IN THE

Supreme Court of the United States

JAMES ERIK GODIKSEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals improperly conclude that the District Court's mishandling of a jury note and replaying only a portion of the defense expert's testimony did not result in prejudice to the Defendant?

TABLE OF CONTENTS[1]

[1] **LIST OF ALL PARTIES**: The caption contains the name of all parties.

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Codes and Guidelines

PETITION FOR A WRIT OF CERTIORARI

The Defendant, James Erik Godiksen, petitions this Court for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Second Circuit affirming his conviction.

OPINIONS BELOW

The February 10, 2021 Summary Order of the Court of Appeals for the Second Circuit, *United States v. Godiksen*, 841 F. App'x 322 (2d Cir. 2021), is Appendix A to this petition. The March 18, 2021 Order of the United States Court of Appeals for the Second Circuit denying the Defendant's petition for panel rehearing or rehearing *en banc* is Appendix B to this petition.

JURISDICTION

With the U.S. Court of Appeals for the Second Circuit having affirmed the judgment of the District Court by a summary order issued on February 10, 2021, and thereafter denying the petition for rehearing on March 18, 2021, this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The District Court had jurisdiction pursuant to 18 U.S.C. § 3231, and the Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATUTORY PROVISIONS INVOLVED

Use of Interstate Commerce Facilities in the Commission of Murder-for-Hire, 18 U.S.C. § 1958

> (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

STATEMENT OF THE CASE

This petition arises from the District Court's mishandling of a jury note in the case of James Erik Godiksen and the District Court's decision to play only a portion of the defense expert's testimony. On July 19, 2018, during jury deliberations at Godiksen's trial, the jury sent a note to the presiding judge at 4:53 pm. The note read as follows: "We'd like to hear or see the transcript of the cross examination + rebuttal of Dr. Baranoski." Appendix D. The next day, the District Court informed counsel, "We received a note from the jury, requesting a playback of a portion of the testimony of Dr. Baranoski. Madame Court Reporter, do we have that material available for the jury now?" Appendix C at 3. The District Court did not read the note into the record or solicit the parties' views as to the appropriate course of action. Instead, the District Court brought the jury into the courtroom and played an audio recording of the government's cross-examination of defense expert Dr. Baranoski *only*, emphasizing a portion of the trial which was damaging to Godiksen's theory of defense.

After the government's cross-examination, at 9:47 a.m., the District Court orally asked the jury, "Does that suffice? Does that satisfy your request?," to which some unknown juror(s) responded, "Yes." *Id.* at 4. Defense counsel immediately objected before the jury left the room, *ibid* ("MR. HAYES: Your Honor?"). The District Court nevertheless excused the jury before hearing from counsel, and the jury resumed its deliberations.

Once the jury left, the District Court heard from defense counsel, who objected. Defense counsel stated: "Your Honor, I believe that -- I believe the jury asked to hear the redirect as well. They called it rebuttal, but redirect -- it's in the note." *Id*. at 5. The government agreed: "Your Honor -- I think that's in the note, Your Honor. I belie -- they say 'rebuttal', but they -- I assume that's the redirect." *Ibid*.

Despite the parties' agreement, the District Court did not recall the jury and play back defense counsel's redirect of Dr. Baranoski's testimony. Instead, when the jury returned to the courtroom at 9:52 a.m., the District Court engaged in an unscripted colloquy with unnamed jurors in which the jurors revealed the process of their deliberations:

> THE COURT: Thank you. Please be seated. Ladies and gentlemen, I just want to clarify that you want to hear Attorney Hayes' reexamination of Dr. Baranoski as well? Is that correct?
>
> THE JUROR: The original request, Your Honor, was to hear the cross and then the rebuttal.
>
> THE COURT: And by 'rebuttal' do you mean --
>
> THE JUROR: Mr. Hayes' follow-up.
>
> THE COURT: Mr. Hayes' -- okay. Would you like to hear --
>
> THE JUROR: But when you asked at the completion of the prosecution, everybody agreed that we were good.
>
> THE COURT: Are you certain?
>
> THE JUROR: Yes.
>
> THE COURT: All righty. Thank you. I misunderstood; I --
>
> THE JUROR: Oh, no, you understood it --
>
> THE JUROR: No, you understood correctly. *We just -- at the break point* --
>
> THE COURT: Yes.
>
> THE JUROR: -- before Mr. Hayes, we said we were satisfied with your --
>
> THE COURT: I understand now, but I misunderstood your request. I just want to make absolutely certain that you do not want to hear Attorney Hayes' reexamination -- redirect examination of Dr. Baranoski.
>
> MR. KALE: Your Honor, just to be clear – I apologize -- perhaps the jury can retire. If they can write a note -- I believe they are supposed to

