raises no issue of "exceptional importance" under Fed. R. App. P. 35(b)(1)(B).

Defendants' appeal focused principally on the district court's discretionary rulings regarding various juror-related issues that arose after deliberations began. The district court reached these rulings after thoroughly addressing each juror issue raised by the defense, conducting painstaking factual inquiries and legal analyses, and repeatedly stating that the court would not hesitate to order a new trial if one was warranted. Ultimately, the record disclosed only one error in the jury deliberations—the jury's exposure to a single paragraph of an American Judicature Society article that did not bear on the defendants' guilt or innocence. The district court conducted a detailed factual inquiry and thereafter properly concluded that neither the jury's exposure to this material, nor any other alleged error, rendered the proceedings unfair or otherwise warranted a new trial. The majority reviewed the record, considered all the arguments raised by defendants in their appeal, and determined that the district court's factual findings were sound and its legal conclusions correct.

In essence, defendants' petition seeks to have this Court ignore unfavorable facts, reevaluate the credibility of jurors, and overturn not only the district court's factual findings but the majority's determination that those findings were not clearly erroneous. As "[t]he function of *en banc* hearings is not to review alleged errors for the benefit of losing litigants," *United States v. Rosciano*, 499 F.2d

173, 174 (7th Cir. 1974), this is not a valid basis for rehearing or rehearing *en banc*. Nor did the majority overlook any of defendants' arguments. As recognized by both the majority and the dissent, the principal argument in the petition, an allegation of structural error, was never previously presented to this Court and is thus waived. In any event, the alleged errors were injected into the proceedings by defendants themselves and do not come close to meeting the standard for "structural error"—error that "necessarily render[ed] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *See Washington v. Recuenco*, 126 S. Ct. 2546, 2551 (2006) (internal quotations omitted). Defendants have presented no valid basis for rehearing or rehearing *en banc*. *See* Fed. R. App. P. 40(a)(2) and 35(b). The petition should be denied.

Background

The majority correctly found that the district court properly exercised its discretion pursuant to Fed. R. Crim. P. 24 when it replaced two jurors with alternates during deliberations following this six-month trial. Op30-31. The majority determined that the district court applied the correct legal standard—that supplied by *McDonough Power Equipment v. Greenwood*, 464 U.S. 548 (1984) (Op19-20)—when it considered issues regarding jurors' answers in *voir dire*, and, after carefully reviewing the record, the majority found no clear error in the factual findings and credibility assessments underlying the district court's decision to dismiss two jurors and one alternate, and no others. Op20-24. The majority was right in its ruling—the record is replete with facts that fully support the district court's determinations regarding the jurors' *voir dire* answers.[1]

[1] Notwithstanding defendants' hyperbolic claim that this case is "unprecedented in American jurisprudence," within just the past ten months, two Circuits have each reviewed a high-profile case involving juror replacement after days of deliberations, have deferred to the trial judges' findings, and have upheld the verdicts reached by reconstituted juries. *See United States v. Kemp*, 2007 WL 2410132 at *33, 36-37 (3d Cir. Aug. 27, 2007); *United States v. Ronda*, 455 F.3d 1273 (11th Cir. 2006).

The record shows that when, after nearly eight days of deliberations, the district court was informed that several jurors had arrests or convictions that had not been disclosed during jury selection, the court questioned jurors individually for periods ranging from three minutes, Tr24516-19 (JA517-18) (Juror Talbot),[2] to approximately 20 minutes, Tr24450-55,24462-67 (JA501-02,504-05) (Juror Ezell), during parts of that Thursday, Monday and Tuesday. On Tuesday afternoon, after replacing two jurors, the district court reinstructed the jury and directed them to begin their deliberations anew. (The jurors were not scheduled to deliberate on Fridays or weekends.)

In conducting these inquiries, the district court obliged *defendants'* requests for juror questioning, often over government objection. For example, jurors Gomilla and Talbot were questioned about bankruptcy filings they made ten and eleven years earlier, which the defense had discovered by combing court records over the weekend. The inquiries about the bankruptcies took place even though the only *voir dire* question arguably calling for such information had appeared under the heading "Criminal Justice Experience." Tr24370,24394,24420 (JA481,487,493). Defendants declined to move to dismiss Gomilla or Talbot. Tr24520 (JA518).

