NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KEVIN MARVELL JACKSON, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district violated petitioner's Fifth and Sixth Amendment rights to due process and a fair trial by issuing repeated instructions that foreclosed the possibility of a hung jury and risked being unduly coercive, and by responding to a note from the deliberating jury by issuing a further instruction that encouraged a verdict in favor of the prosecution.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kevin Marvell Jackson respectfully petitions this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The court of appeals affirmed petitioner's convictions in an unpublished Order and Judgment. (Appendix A.)

JURISDICTION

The court of appeals affirmed petitioner's convictions on April 22, 2025. (Appendix A.) On June 2, 2025, the court of appeals issued its order denying petitioner's petition for panel reharing and/or rehearing en banc. (Appendix C.)

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part:

> … nor shall any person … be deprived of life, liberty, or property, without due process of law …

U.S. Const., amend. V.

The Sixth Amendment to the U.S. Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed …

U.S. Const., amend. VI.

STATEMENT OF THE CASE

1. Proceedings in the district court

District court jurisdiction

The district court had jurisdiction over the underlying criminal case pursuant to 18 U.S.C. § 3231.

The convictions

Petitioner was tried and convicted by a jury for felony murder in Indian Country, two counts of robbery in Indian Country, and using, carrying, brandishing, and discharging a firearm during and in relation to a crime of violence. (Vol. I at pp. 170-72.)

The government's theory of the underlying facts

The government's theory of the facts has been succinctly summarized by the court of appeals:

> Bradley Dillon and Dakota Berryhill decided to prank Mr. Dillon's girlfriend by calling and telling her they had won $10,000 at a casino. They then drove to the girlfriend's house. Mr. Berryhill waited in the car while Mr. Dillon went inside. A masked man later identified as Mr. Jackson opened the car door, pointed a gun at Mr. Berryhill, and demanded the $10,000. Mr. Berryhill said he had no winnings, and Mr. Jackson forced him into the house. When Mr. Jackson realized the two men did not have the $10,000, he decided to take them to an ATM and started leading them at gunpoint to Mr. Berryhill's car. Mr. Berryhill jumped into the car and drove off. Mr. Jackson "just looked around and then he shot Bradley [Dillon]," who died of his wounds. ROA, Vol. III at 212.

(Appendix A, p. 2.)

The paucity and weakness of the government's evidence against petitioner

No physical evidence tied petitioner to the crime or the crime scene. No surveillance video or other objective evidence placed him at that location when the murder victim was shot and killed. And petitioner made no inculpatory statements to law enforcement. As the government conceded, "there was no murder weapon, DNA or surveillance footage linking [petitioner] to the fatal shooting." (Vol. I at p. 832.)

Lacking any such reliable, objective, forensic evidence, the government's case against petitioner turned on the testimony of four witnesses who were unreliable. Two young women who were acquainted with petitioner claimed they had seen him shoot the homicide victim. But each of these young women repeatedly lied to law enforcement about what they had witnessed.

Victoria Garza lived at the residence where the robberies occurred and outside of which the homicide occurred. She lied to the 9-1-1 operator, she lied to the responding officer at the scene, she lied to the FBI, and she lied at the police station. (Vol. III at p. 228 (to 9-1-1 operator); at p. 215 (to the responding officer); at pp. 216-17, 230 (to the FBI); at pp. 235-37 (at the police station).) Garza testified that although she had told law enforcement the perpetrator had worn a mask, taken it off, and dropped it at the house where she lived, no law-enforcement officer ever collected the mask, so she threw it away. (Vol. III at pp. 223-24.) She acknowledged under oath that she broke the phone she had been using on the night of the homicide, rendering the information on it unavailable for the investigation. (Vol. III at pp. 217-18.) The

lead FBI agent for this case opined that Garza had withheld information from him. (Vol. III at p. 509.)