> communicate by note, so if they can write a note if they want to hear it or not hear it?
>
> THE JUROR: That's fine.
>
> THE COURT: Do you understand my confusion? We do have that available for you here, and we can play that back for you. So please let us know if you'd like that.
>
> THE JUROR: Okay, we will -- we'll retire to the deliberation room and send a note out if we'd like to follow up.
>
> THE COURT: All righty. Thank you.

Id. at 6–8. The jury then retired and wrote two notes. The first, written at 10:00 a.m., Appendix E, indicated that it had reached a verdict. The second, written at 10:02 a.m., Appendix F, indicated that the jurors did not need to hear the defense's redirect of Dr. Baranoski. The jury then announced its guilty verdict at 10:16 a.m. *See* Appendix G (jury interrogatories and verdict form). On July 30, 2019, the District Court issued a decision denying the Defendant's motions for acquittal and new trial pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure.

Godiksen appealed to the Court of Appeals for the Second Circuit. The Court of Appeals affirmed by Summary Order. Appendix A. The Court of Appeals held the trial judge did not follow the proper procedure for handling jury notes as set forth in *United States v. Ronder*, 639 F.2d 931, 934 (2d Cir. 1981): "Here, the district court undoubtedly failed to adhere to the *Ronde*r procedure when it did not read the jury's note into the record or solicit responses from counsel; the district court then compounded the problem when it engaged in oral colloquies with the jury." *United States v. Godiksen*, 841 F. App'x 322, 327 (2d Cir. 2021). The Court held, however, that "[s]ince the decision to not play back the requested testimony ultimately fell within the district court's broad discretion, Godiksen cannot show prejudice from the district court's departure from

Ronder." *Ibid.* On March 18, 2021, the Court of Appeals denied the Defendant's motion for panel rehearing or rehearing *en banc*. Appendix B.

REASON FOR GRANTING THE PETITION

I. The District Court's mishandling of the jury note was not a harmless error.

There is substantial reason to believe that the District Court's error caused harm to the Defendant and affected the jury's verdict. By not following the required procedure for the handling of jury notes and the testimony playback, the District Court denied Godiksen the opportunity for a fair trial. This procedural error resulted in unfair prejudice beyond a reasonable doubt against the Defendant.

The Second Circuit procedure for the handling of jury notes, set forth in *Ronder*, 639 F.2d at 934, requires: (1) the jury's inquiry be submitted in writing, (2) the note be marked as a court exhibit and be read in front of the Defendant and counsel, (3) counsel be afforded the opportunity to suggest appropriate responses, and (4) after the jury is recalled, before responding, the judge should read into the record the contents of the note concerning substantive inquiries. Each of these steps has a distinct purpose designed to protect the defendant from undue prejudice. *See id*. Substantial compliance is acceptable as long as the defendant was not harmed by the procedural error. *See United States v. Ulloa*, 882 F.2d 41, 45 (2d Cir. 1989) (citing *United States v. Johnpoll*, 739 F.2d 702 (2d Cir.), *cert. denied,* 469 U.S. 1075, 105 S. Ct. 571, 83 L.Ed.2d 511 (1984)).

In the case at hand, the District Court erred by (1) not reading the note into the record ahead of time, (2) not soliciting the parties' responses as to the proper course of action, (3) stopping the testimony at the end of the government's cross-examination, (4) engaging in oral conversation with one juror to ask if the jury, as a whole, was "satisfied" before playing the requested redirect testimony, (5) not replaying the rebuttal when alerted to the error, (6) and engaging in another oral

colloquy with the jury to inquire whether they wanted to hear the redirect. This error resulted in the jury being unduly influenced in favor of the government. This error is especially troubling when considering the jury's note suggested that it was particularly focused on determining whether Godiksen had acted with specific intent.