The district court also questioned three jurors (Casino, Svymbersky, and Rein) about their contacts with the criminal justice system from no less than 23 years and as much as 44 years earlier, *see* Tr24542-45,24559-60,24625-33,24643-52,24743-45, 24750-54 (JA524-25,528,545-47,550-52,575,577-78) and found that these jurors credibly reported that they had not thought of their long-ago brushes with the law during *voir dire*. R867:69-71(JA69-71).

In contrast, jurors Pavlick, Ezell, and Masri deliberately withheld information that would have provided grounds for their dismissal for cause. Op22-23. In connection with one of Ezell's

[2] Citations to the panel's opinion are to the typescript version cited by defendants.

seven undisclosed arrests, she gave false information to law enforcement authorities (Tr24304-05,24472-73 (JA463-64,506))—conduct similar to a charge against defendant Ryan. One of Pavlick's undisclosed arrests and convictions was a felony DUI offense that took place while Ryan was Secretary of State (Tr24290 (JA460)), and unknown to the parties, during jury selection Masri was on probation for an undisclosed 2004 DUI conviction (Tr24615-16 (JA543)). Not only did trial evidence focus on Ryan's tenure at the Secretary of State's Office, which sets drunk driving policies, but the defense presented witnesses who testified about Ryan's achievements in strengthening drunk-driving laws. Op35. Defendants did not object to dismissing Ezell, Pavlick, and Masri.

The majority further found no basis in the record for concerns that Ezell's removal "potentially chilled the expression of pro-defense jurors in deliberations" (Op25-26), or "that the district court dismissed Ezell because of her view of the evidence or that the prosecution tricked the district court into dismissing Ezell for cause based on its belief about Ezell's view of the evidence" (Op25). Again, there are ample facts in the record to support these conclusions by the majority.

The instructions to the reconstituted jury prevented any chilling of pro-defense views based on the removal of Ezell ("the circumstances that brought about the fact that these two jurors were excused . . . were not prompted by . . .your previous deliberations . . . " Tr24804-05 (JA590)). The potential for "chilling" was further diminished by the district court's earlier instruction to the original twelve jurors, after receiving notes indicating discord among them regarding Ezell's behavior, that they were the "jurors selected to decide this case" (R802:Exh1) and by the fact that the first juror dismissed was not Ezell, but rather, Pavlick—who had signed the complaint regarding Ezell's conduct. Op26. Further, Ezell's views of the merits were not known at the time—indeed there was no disagreement from the defense when the district court noted that the jury notes did not reveal the

jurors' views on the merits or "whose side anybody was on." *See* Tr24097,24582 (JA411,534). The defense never claimed that Ezell was a "defense holdout" or objected to her dismissal on that basis.

The majority was likewise supported by the factual record when it concluded that the background checks regarding the jurors did not prejudice the defense by making the jurors fearful of future investigation or prosecution. Op26-27. An important fact not mentioned by the defendants' original brief to this Court or in the petition is that, throughout the questioning of the jurors, the district court ensured that the questioning would not affect the jurors' ability to be fair and impartial, and received assurances from the jurors that it would not. *See*, *e.g.*, Tr24502,24509-10(JA514,516) (assuring Gomilla that nothing she said would be used against her and that no one was suspicious of her); Tr24542,24754(JA524,578) (assuring Svymbersky that questioning was "generated by media, not by anybody in here," and receiving Svymbersky's assurance that the questioning would have"no bearing over [his] judgment in this trial"); Tr24637-38(JA548) (receiving assurance from Rein that questions did not make him feel that he had to please the court or "please one side or please the other in connection with your deliberations"); Tr24649-50,24744-45(JA551,575) (receiving assurance that Casino could be fair). Further, the jurors were instructed once again that neither party had instigated the court's questioning and that the court's questioning should play no role in their deliberations. Tr24804-05(JA590).

The majority determined that the district court properly concluded there were no grounds for believing that the reconstituted jury had failed to, or was incapable of, restarting deliberations. Op26, 29-31. Again, this determination is fully supported by the facts in the record. Before allowing the commencement of deliberations by the reconstituted jury, the district court ensured that alternates Svymbersky and DiMartino had not discussed the case and had not been exposed to prejudicial

media coverage, and that each of the remaining original jurors was capable of deliberating anew and disregarding what had gone before. Tr24539-43,24759-78(JA523-24,579-84).