Natalie McMahon was engaged in a casual sexual relationship with petitioner at the time of the homicide. (Vol. III at p. 369.) She claimed her memory of the events was impaired because she had blacked out on Xanax, of which she said she had taken five times her typical dose that night. (Vol. III at pp. 303-04, 311, 318.) She did not even remember that she had lied to police, though it was undisputed she had done so. (Vol. III at p. 308.) Her credibility was so abysmal that during a conversation in chambers on a trial break, the judge discussed how, if he had been defense counsel for petitioner on this case, he would have challenged McMahon's credibility during closing argument to the jury. (Vol. III at p. 364.) The lead case agent testified that McMahon had given the FBI the wrong phone number for herself, had not provided them with the password to her Facebook messenger account, and, like Garza, had generally withheld information from him during the investigation. (Vol. III at pp. 504-05, 509.) He also admitted that McMahon's out-of-court identification of petitioner as the perpetrator had occurred on the heels of him essentially threatening her with the death penalty. (Vol. III at pp. 571-72.)

The government repeatedly conceded that Garza and McMahon had major credibility problems. (Vol. III at p. 31 (at first pretrial conference, prosecutor characterizing McMahon as "a completely untrustworthy witness"); Vol. III at p. 652 (prosecutor arguing, during rebuttal closing: "Can you believe every word that [McMahon] and [Garza] said? Heck no."); *id.* at p. 653 (prosecutor arguing during

rebuttal closing that jurors "would throw stuff at me" if he claimed they were wonderful witnesses and asking "Why would we put a person like [McMahon] on the stand? Why would I call somebody like [Garza] if you can't even believe them? Because they are there.").)

Dakota Berryhill, the surviving robbery victim and a friend of the decedent, fled the scene and did not contact police. (Vol. III at pp. 132-38, 168.) He felt McMahon had set up him and the decedent. (Vol. III at pp. 168-69.) Mr. Berryhill did not know petitioner, but during a pretrial identification procedure, he identified a photo of him (out of an array of six photos known as "a six-pack") as someone who "looked like" the perpetrator. (Vol. III at pp. 139-42; Gov't Exhibits 16 & 17.) Before eliciting the out-of-court identification from Mr. Berryhill, and contrary to FBI policy designed to ensure a fair and neutral process, the FBI agent who conducted the procedure failed to advise Mr. Berryhill that the perpetrator might not be included in the array. (Exhibit 17; Vol. III at pp. 561-63, 570.) When the FBI agent first presented the array to Mr. Berryhill, he did so with his finger pointing to petitioner's photo. (Exhibit 17.) Moreover, petitioner's photo stands out in the array because he is the only one of the six men who is sticking out his tongue (slightly) and because the lines behind him are angled to a degree that is distinct from the other five. (Exhibit 16.) Even with all these indicia of undue suggestiveness, Mr. Berryhill was extremely hesitant to identify petitioner and did so only under pressure from the FBI. (Exhibit 17.) The lead case agent also threatened Mr. Berryhill with the death penalty. (Vol. III at p. 572.) Mr. Berryhill ultimately made an in-court identification of petitioner that

was much improved from his out-of-court identification. (*Compare* Vol. III. at p. 142 with Exhibit 17.)

The prosecution finally relied on Logan Boyd, a jailhouse informant who implausibly claimed petitioner had confessed to him while they were cellmates. (Vol. III at pp. 416-17, 439.) This claim was rendered unworthy of belief by the absence of any record showing these two men were ever assigned to the same cell, the existence of records showing each of them had other cellmates, and testimony from the jail's Director of Operations credibly refuting informant Boyd's farfetched claim that jail inmates were able to reassign themselves to different cells whenever they wanted. (Vol. III at pp. 748-824.)

