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IN THE SUPREME COURT OF THE UNITED STATES

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ROCKY DIETZ, :

Petitioner, : No. 15-458

v. :

HILLARY BOULDIN. :

- - - - - x

Washington, D.C.

Wednesday, April 26, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:11 a.m.

APPEARANCES:

KANNON K. SHANMUGAM, ESQ., Washington, D.C.; on behalf of Petitioner.

NEAL K. KATYAL, ESQ., Washington, D.C.; on behalf of Respondent.

JOHN F. BASH, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(11:11 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 15-458, Dietz v. Bouldin.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM

ON BEHALF OF THE PETITIONER

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

When a judge discharges a jury after it reaches a verdict, the jury's service is at an end and the jurors return to being ordinary members of the public. This case presents the question whether a district court has inherent authority under Article III of the Constitution to recall discharged jurors for further service in the same case, here, for the purpose of deliberating anew and reaching an entirely different verdict.

The answer to that question is no. The established rule of common law forbade the recall of discharged jurors. In numerous respects, the Federal Rules of Procedure reflect the understanding that a district court's authority ends at the point of discharge.

CHIEF JUSTICE ROBERTS: I thought you had a

1 clear bright-line rule until I got to page 9 of your  
2 reply brief, where you say, "A jury may remain  
3 effectively undischarged despite a judge's pronouncement  
4 of discharge."

5           There are cases where you agree that if the  
6 judge says you're discharged, they're not really  
7 discharged, and the judge can say, oh, come on back.  
8 I've got something else you've got to do.

9           MR. SHANMUGAM: Mr. Chief Justice, our rule  
10 is clear. It's a rule that a district court lacks the  
11 authority to recall discharged jurors. The question  
12 that we discuss at page 9 of our reply brief is the  
13 question of what the definition of a discharge is. And  
14 what we offer --

15           CHIEF JUSTICE ROBERTS: Well, that's pretty  
16 lawyerly.

17           (Laughter.)

18           MR. SHANMUGAM: Thank you, Mr. Chief  
19 Justice.

20           (Laughter.)

21           CHIEF JUSTICE ROBERTS: Saying anytime  
22 you're discharged, it's over. Now, discharge may not be  
23 discharge in every case. Because you recognize that  
24 there are cases where the judge says you're discharged  
25 but you would allow them to come back.

1 MR. SHANMUGAM: And that is simply, Mr.  
2 Chief Justice, because we believe the discharge is an  
3 act; it's not just a pronouncement. And that's what the  
4 vast majority of the lower courts have said. They have  
5 said that a jury is discharged when, having been  
6 released from service, the jurors have left the judge's  
7 presence and control.

8 CHIEF JUSTICE ROBERTS: Okay. Presence and  
9 control. Now, that's -- that's the key distinction that  
10 you have?

11 MR. SHANMUGAM: That is what lower courts  
12 have said, and we're certainly comfortable with that  
13 distinction. And if --

14 CHIEF JUSTICE ROBERTS: So if they're  
15 still -- if they're still in the courtroom, he can say,  
16 wait, hold up. You've got to come back and do this.

17 MR. SHANMUGAM: Yes, that is correct. And  
18 that is basically the line --

19 CHIEF JUSTICE ROBERTS: What if they're in  
20 the hall outside the courtroom?

21 MR. SHANMUGAM: The hall --

22 CHIEF JUSTICE ROBERTS: Nothing's happened.  
23 They're all still there.

24 MR. SHANMUGAM: The hall is outside a  
25 judge's presence and control. And the only cases where

1 jurors have been permitted to be recalled outside the  
2 courtroom under this standard are cases where the  
3 jurors, say, have gone back to the jury room. And I  
4 think it's fair to say under those circumstances, that  
5 the jurors are no longer -- are still within the judge's  
6 presence and control.

7           Certainly, we don't think that that  
8 definition could be stretched to facts like this case,  
9 where the jurors have not only left the courtroom, but  
10 at least two of the jurors have left the immediate  
11 vicinity of the courtroom. And it appears from the  
12 record as if one of the jurors has left the courthouse  
13 altogether.

14           CHIEF JUSTICE ROBERTS: What they're worried  
15 about -- what they're worried about with the rule about  
16 discharge and then bringing them back is that the jurors  
17 may have talked to somebody about the case, heard  
18 something about it, had information that's going to be  
19 prejudicial to the defendant that they shouldn't have  
20 gotten. Why doesn't it make sense to say, well, if  
21 they're right out in the hall or, you know, they're down  
22 the hall, bring them back in and ask, just as the judge  
23 did here, have you talked to anybody about the case?