Moreover, the reconstituted jury deliberated for ten days, and before returning a verdict, asked for information not requested by the original jury; this supports the finding that the jury proceeded in accordance with the district court's instructions. See Op30. As the district court found, the jurors who deliberated to judgment were "diligent and impartial" and "made every effort to be fair, even amid extraordinary public scrutiny." Op18.

At bottom, there was only one instance of jury error: the original jury was exposed to one item of extraneous material, a paragraph from an American Judicature Society article (the AJS material) regarding substitution of a juror who is unwilling or unable to deliberate, but the majority found that the district court had properly exercised its discretion in concluding that exposure to this material did not warrant a new trial. Op10, 14-15. Once again, the majority's determination is fully supported by the record. The AJS material did not relate to the defendants or the evidence, and was consistent with the court's instructions. Op14-15. Juror Peterson's testimony, which the district court credited, was that Ezell did not change her approach to the deliberative process after the AJS material was read (Ezell herself had *forgotten* about the article until days after she learned that verdicts were returned, 5/5/06Tr20(JA625)), and that she (Peterson) did not refer to the article during the renewed deliberations. 5/5/06Tr89-90(JA645). Moreover, the jury was instructed to begin anew after the AJS material was introduced. Op15-18. The finding that the AJS material did not play "any role in the reconstituted deliberations" and did not prejudice the verdict, the majority held, was supported by the evidence, and the district court did not abuse its discretion in denying the defendants a new trial. Op14-19.

One judge dissented, relying on two arguments that defendants had not raised on appeal. Those arguments, now in the petition, depend on factual assertions contrary to the district court's findings, as we explain.

ARGUMENT

I. Defendants' Structural-Error Argument Has Been Waived, and in Any Event No Structural Error Occurred.

The most extraordinary feature of the defense's petition is that its main argument—that the questioning of jurors allegedly caused them to be fearful of prosecution and thus created structural error—was never presented in the district court and did not appear in defendants' appellate briefs. Both the majority and the dissent recognized this absence. Op54, 59.[3] Arguments not presented to the district court are forfeited; arguments not developed in appellate briefs are waived. "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) (citations omitted). Granting review of a waived argument would be an unprecedented use of the *en banc* process.

This structural error argument was not presented below or on direct appeal for good reason: it lacks merit, on both the facts and the law. On the facts, as the majority recognized, the district court "took every possible step to ensure that the jury was and remained impartial, and, through credibility findings and findings of fact, concluded that this one was." Op54. The majority deferred to the district court's first-hand assessment of the jury: "the jurors who deliberated to verdict in this

[3] Only in the context of defendants' argument that the removal of Ezell had been purportedly motivated by her supposed status as a "defense holdout" did defendants raise an argument about the alleged fearfulness of the jurors. Their entire argument comprised one paragraph and contains no hint of a structural error argument. Br.42.

case were diligent and impartial . . . . They sat attentively through nearly six months of evidence . . . The court believes these jurors made every effort to be fair, even amid extraordinary public scrutiny." Op18 (quoting district court's findings). The district court stated its findings in no uncertain terms: there was no "reasonable possibility that jurors failed to vote their conscience for fear of prosecution." R867:88(JA88). *See also* R867:87(JA87).

As the majority held, the district court's findings are fully supported by the record, and defendants' complaints are not. Op26. First, the district court's instructions to the reconstituted jury included the admonition that the district court's inquiries into the jury questionnaires were not to be considered in any way. Tr24804-05(JA590). "We presume that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *United States v. Puckett*, 405 F.3d 589, 599 (7th Cir. 2005). This presumption "can only be overcome if there is an overwhelming probability that the jury was unable to follow the instruction as given." *Id.* (citations and internal quote marks omitted).

In addition, when questioning jurors, the district court ensured that the questioning would not affect the juror's ability to be fair and impartial. *See* Tr24502,24509-10(JA514,516); Tr24516 (JA517); Tr24542,24754(JA524,578); Tr24637-38(JA548); Tr24649-50,24744-45(JA551,575). Even without those assurances, the retained jurors could not have believed the government was interested in prosecuting them when they were allowed to remain on the jury.