The district court's jury instructions

The district court twice instructed jurors that they had to reach a unanimous agreement, period—not just in order to return a verdict. (Vol. I at pp. 343, 348 (Appendix D.) An instruction titled "A Jury's Duty to Deliberate," although stating near the outset, "You should try to reach an agreement if you can," also instructed jurors: "The decisions you reach in the jury room must be unanimous. You must all agree." (Vol. I at p. 343 (Appendix D).) In its final closing instruction, the district court again told jurors that "[t]he decision you reach must be unanimous. You must all agree." (Vol. I at p. 348 (Appendix D).)

The district court's response to the note from the deliberating jury

During its deliberations, the jury sent out a note requesting the names of persons who corresponded to phone numbers in a particular government exhibit. (Vol. I at pp. 350-51 (Appendix E).) Shortly thereafter, following discussion with counsel for the parties (and no objection from either side), the district court responded in writing to the jury: "You have all of the evidence necessary for you to reach a verdict." (Vol. III at pp. 661-63 (Appendix B); Vol. I at p. 351 (Appendix E).)

After a couple more hours of deliberations, which stretched well into the evening, the jury convicted petitioner on all counts. (Vol. I at pp. 353-56; Vol. III at pp. 665-66.)

2. Proceedings in the court of appeals

Because one instruction told jurors they should "try to reach an agreement if you can" and another referenced the possibility of "split votes," the court of appeals found "no error, let alone plain error," in the instructions provided to the jury before its deliberations. (Appendix A, p. 6.)

Regarding the district court's response to the note from the deliberating jury, the court of appeals acknowledged petitioner's arguments that "the district court interfered with the jury's factfinding role when, in response to the jury note, it said the jurors had 'all of the evidence necessary . . . to reach a verdict'" and that, due to the burden of proof in a criminal case, "because only a guilty verdict requires evidence, the court's response 'implied that the verdict would be guilty.'" (Appendix A, p. 7.) The court of appeals then reasoned that petitioner's argument "overlooks context," noting that before the jurors began deliberating, the district court had told

them that if they ask a question, the court would probably respond: "You have all of the law and evidence necessary for you to reach your verdicts." (Appendix A, p. 7.) The court of appeals held that the district court's similarly worded response to the deliberating jury's note "did not imply that the jury should find [petitioner] guilty." (Appendix A, p. 7.)

REASONS FOR GRANTING THE WRIT

1. This Court should grant certiorari because the court of appeals has decided an important question of federal constitutional law that has not been, but should be, settled by this Court: whether trial judges violate due process and the right to a fair trial when they issue instructions that preclude the possibility of a hung jury.

In every criminal trial, there are generally three possible outcomes of jury deliberations: a unanimous vote for conviction, a unaminous vote for acquittal, or a hopeless deadlock in the jurors' votes, i.e., a "hung jury." The district court's instructions repeatedly telling the jury "[y]ou must all agree" were erroneous because they precluded the third outcome—a hung jury—at petitioner's federal criminal trial. (Vol. I at pp. 343, 348.)

As this Court recognized a few years ago, a hung jury is not necessarily "a waste"—instead, it may well be "an example of a jury … deliberating carefully and safeguarding against overzealous prosecutions …." *Ramos v. Louisiana*, 590 U.S. 83, 99-100 (2020).

Of course, it is perfectly appropriate for a trial judge to instruct jurors that *in order to reach a verdict*, they must be unanimous. This is true whether the verdict is guilty or not guilty. *See* Tenth Circuit Pattern Criminal Jury Instruction No. 1.23

(rev. 2023) ("To reach a verdict, whether it is guilty or not guilty, all of you must agree. Your verdict must be unanimous on each count of the indictment.").

But the district court's instructions here departed from this pattern instruction in an important way. They did not qualify the court's mandate for unanimous agreement by tying it to what was necessary *to reach a verdict*. Instead, the instructions presented the jurors who convicted petitioner with a free-floating mandate to agree with one another, period, i.e., in all circumstances. Under the district court's instructions, with respect to each count, there were only two potential paths forward by which jurors could conclude the trial, get out of the jury deliberation room, and be allowed to go home: a unanimous vote of guilty, or a unanimous vote of not guilty. This was error that presented an undue risk of coercion in the jury's verdict.