24           MR. SHANMUGAM: Mr. Chief Justice, I think  
25 that the courts that have adopted that functional

1 definition of discharge, that have looked at discharge  
2 as the point at which jurors have separated or  
3 dispersed, have focused on the potential for influence,  
4 not the fact of influence. In other words, those courts  
5 aren't applying -- aren't engaging in a prejudiced  
6 inquiry under the guise of defining discharge.

7           Instead, what they are saying is, in  
8 essence, the point at which the jurors are no longer  
9 together as a unit and, again, no longer within the  
10 Court's instruction and direction is the point at which  
11 they've been discharged. And I think that that has  
12 proven in the case law to be a relatively easy line to  
13 apply.

14           And many of the cases on which Respondent  
15 relies are cases in that category; in other words, cases  
16 where courts, at the same time as they have recognized  
17 the common law rule, have applied this functional  
18 definition of "discharge."

19           Now, again, we think that this case plainly  
20 does not fall even within that somewhat broader  
21 definition, and the issue of whether the jury has been  
22 discharged in this case is obviously not in dispute  
23 before this Court. But I do think that in practice, if  
24 this Court were to adhere to the common law rule, that  
25 definition would be pretty easy to apply in practice,

1 and there aren't a lot of lower court decisions that  
2 seem to have struggled with the application of that  
3 decision. And once you take those --

4 JUSTICE SOTOMAYOR: I --

5 MR. SHANMUGAM: I was just going to say that  
6 once you take those cases away, Respondent really does  
7 not have very much by way of common law authority on  
8 which to rest.

9 JUSTICE SOTOMAYOR: Am I -- are you  
10 confirming that you're not raising a constitutional  
11 barrier to the recall of jurors?

12 MR. SHANMUGAM: Yes. I think we have  
13 consistently made the point all along that this issue  
14 obviously implicates the underlying right to a fair  
15 trial. And the rule that we're articulating is  
16 certainly protective of that interest, but it --

17 JUSTICE SOTOMAYOR: All right. But not --  
18 not directly.

19 MR. SHANMUGAM: Yes, that is correct.

20 JUSTICE SOTOMAYOR: In most fair trial  
21 analyses, we look to prejudice. You don't get a fair  
22 trial unless there is a likelihood of prejudice. So why  
23 is it that we would make an absolute rule barring the  
24 recall of the jury, except in the circumstance you're  
25 conceding? Why don't we go back to what the Chief



1 Justice said? Why aren't we looking for more specific  
2 prejudice?

3 MR. SHANMUGAM: Justice Sotomayor, that is  
4 for the simple reason that we believe this is really a  
5 question about a district court's authority. And in  
6 analyzing whether a district court --

7 JUSTICE SOTOMAYOR: Well, there's no  
8 statutory bar.

9 MR. SHANMUGAM: Well, that is correct, and  
10 there is no explicit bar in the rules. But when you are  
11 considering whether a court has inherent authority under  
12 Article III of the Constitution, the three  
13 considerations on which this Court has relied are,  
14 first, the history -- and we believe that, far from  
15 there being a long history in Respondent's favor, that  
16 the history really points decisively in our direction.  
17 The Federal rules, and while it is true that the Federal  
18 rules do not explicitly prohibit jury recall after  
19 discharge, time and again the Federal rules indicate  
20 that a court's authority is limited at the point of  
21 discharge and that a court's authority after discharge  
22 is constrained in various respects. And critically, the  
23 Federal rules also provide specific and concededly  
24 adequate remedies for the defect at issue here, an  
25 invalid or ambiguous verdict.

1 JUSTICE SOTOMAYOR: Well, we don't have a  
2 specific rule that permits district courts to rescind  
3 any order they've issued. But we've routinely, through  
4 history, permitted district courts, when they think  
5 they've entered an erroneous order, to just rescind it.  
6 Why isn't this one of those orders?