The conduct of the reconstituted jury demonstrates that it was not intimidated or pressured into returning a guilty verdict: after being painstakingly reinstructed, the reconstituted jury began deliberations that lasted for ten days. Op30. During the second round of deliberations (as the

majority opinion recognized), the jury asked for additional instructions that the original jury had not sought. Op30. Those are not the actions of a jury that has been pressured or intimidated into returning a verdict for the prosecution. Instead, they show the jury was diligently and impartially fulfilling its duty. There was no error, let alone clear error, in the district court's fact finding.

Nor is there a basis in the record for concluding that jurors were fearful of prosecution. In a leap of speculation, defendants rely on press reports that jurors faced perjury investigations, Pet.5-6, while ignoring the district court's finding that "there is no indication in the record that any jurors saw more than headlines in connection with this matter" and its unwillingness to "assume" the jurors ignored instructions to avoid media coverage.[4] Nowhere in the transcript is there an indication that the jurors were reading press reports about possible investigations of the jurors themselves. Instead, the record reflects that the jurors wer not aware of the press reports and had only tangential exposure to them. *See* Tr24546-47(JA525) (Svymbersky acknowledges hearing from someone at work about investigation of juror, denies reading newspapers about the trial); Tr24627-28(JA546) (Rein denies reading newspaper reports, states that he would throw away parts of paper dealing with trial); Tr24650-51(JA551-52) (Casino denies reading the newspaper or watching the news).

Defendants contend that Juror Losacco was fearful of prosecution when she said that she was "scared." The majority correctly recognized that the record supported the district court's observation that it was the presence of a roomful of attorneys that made Juror Losacco uncomfortable, an observation that was fully supported by Losacco's statement, immediately preceding her comment

[4] A close reading of the record casts doubt on whether any juror even saw or read headlines. *See* Tr24546-47(JA525) (Svymbersky), 24627-28,24639(JA546,549) (Rein). In addition, Warner's counsel conceded at trial that even had a juror seen headlines about the investigation of juror backgrounds, that would not be grounds for automatic disqualification, Tr24636-37(JA548).

about being afraid, that she *felt she was in a job interview.* One who is fearful of being prosecuted does not describe the setting as that of a job interview. Once again, these adverse fact findings weigh strongly against *en banc* review, which typically is reserved for resolving important questions of law.

A structural error analysis is not called for in the absence of error: if the jurors were not fearful of prosecution, as the district court found, there is no need to analyze whether such fearfulness resulted in error, structural or otherwise. "Even when the Supreme Court's decisions call for structural error analysis, the factual basis for finding such error may be in dispute, as it is here." Op54 (citing *Bracy v. Shomig*, 286 F.3d 406, 409-11 (7th Cir. 2002)).

In any event, as a matter of law, structural error is a tightly constrained category of errors that results in reversal without regard to whether the error was harmless. Only in rare cases has the Supreme Court held that an error is structural, cases in which the error "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Washington v. Recuenco*, 126 S. Ct. 2546, 2551 (2006) (internal quotations omitted). "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Neder v. United States*, 527 U.S. 1, 8 (1999) (internal quotations omitted). (Structural error has been found only in cases involving complete denial of counsel, a biased trial judge, racial discrimination in the selection of the grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction. *See Recuenco*, 126 S. Ct. at 2551 n.2.)

Defendants seem to be positing a rule under which every time jurors are questioned in the presence of federal prosecutors an irremediable conflict arises between the jurors' duty to deliberate fairly and their fear of prosecution by the government. This is not sensible. A trial court questioning

a juror in the presence of the parties (which, of course, includes prosecutors) about a possible inconsistency in a *voir dire* response cannot by itself create structural error. Such inquiries are not uncommon and may occur at various points during a trial. Indeed, during many trials, occasions arise where jurors must be questioned about their adherence to the judge's orders—for example, whether jurors saw something or read something they were not supposed to be exposed to, or whether jurors had improper contact with parties or witnesses. If such inquiries reveal that a juror knowingly violated a judge's order, the juror could be punished by fine or imprisonment as contempt of court under 18 U.S.C. § 401. Yet nowhere has any court ever suggested that such inquiries constitute structural error. If that were so, jury trials would be studies in gamesmanship and paralysis—litigants could then, as a matter of tactics, raise allegations of juror misconduct, and trial courts would have to choose between inquiries that supposedly would cause "structural error" or allowing possibly tainted jurors to remain. Nor is it realistic to believe that jurors leap to the conclusion that they are targets of contempt prosecutions simply because an inquiry is made.