Contrary to the court's of appeals' conclusion, neither of the district court's other instructions alter the conclusion that fundamental constitutional error occurred at petitioner's trial.

The instruction that jurors "should try to reach an agreement if you can" did not suggest it would be acceptable for jurors to fail in their efforts to reach agreement, as the very same instruction contained the more forceful, blanket statement in the second paragraph: "You must all agree." (Vol. I, p. 343 (Appendix D).) The latter forumation was then repeated as one of the last instructions given to jurors when they were sent out to deliberate, adding to the risk of coercion. (Vol. I, p. 348 (Appendix D).)

Likewise, the district court's reference to the possibility that a split vote could occur during deliberations (Vol. I, p. 346 (Appendix D)) did not suggest in any way that such a split or deadlock could be a final outcome of the jury's decision-making process, as opposed to a moment in time along the way towards a unanimous verdict.

This Court has not yet had occasion to provide feedback to trial judges that instructing jurors in a criminal case that they "must all agree" violates the Due Process Clause of the Fifth Amendment and the fair-trial guarantee of the Sixth Amendment because it precludes the possibility of a hung jury. U.S. Const. amends. V, VI. This is an important issue of fundamental constitutional rights, and the Court should grant certiorari here to provide guidance about it to the lower courts. R. 10(c).

2. This Court should review this case because the Court's case law relevant to the issue of a judge's comments on the evidence is sparse, as three justices of this Court have recognized.

The problem of the district court's blanket instructions telling jurors they all had to agree with one another was compounded when the court responded to the question from the deliberating jury. The district court had received a note reflecting that at least one juror was asking if the court would provide the jury with additional information about a government exhibit. (Vol. I at p. 351 (Appendix E).) The court should have responded with a simple "no" or perhaps a more fulsome statement such as "You have received all of the evidence you are going to receive in this case." Instead, the court responded: "You have all of the evidence *necessary for you to reach a verdict*." (Vol. I at p. 351 (Appendix E) (emphasis added).) This was highly problematic due to the inherent asymmetry in a criminal case with respect to the burden of proof and the necessity for the presentation of evidence. The jurors had of

course been instructed that the prosecution bore the burden of proof (Vol. I at pp. 318, 334-40.) Given that a verdict of "guilty" must rest on evidence sufficient to constitute proof beyond a reasonable doubt of all the elements of the charged offense, whereas a verdict of "not guilty" requires no evidence at all, a statement by the trial judge that the jury had "all of the evidence necessary to reach a verdict" implied that the verdict would be guilty. The only circumstance when a certain amount of evidence is necessary to reach a verdict is when that verdict is "guilty."

The response to the jury's inquiry was thus improper, because it tended to communicate that the judge believed the evidence presented by the government at petitioner's trial was sufficient to support a guilty verdict.

Here, as in *United States v. Miller*, 738 F.3d 361, 378 (D.C. Cir. 2013), the district court's response to the note from the deliberating jury "impermissiblyinterfered with the jury's independent role as the finder of fact." *Miller*, 738 F.3d at 378. And the court "allow[ed] itself to be enlisted in the fact-finding process" and "usurped the jury's exclusive role," thereby depriving petitioner of his Sixth Amendment right to trial by jury. *See Miller*, 738 F.3d at 380.

Individually and in combination with the previously discussed instructional error, this violated not only petitioner's his Sixth Amendment right to a fair jury trial but also his Fifth Amendment right to due process and. *See* U.S. Const. amends. V, VI.

The court of appeals reasoned that petitioner's argument about the court's response to the deliberating jury's note "overlooks context." (Appendix A, p. 7.) But

the context the court of appeals relied on was nothing more than the fact that the district court had already told the jury that such a response was its "usual response to jury questions" about the evidence. (Appendix A, p. 7; Vol. I, p. 347 (Appendix D).) The widespread nature of this practice serves to support the need for this Court's intervention at this time.

