No. 15-458

In the Supreme Court of the United States

ROCKY DIETZ, PETITIONER

v.

HILLARY BOULDIN

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

REPLY BRIEF FOR THE PETITIONER

GEOFFREY C. ANGEL
ANGEL LAW FIRM
803 West Babcock Street
Bozeman, MT 59715

KANNON K. SHANMUGAM
Counsel of Record
ALLISON B. JONES
NICHOLAS T. MATICH
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 15-458

ROCKY DIETZ, PETITIONER

v.

HILLARY BOULDIN

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

REPLY BRIEF FOR THE PETITIONER

This case is a clear-cut candidate for certiorari. In his brief in opposition, respondent does not dispute that this case cleanly and squarely presents a question of substantial legal and practical importance which arises frequently in the lower courts, but which has only rarely come before this Court: namely, whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case. Instead, respondent devotes most of his brief to arguing that the courts of appeals are not divided on the question presented.

That is a curious strategy, in light of the fact that both the Ninth Circuit (in the decision below) and the Eighth Circuit (in an earlier decision) have expressly recognized a circuit conflict. And those courts were plainly correct to do so. Contrary to respondent's contention, the six courts of appeals to have addressed the question are divided over the correct rule governing the recall of discharged jurors, not merely over how a supposedly uniform rule is applied in particular cases. And respondent cannot seriously dispute that the courts on the other side of the conflict "would decide the case differently" if presented with the facts here. Stephen M. Shapiro et al., *Supreme Court Practice* § 6.31(a), at 479 (10th ed. 2013).

This is the rare case that comes before the Court at the certiorari stage with an expressly recognized circuit conflict and no asserted vehicle problems. Because this case readily satisfies the familiar criteria for further review, the petition for certiorari should be granted.

1. Respondent contends that "there is no split of authority" on the question presented, Br. in Opp. 14; instead, "all the circuits are following the same rule" but simply reach different outcomes, *id.* at 15. That contention is patently incorrect.

a. As a preliminary matter, the two courts of appeals at the heart of the circuit conflict have expressly acknowledged that conflict. In the decision below, the Ninth Circuit specifically contrasted the "case-specific" approach adopted by the Second, Third, and Seventh Circuits with the "bright-line rule" adopted by the Eighth Circuit in *Wagner* v. *Jones*, 758 F.3d 1030 (2014), cert. denied, 135 S. Ct. 1529 (2015). Pet. App. 9a. The Ninth Circuit considered and rejected the Eighth Circuit's rule and instead sided with the circuits adopting the contrary rule: namely, that a judge may recall jurors

after the judge has discharged the jury from service and the jurors have left the judge's presence. See *id.* at 11a.

Conversely, in adopting its "bright line rule" in *Wagner*, the Eighth Circuit considered and rejected the "case-specific" approach adopted by the Second, Third, and Seventh Circuits. *Wagner*, 758 F.3d at 1034-1035. The Eighth Circuit noted that courts were divided into "two camps" on the question presented. *Id.* at 1034.

Respondent simply makes no effort to reconcile his contention that the courts of appeals follow a "uniform rule of law" on the question presented, Br. in Opp. 19, with those courts' express recognition of a circuit conflict (much less their articulation of the competing legal standards). And just to be clear: contrary to respondent's assertion (*id.* at 19-21), petitioner's argument is that the Ninth Circuit adopted the incorrect legal standard in this case, not that it invoked the correct legal standard but simply misapplied it. The expressly recognized circuit conflict on the legal standard for recalling discharged jurors warrants the Court's review.

b. In fact, the Ninth Circuit was correct when it recognized that its decision in this case conflicts with the Eighth Circuit's decision in *Wagner*. In each case, the judge accepted the jury's disposition of the case and discharged the jury, and the jurors left the courtroom. See Pet. App. 25a; *Wagner*, 758 F.3d at 1033. The judge then recalled the jurors for further service in the case, struck the previously entered disposition, and entered a new, substantively different disposition based on further input from the reconstituted jury. See Pet. App. 30a, 38a; *Wagner*, 758 F.3d at 1033. In *Wagner*, the Eighth Circuit categorically held that a judge may not recall jurors to "render, reconsider, amend, or clarify" a verdict after the judge has discharged the jury and the jurors have left the courtroom. 758 F.3d at 1035. In this case, by

contrast, the Ninth Circuit held that a judge may recall jurors to reconsider or amend their verdict in such circumstances, as long as the judge is satisfied that the jurors "were not exposed to prejudicial influences" during the period of dismissal. Pet. App. 11a. It is hard to imagine a starker conflict.