A trial judge should do everything within their power to avoid "crossing the line between instructing the jurors and participating in their decision making" while communicating with the jury during the deliberation phase. *Ulloa*, 882 F.2d at 45. Depending on the circumstances of the communication between the judge and the jury, the judge's response can constitute "an impermissible comment on [the defendant's] guilt." *United States v. Wills*, 88 F.3d 704, 718 (9th Cir.), *cert. denied*, 519 U.S. 1000, 117 S.Ct. 499, 136 L.Ed.2d 390 (1996). With respect to playbacks, "[w]hether to allow testimony to be reread to the jury is a matter committed to the sound discretion of the trial court." *United States v. McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990). However,

> a court's response to a jury request for a readback should balance a jurors' need to review the evidence before reaching their verdict against the difficulty involved in locating the testimony to be read back, *the possibility of undue emphasis on a particular portion of testimony read out of context,* and the possibility of undue delay in the trial.

United States v. Criollo, 962 F.2d 241, 243 (2d Cir. 1992) (emphasis added).

In *United States v. Richard*, 504 F.3d 1109 (9th Cir. 2009), the Ninth Circuit Court of Appeals reversed due to a less serious read back error. The jury requested to hear a witness's testimony and cross-examination. The trial judge explained the difficulties involved in reading back the entire testimony and asked the jury to specify which portions it wanted to hear, which the jury did. The trial judge had those specific portions reread. The Court of Appeals reversed, noting that "[a]lthough there is no panacea for the inherent risk of undue emphasis resulting from the

playback (or rereading) of witness testimony during jury deliberations, certain precautions must generally be taken to avoid that risk." *Id*. at 1113–14. One of those precautions is that "the jury should ordinarily be provided with the witness's *entire* testimony-i.e., direct *and* cross-examination, and should be admonished to weigh all the evidence and not focus on any portion of the trial." *Id*. at 1114 (emphasis in original). In replaying only the requested portions of the witness's testimony, the trial judge committed two major errors. First, "despite the clearly one-sided nature of the portion to be replayed, the district court did not admonish the jury against unduly emphasizing the testimony or otherwise attempt to minimize the risk of undue emphasis." *Id*. at 1115. Second, "not only did Richard's jury indicate its 'obvious intent' to rely on a particular portion of Reeder's testimony, it did so at the request of the district court." *Id*. at 1116.

While the trial judge has discretion in how to handle jury notes and the playback of previous testimony, the judge must take precautions to avoid the inherent risk of undue emphasis on one particular portion. *Id*. at 1113–14. Specifically, the court in *Richard* gave the example that one way to avoid this risk is to play the entirety of the testimony for the jury. *Id*. at 1114. The trial judge in Godiksen's case failed to do this or take any other measures to avoid the inherent risk that comes with playing only a portion of a witness's testimony. Additionally, in only playing a portion of the requested testimony from Dr. Baranoski, the District Court did not admonish the jury at any point—even after being alerted by both parties to its error—that it should not place undue weight on this portion of the testimony. This error by the District Court placed an undue emphasis on the government's cross-examination of Dr. Baranoski, which was extremely damaging to Godiksen's theory of defense. By not playing the redirect as originally requested, the District Court emphasized to the jury that defense counsel's rehabilitation of his expert witness was unimportant or that the District Court was impatient to conclude the trial.

Additionally, the District Court should have read the note into the record and solicited the parties' views. *Ronder*, 639 F.2d at 934 ("It is settled law that messages from a jury should be disclosed to counsel and that counsel should be afforded an opportunity to be heard before the trial judge responds."). This is not elevating form over substance. The Court of Appeals takes departures from this rule "very seriously." *United States v. Blackmon*, 839 F.2d 900, 915 (2d Cir. 1988). The District Court's decision to depart from the rule in Godiksen's case is particularly serious because "[p]artial read-backs have rather consistently met with disfavor." *Richard*, 504 F.3d at 1116. Defense counsel was deprived of the opportunity to object to any readback at all or insist on a read back of Dr. Baranoski's direct testimony as well.