As the majority recognizes, Op53, *Remmer* disposes of this argument, holding that even interrogation of a deliberating juror by law-enforcement officers about an extraneous contact is subject to harmless error analysis and thus is not structural. *Remmer v. United States*, 347 U.S. 227, 228 (1954) (remanding for determination whether extraneous influence was harmless). Defendants point to no case with which the majority opinion is in conflict. Defendants cite *Remmer v. United States* 350 U.S. 377 (1956) ("*Remmer II*"), stating that the Supreme Court there ordered a new trial "over the district court's finding of no prejudice." Pet8. This is not accurate. The Supreme Court reversed in *Remmer II* not on the ground that the question of prejudice was irrelevant, but on the ground that the district court had undertaken an "unduly restrictive" inquiry into whether prejudice

had resulted from the contact. *Remmer II*, 350 U.S. at 382.

Defendants' reliance on *United States v. Harbin*, 250 F.3d 532 (7th Cir. 2001), is also unavailing. Of course in their appeal defendants never cited *Harbin* for the proposition that contact with deliberating jurors created structural error. *Harbin* does not say that. In fact, *Harbin* recognizes what the majority understands—that *Remmer* is not about structural error. *See Harbin*, 250 F.3d at 544 (distinguishing *Remmer*). *Harbin* recognized a structural error that had occurred when the district court allowed the government to exercise a peremptory strike after the jury had been seated, which action "failed to provide notice to the defendants of the jury selection process that would actually be used" and "gave the prosecutor unilateral, discretionary control over the composition of the jury mid-trial." *Harbin*, 250 F.3d at 547. Nothing of the sort took place here.[5]

En banc review should not be granted to consider a forfeited, waived, factually-disputed, meritless argument.

II. Defendants' Cumulative Error Argument Is Without Merit.

The secondary argument set forth in the petition—that the district court failed to analyze the cumulative effect of the alleged trial errors—was also never presented below or on appeal. Although defendants' brief intoned the term "avalanche of errors," Br.17, they never moved beyond that catchphrase to argue that even if each alleged juror error was harmless considered in isolation, together the errors had a cumulative effect and compelled reversal. This argument was waived.

More importantly, aside from the conclusion that the introduction of the AJS material was

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[5] In *Harbin*, this Court discouraged "fishing expeditions during trial designed to elicit 'new information' concerning seated jurors" in order not to "encourage parties to refrain from submitting questions on *voir dire* in order to leave open avenues for challenges during trial." 250 F.3d at 539. In their search for such things as jurors' undisclosed bankruptcies (which would not have served as grounds for cause dismissal), defendants attempted to achieve what *Harbin* condemned.

(harmless) error, no other error in the management of the jury was found either by the district court or the majority. Given that the cumulative error doctrine looks to the cumulative effect of multiple, individually harmless, errors, it is not surprising that the majority did not engage in such analysis: cumulative error analysis is not "cumulative allegation" analysis. "If there are no errors or a single error, there can be no cumulative error." *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001).

Defendants make allegations of error that are both unsupported by the record and contrary to the district court's factual findings and credibility determinations (which were affirmed by the majority). For example, defendants claim (Pet.2) there was an "astonishing effort" by the jurors to force out a "defense juror," when the district court found that there was no evidence to support such a claim, R867:83-84(JA83-84); 5/5/06 Tr95(JA646). Defendants also claim as error the removal of Ezell, a "defense juror" (Pet.2), when they did not argue she was a defense juror at the time of her removal and the district court emphatically found that Ezell's views were unknown to the parties and to the district court. *See* R867:84(JA84), R931:27 n.9. Finally, defendants allege "a raft of other juror misconduct" (Pet.2), while ignoring the district court's specific findings that no such misconduct had taken place. *See, e.g.*, R:867:87,92(JA87,92)(no exposure to media coverage).