Counsel believes the last time this Court reversed a criminal conviction due to the presiding judge's impermissible comment on the evidence in front of the jury was nearly a century ago, when the Court explained:

> The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling." This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence "should be so given as not to mislead, and especially that it should not be one-sided"; that "deductions and theories not warranted by the evidence should be studiously avoided."

Quercia v. United States, 289 U.S. 466, 470 (1933) (reversing drug conviction because trial judge expressed to juors his view that the defendant had repeatedly lied during his testimony, except when he agreed with the government).

The Court's more recent foray into this area in *Early v. Packer*, 537 U.S. 3 (2002), failed to provide sufficient guidance to the lower courts, because it was a federal habeas case decided under the deferential standard of review of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). As the Court concluded in *Packer*, "Even if we agreed with the Ninth Circuit majority (Judge Silverman dissented) that there was jury coercion here, it is at least reasonable to conclude that

there was not, which means that the state court's determination to that effect must stand." 537 U.S. at 11.

In 2010, while dissenting from the denial of certiorari in a federal habeas case, three justices of this Court noted the scarcity of clear law from the Court on the issue of improper judicial commentary on the evidence presented at a criminal trial:

> The clearly established law relevant to this case is sparse. Just one of this Court's decisions, *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), has addressed the constitutional rule against coercive jury instructions. And *Lowenfield* held only that, on the totality of the circumstances present there, no unconstitutional coercion resulted. *Id.*, at 241, 108 S.Ct. 546. The Court has also decided several cases on the specific practice of judicial comment on the evidence. *E.g., Quercia v. United States*, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321 (1933). But all of those cases arose under this Court's supervisory power over federal courts; they set no clearly established constitutional limits under AEDPA. *See Early v. Packer*, 537 U.S. 3, 10, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (per curiam). As a result, the clearly established law in this area provides very little specific guidance. About all that can be said is that coercive instructions are unconstitutional, coerciveness must be judged on the totality of the circumstances, and the facts of *Lowenfield* (polling a deadlocked jury and reading a slightly modified *Allen* charge) were not unconstitutionally coercive. *See* 484 U.S., at 237–241, 108 S.Ct. 546.

Wong v. Smith, 562 U.S. 1021 (2010) (Alito, J., with Roberts, C.J., and Scalia, J., dissenting from the denial of certiorari).

This Court should grant certiorari to provide the necessary guidance in this important area of federal constitutional law.

3. **Notwithstanding that the errors are unpreserved, this appeal provides a good vehicle for addressing these important constitutional violations because, even on plain-error review, the weakness of the government's evidence against petitioner and the nature of the errors themselves together warrant reversal.**

As petitioner argued below, the constitutional errors from the district court's insutrctions in this case were so obvious and significant that reversal is warranted even on plain-error review under *United States v. Olano*, 507 U.S. 725, 736 (1993). (*See* Opening Br., pp. 13-14.) Petitioner maintains that not only were the errors "plain" or "obvious" but that they should be deemed per se prejudicial, as they are not amenable to specific evidentiary showings of prejudice. (Opening Br., p. 14.) Even if these errors are not deemed per se prejudicial, however, upon full merits review, this Court should find that the third prong of the *Olano* test is met because of the lack of objective, reliable evidence tying petitioner to the crime and the overall weakness of the witness testimony presented by the government.

The errors at issue here, which go to the heart of our jury system and the paramount importance of judicial neutrality, also seriously affect the fairness, integrity, or public reputation of judicial proceedings. *See Olano*, 507 U.S. at 736.

CONCLUSION

For all these reasons, petitioner asks this Court to grant certiorari and, following full merits review of this case, hold that the district court's instructions and response to the note from the deliberating jury violated his rights to due process and a fair trial under the Fifth and Sixth Amendments, and that reversal of pertition's convictions on plain-error review is warranted.

DATED: September 2, 2025

Respectfully submitted,

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