Respondent attempts to distinguish *Wagner* on two principal grounds, neither of which is availing. Respondent first suggests that the bright-line rule the Eighth Circuit adopted in *Wagner* was "based on the facts before it," implying that the Eighth Circuit would follow a different rule in a case in which evidence existed to determine whether the jury was in fact "subjected to outside influences during the time of discharge." Br. in Opp. 15. But far from being "[c]ritical to the court's holding," *ibid.*, the fact that no evidence existed about the jurors' conduct during the period of discharge played no part in the Eighth Circuit's selection of the proper rule. See *Wagner*, 758 F.3d at 1034-1036. The Eighth Circuit unequivocally articulated the bright-line rule as a rule for all future cases, not just the particular case under consideration. See *id.* at 1035. Indeed, the Eighth Circuit explained that, under its rule, once the jury leaves the courtroom, "we *presume* mingling occurs" between the jurors and prejudicial outside influences, and it is of no moment "whether [a] juror actually had such [an] encounter." *Id.* at 1035 & n.9 (emphasis added; internal quotation marks and citation omitted).[1]

[1] Respondent claims that the Eighth Circuit "had to adopt the bright line rule by default" because it lacked evidence of the jurors' conduct. Br. in Opp. 15. That makes no sense. The Eighth Circuit could just as easily have adopted a contrary rule and reversed on the ground that the district court failed to inquire whether the jurors were subjected to prejudicial influences.

Respondent next argues that *Wagner* is distinguishable because the judge declared a mistrial before discharging the jury. See Br. in Opp. 16. As the Eighth Circuit observed, it is true that, at the time of its decision, none of the cases on the other side of the circuit conflict involved a situation in which jurors had been recalled to rescind the previous disposition of the case and announce a substantively different verdict. See *Wagner*, 758 F.3d at 1036 n.10. In that sense, it was uncertain whether those courts would extend their rule to such a context.

But now the Ninth Circuit has done just that. The judge recalled the discharged jurors to rescind the prior verdict, conduct new deliberations, and reach a substantively different verdict. While the prior disposition in this case was an affirmative verdict for one party, rather than a mistrial, that is a meaningless distinction. Both situations equally implicate the Eighth Circuit's concerns about the "potential for confusion, unintended compulsion," and giving a "vacillating juror an opportunity to reconsider"—"especially where there is the possibility that the jury, or some of its members, may have been confused in the understanding of the instructions." *Wagner*, 758 F.3d at 1036. For that reason, it is unsurprising that the Ninth Circuit recognized that its decision was in conflict with *Wagner*.[2]

---

[2] In a related vein, respondent asserts that, in *Wagner*, the Eighth Circuit "allow[ed] a jury to be recalled, in limited circumstances, once discharged." Br. in Opp. 15. That is highly misleading. At most, the Eighth Circuit contemplated that a judge could recall jurors after declaring the jury discharged *if the jurors remained in the courtroom*, in the judge's presence, during the entire period of "discharge." See *Wagner*, 758 F.3d at 1036. That is obviously not what happened here. And contrary to respondent's assertion (Br. in

c. As for the other cases in the circuit conflict, respondent seemingly agrees that, like the Ninth Circuit, the Second, Third, and Seventh Circuits have adopted a rule that would allow a judge to recall jurors after they have been discharged and have left the judge's presence, as long as the judge determines that the jurors were not actually prejudiced in the intervening period. See Br. in Opp. 9-13 (discussing *United States* v. *Rojas*, 617 F.3d 669 (2d Cir. 2010); *United States* v. *Figueroa*, 683 F.3d 69 (3d Cir. 2012); and *United States* v. *Marinari*, 32 F.3d 1209 (7th Cir. 1994)). In each of those cases, the court of appeals held that the recall of discharged jurors was permissible. See Pet. 12-14.

Respondent merely quibbles with where *Summers* v. *United States*, 11 F.2d 582 (4th Cir.), cert. denied, 271 U.S. 681 (1926), falls on the circuit conflict. In particular, respondent notes that decisions adopting a more expansive rule have quoted or cited *Summers*, see Br. in Opp. 9-13, and he claims that *Summers* does not conflict with the decision below because the Fourth Circuit did not "identify the boundaries" of its rule, *id.* at 9. For those reasons, he argues, *Summers* is consistent with the Ninth Circuit's decision in this case. See *ibid.*

As a preliminary matter, regardless of how *Summers* is characterized, there is a clear division of authority on the question presented between the Eighth Circuit, on the one hand, and the Second, Third, Seventh, and Ninth Circuits, on the other. Especially given the importance of the question presented, that conflict among the courts

---

Opp. 15), such a narrow exception would not render the Eighth Circuit's rule the "same" as the more expansive rule adopted by the Second, Third, Seventh, and Ninth Circuits. See Pet. 11-14.

of appeals is more than sufficient, even without *Summers*, to warrant this Court's review.