In *Criollo*, the Court of Appeals reasoned:

> We have no way of determining whether the jury wanted to request a readback, but was chilled from doing so by the court's prohibition against readbacks stated in the midst of defense counsel's summation. Since this case was so short and involved only a few witnesses, we might well conjecture that any request for a read-back would not be the result of a confused jury attempting to sort through reams of evidence, but rather such a request could indicate that the jury has a genuine ability to resolve serious questions of fact.

Criollo, 962 F.2d at 244.

As in *Cirillo*, we have no way of determining whether the jury still wanted to hear the redirect portion of the testimony, as requested, but was chilled from doing so by the District Court's question, "Does that suffice? Does that satisfy your request?," questions that when asked by a trial judge in a black robe from the bench to a juror demand only one response. *See generally United States v. White*, Nos. 92-5887 & 92-5888, 23 F. 3d 404, 1994 WL 177280, at *6 (4th Cir. May 11, 1994) (unpublished) (Phillips, J., specially concurring) ("[T]here's much to be said for . . . declaring [the error] not subject to harmless error excuse—prejudicial *per se* error. The Second Circuit recently has done just that in *United States v. Criollo*, 962 F. 2d 241, 244 (2d Cir. 1992), for the very good reason that ***principled harmless error analysis is impossible, there being no***

way, given the prohibition, ever to know whether a jury may have felt the need for a clarification that could have avoided a prejudice now forever hidden*."*) (emphasis added), *cert. denied*, 513 U.S. 967, 115 S. Ct. 434, 130 L.Ed.2d 246 (1994).

Because of the secret nature of jury deliberations, we cannot know the impact that the District Court's actions had on the deliberations and the ultimate verdict. It bears emphasis, however, that the recorded oral statements of two jurors indicate that it was only after the District Court's statements, after one juror said he was satisfied, and after the jury had then retired and resumed their deliberations, that the jury collectively found it was satisfied. Appendix C at 6–8. The jury may have interpreted the District Court's selective playback as favoritism for the government or indicative of the District Court's desire to conclude the trial. **Either way, no juror would have gone against the District Court when asked if they were satisfied. The operative answer was "yes."** Additionally, individual jurors may likewise have felt beholden to the lone juror's statement that they were collectively satisfied by the readback of Baranoski's cross-examination only. It is possible, for instance, that some jurors were attempting to use the government's cross-examination to prove to other jurors that Godiksen was guilty. In this context, it was important that the jury hear, at the very least, defense counsel's rehabilitation of Dr. Baranoski on redirect as well as her reiteration that Godiksen was "impaired," and while perhaps able to form a "plan", was not able to form a "realistic" or "rational" plan, points that relate directly to the crucial question of specific intent.

Further, even though the jury informed the District Court that it had reached a verdict only *eight minutes* after the District Court's improper colloquy with the jury, in affirming the Court of Appeals ignored its own precedent emphasizing the "short length of the deliberations following the [improper] communication." *See United States v. Mejia*, 356 F.3d 470, 477 (2d Cir. 2004)

("the verdict was returned a mere fifty minutes after the court's [improper] response"); *Krische v. Smith*, 662 F.2d 177, 179 (2d Cir. 1981) (jury returned verdict "one hour and twenty minutes" after improper communication); *Ronder*, 639 F.2d at 934 ("Approximately one-half hour later, the jury returned verdicts of guilty on both counts.").

While the District Court does have broad discretion, a judge's response to a juror note can constitute "an impermissible comment on [the defendant's] guilt." *Wills*, 88 F.3d at 718. Additionally, in deciding whether to play back testimony for the jury, the possibility that this playback will result in undue emphasis on a particular portion of the testimony should be considered. *Criollo*, 962 F.2d at 243. Courts have provided methods in which a court can minimize undue emphasis or prejudice to the defendant. *See, e.g.*, *Richard*, 504 F.3d at 1109. The District Court here, however, took none of the suggested measures or any other action to protect Godiksen from prejudice. The District Court's actions were improper and failed to safeguard against the risks of playing only a portion of a witness's testimony. Due to these improper actions, there is substantial reason to believe that the jury was unduly influenced and as a result, Godiksen suffered prejudice and the verdict must be vacated.

CONCLUSION

For the foregoing reasons, the Defendant respectfully requests this Court grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

JAMES ERIK GODIKSEN

Dated: June 23, 2021

By /s/Tracy Hayes/s/

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