United States v. Banks, 405 F.3d 559 (7th Cir. 2005), and *United States v. Santos*, 201 F.3d 953 (7th Cir. 2000), cited by defendants, are not in conflict with the majority opinion: in *Banks*, the appellant argued for a cumulative-error analysis ("Banks claims that he was denied a fair trial due to cumulative errors of the district court," *Banks*, 405 F.3d at 559), but was unsuccessful because only one error had been identified. In *Santos*, there were multiple errors of the same type that had a cumulative effect, compelling reversal. *Santos*, 201 F.3d at 965. The so-called "cumulative" effect, like the structural error argument, is inappropriate for *en banc* review because it was waived

and requires overturning adverse fact findings. But even more basically, it is simply inapposite here, since only one error occurred.

III. The Majority Did Not Misapprehend Or Overlook Defendants' Rule 24 Argument.

The third argument in the petition attempts to create a conflict, where none exists, between the majority and earlier decisions of this Circuit. Defendants argue that the majority concluded that the district court had "unfettered discretion to alter the composition of a deliberating jury without any consideration of the constitutional rights to a fair trial and impartial jury." Pet.12.

The majority did not hold that Fed. R. Crim. P. 24(c) trumps the Due Process Clause of the Fifth Amendment. The majority recognized that both case law and the Rule afforded the district court the discretion to replace jurors, even deliberating jurors, only where there is a "legitimate basis" for doing so. Op28-29. Here the majority found not only that there was cause to remove Pavlick, Ezell, and Masri, but also that the jurors were capable of starting deliberations anew, Op29, that nothing untoward had happened in the jury's treatment of Ezell, Op29, that alternate DiMartino had not had improper contact with anyone before being seated, Op30, and that the length of deliberations after substitution showed that the district court's instructions to start over had been followed, Op30. Thus, the majority, like the district court, found a legitimate basis for replacing jurors and that the replacement would not deprive defendants of a jury able to restart deliberations in a fair manner.

The majority's lengthy treatment of the context in which the district court replaced two jurors makes clear that there is no conflict between it and *United States v. Humphrey*, 34 F.3d 551 (7th Cir. 1994), which alludes to the absence of prejudice in retaining a juror when affirming the district court's exercise of discretion to have done so. Nothing suggests that had the majority concluded that

defendants' rights to a fair trial been compromised by juror substitution, it would nevertheless have affirmed on the ground that the letter of Rule 24(c) had been complied with. In light of the majority's extensive discussion of the propriety of both the removal of jurors and the restart of deliberations, and since the district court followed Rule 24(c), there is no grounds for asserting error.

Moreover, no prejudice resulted from the juror dismissal and substitution. The alternate jurors, when questioned, assured the district court of their impartiality. No sound reason has been advanced to call their fairness into question, and the district court certainly found none. On the contrary, the diligence and impartiality of the jury impressed the district court, Op18, as they should impress any observer of these proceedings.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for rehearing or rehearing *en banc*.

Respectfully submitted,

PATRICK J. FITZGERALD,
United States Attorney
EDMOND E. CHANG
Assistant United States Attorney
Chief of Appeals, Criminal Division

By: _____
STUART D. FULLERTON
Assistant United States Attorney
219 South Dearborn, 5th Floor
Chicago, Illinois 60604
(312) 353-5266

RULE 32 CERTIFICATION

I hereby certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and Circuit Rule 32(b), because it has been prepared using the WordPerfect X3 proportionally-spaced typeface of Times New Roman with 12-point font in the text and 11-point font in the footnotes.

Respectfully submitted,

PARICK J. FITZGERALD
United States Attorney

By: _____

STUART D. FULLERTON
Assistant United States Attorney
219 S. Dearborn Street
Chicago, Illinois
(312) 353-5266

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GEORGE H. RYAN, SR.,	)	
	)	Honorable Rebecca R. Pallmeyer

CERTIFICATE OF SERVICE

I, Stuart D. Fullerton, hereby certify that on September 11, 2007, I caused two copies of the foregoing ANSWER OF THE UNITED STATES TO PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC*, to be served upon the following by first-class, postage-paid mail:

Daniel K. Webb
Winston & Strawn
35 W. Wacker Drive
Chicago, Illinois 60601

Gene C. Schaerr
Winston & Strawn
1700 K Street, N.W.
Washington, DC 20006-3817

Marc W. Martin
53 W. Jackson Boulevard
Suite 1420
Chicago, Illinois 60604

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: _____
STUART D. FULLERTON
Assistant United States Attorney
219 S. Dearborn Street
Chicago, Illinois 60604
(312) 353-5266