What is more, respondent's efforts to recharacterize *Summers* are unpersuasive. Numerous courts, including the Ninth Circuit here, have recognized that those courts that have adopted the more expansive rule have "extended" *Summers* to situations beyond that approved by the Fourth Circuit. See Pet. App. 7a. In particular, in *Wagner*, the Eighth Circuit correctly observed that *Summers*, as well as the cases on which it relied, involved a situation in which the trial judge "nominally discharged the jury but corrected errors before the jury dispersed from the courtroom and the direct view of the trial judge." *Wagner*, 758 F.3d at 1035 n.9. And in *Summers* itself, the Fourth Circuit explained that a jury is "irrevocably discharged" when the jurors are "allowed to disperse and mingle with the bystanders, with time and opportunity for discussion of the case, *whether such discussions be had or not*." 11 F.2d at 586 (emphasis added). As a result, it is "inconsistent" with *Summers* to read it to permit recall where jurors have dispersed outside the courtroom beyond the view of the judge. See *Wagner*, 758 F.3d at 1035 n.9.

For similar reasons, respondent errs when he claims that *Summers* does not conflict with the decision below because the Fourth Circuit did not "identify the boundaries" of its rule. Br. in Opp. 9. As petitioner has noted (Pet. 11), the Fourth Circuit held that a jury has been "irrevocably discharged" when jurors are "allowed to disperse and mingle with bystanders, with time and opportunity for discussion of the case, *whether such discussions be had or not*." 11 F.2d at 586 (emphasis added). This case unquestionably would have come out differently under the Fourth Circuit's rule, because the jurors had left the courtroom (and mingled with non-jurors

outside the judge's control) before the judge recalled them.

In any event, the bottom line here should not be obscured: as the courts of appeals themselves have recognized, there is a clear circuit conflict on the legal standard governing the recall of discharged jurors. That conflict, on an important and recurring question, warrants resolution by this Court.

2. Respondent's remaining arguments require little by way of reply.

a. Respondent halfheartedly argues that the Court should deny the petition because it denied a petition for certiorari in *Wagner* and "there is no additional reason to address" the question presented in this case. Br. in Opp. 7. But respondent completely ignores the reasons petitioner has already offered as to why this case is a vastly superior vehicle for further review. See Pet. 19-20. To begin with, the Ninth Circuit's decision here deepens the circuit conflict and is itself squarely in conflict with the Eighth Circuit's decision in *Wagner*. Thus, to the extent that there was any doubt about the existence of a conflict at the time of *Wagner*, the Ninth Circuit's decision dispels it. In addition, resolution of the question presented is outcome-dispositive here, but likely would not have been in *Wagner*. Not only did the Eighth Circuit identify errors in the jury instructions that independently would have required a new trial; the absence of evidence about the jurors' conduct after discharge meant that, even under a more expansive rule, a new trial may still have been required. See *Wagner*, 758 F.3d at 1036-1037. In addition, the petitioner in *Wagner* disputed the Eighth Circuit's characterization of the facts, further complicating the case. See Pet. 19-20.

Here, by contrast, respondent does not dispute that this case is a suitable vehicle for considering the question

presented. Respondent concedes that the initial verdict was invalid, see Br. in Opp. 3; that, after the jury was discharged, the jurors left the courtroom, see *id.* at 4; and that, upon recalling the jurors, the judge inquired into the outside influences they encountered prior to recall, see *ibid.* This case thus cleanly and squarely presents the Court with the opportunity to decide whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case.

b. Finally, respondent dismisses as irrelevant the decisions from state courts of last resort addressing the question presented. See Br. in Opp. 17-18. Respondent contends that at least some of the cited decisions from state courts of last resort turn entirely on state law, not federal law, on the ground that the fundamental constitutional guarantee of a fair trial is "not at issue" in civil cases. *Id.* at 18. But respondent's premise is evidently incorrect: this Court has repeatedly recognized that "a fair trial in a fair tribunal is a basic requirement of due process" protected by the Fourteenth Amendment in civil as well as criminal cases. *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009); see *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980). If anything, the constitutional implications of recalling discharged jurors after they have left the judge's presence merely heighten the importance of the question presented. See Pet. 16-17.

But regardless of whether the question presented here is ultimately a matter of state law when it is considered by state courts (an issue that this case obviously does not present), the decisions from at least 23 state courts of last resort—in addition to those from six federal courts of appeals—demonstrate the frequency with which the question arises and the ripeness of the ques-

tion for this Court's resolution. See Pet. 14-15. The federal and state courts to address the question have fully developed all of the relevant arguments on both sides of the question, rendering further percolation of no benefit. Indeed, when faced with the question themselves, federal courts routinely discuss the reasoning of state-court decisions. See, *e.g.*, Pet. App. 9a, 10a; *Wagner*, 758 F.3d at 1034-1035. The intractable conflict among the state courts of last resort only confirms that the similarly intractable conflict among the federal courts of appeals will persist until this Court intervenes to resolve it. For that reason, and in light of the indisputable importance of the question presented, this case plainly warrants the Court's review.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GEOFFREY C. ANGEL
ANGEL LAW FIRM
803 West Babcock Road
Bozeman, MT 59715

KANNON K. SHANMUGAM
ALLISON B. JONES
NICHOLAS T. MATICH
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

DECEMBER 2015