7 MR. SHANMUGAM: District courts have  
8 authority to be sure to rescind certain types of orders.  
9 In our reply brief, we point to various examples of  
10 orders that cannot be rescinded, such as a decision by a  
11 district court to transfer venue, a decision by a  
12 district judge to --

13 JUSTICE SOTOMAYOR: But those are  
14 statutorily barred from happening.

15 MR. SHANMUGAM: Well, I don't -- I don't  
16 think that that's right. I think that courts have said  
17 that those orders are essentially like the order at  
18 issue here, final in the relevant sense; in other words,  
19 a district court's authority is at an end when a  
20 district court transfers the case to another district,  
21 when a judge recuses himself or herself, when a district  
22 court enters final judgment over part of a case under  
23 Rule 54(b), so --

24 JUSTICE GINSBURG: But until -- until final  
25 judgment, is the -- the rule is everything is

1 interlocutory. The -- when -- when the judgment is  
2 entered, that's it, that's an end of the case. District  
3 court loses authority over it. But here we haven't had  
4 a final judgment. Yes, the jury was discharged, but  
5 there's no judgment that's been entered in the case.  
6 Why doesn't the judge retain authority up until the  
7 point where he enters -- where judgment is entered on  
8 the jury verdict?

9 MR. SHANMUGAM: And, Justice Ginsburg, all  
10 of the examples to which I just pointed are orders that,  
11 notwithstanding the fact that final judgment in the case  
12 has not yet been entered, are nevertheless orders that  
13 the entering judge cannot revoke. And so, too, here.  
14 Our submission is a quite straightforward one. It is  
15 that the active discharge denotes the point at which a  
16 district court's authority over the jury is at an end,  
17 and the jury's authority over the case is at an end.

18 And to finish my answer to Justice Sotomayor  
19 about the Federal rules, I think it is critically  
20 important here for the purposes of analyzing whether  
21 there is inherent authority that there are specific and  
22 conceivably adequate remedies for correcting an invalid  
23 or ambiguous verdict both before a discharge and after  
24 discharge.

25 So first, before a discharge, we certainly

1 concede that before the jury is discharged, a district  
2 court has the authority to recall a jury, and it's not  
3 even recalling the jury. It's simply reinstructing the  
4 jury and ordering the jury to engage in further  
5 deliberations. That conspicuously did not take place  
6 here, notwithstanding the fact that both the district  
7 court and Respondent's counsel acknowledged that a  
8 verdict of \$0 would be invalid.

9           After discharge, there are actually two  
10 remedies. The first is the remedy of a new trial, and  
11 we certainly think that that has long been the remedy  
12 for the type of defect at issue here, a verdict that is  
13 contrary to the weight of the evidence, and indeed, not  
14 only contrary to the weight of the evidence, but  
15 contrary to any of the evidence.

16           The other remedy, which I do want to focus  
17 the Court's attention on, is the remedy that is provided  
18 in Civil Rule 60(a). And that is the remedy that  
19 enables a district court to essentially conduct a  
20 streamlined proceeding to correct clerical errors and  
21 oversights and omissions in a judgment. And so in the  
22 other major category of cases on which Respondent  
23 relies, those are cases in which there were simply  
24 mistakes in the original verdict, cases where two  
25 verdict forms might have been found in the record or

1 cases where the recorded verdict --

2 JUSTICE KENNEDY: In your -- in your view --  
3 let's suppose the jury were truly discharged and they --  
4 they were away for a day, could -- but the judgment  
5 hasn't been entered yet. Could the judge amend the  
6 judgment or state in the judgment that \$10,000 be  
7 awarded?

8 MR. SHANMUGAM: No, for the simple reason  
9 that I don't think you would know what a correctly  
10 instructed jury would have done in that circumstance.  
11 And indeed, in this case, the further complication was  
12 that the jury was required not only to award the \$10,000  
13 in stipulated damages for past medical expenses, but  
14 also to award some amount for future expenses. And  
15 indeed, when the jury came back, it returned a verdict  
16 of \$15,000. So I don't think that that could have been  
17 done in this case.

18 CHIEF JUSTICE ROBERTS: What if the jury is  
19 discharged and the judge is looking at the verdict and,  
20 I don't know, shows it to the lawyers and says, okay,  
21 it's 28,000. The lawyer says, no, that's a three. It's  
22 23,000. Can the judge just stop the jury and say, well,  
23 here, what is it? Is this 28 or 23?

24 MR. SHANMUGAM: The proper remedy in that  
25 circumstance, Mr. Chief Justice, would be the one that

1 I've just suggested, namely a proceeding under  
2 Rule 60(a) of the Civil Rules. And in aid of that  
3 proceeding, the judge has the ability to call back the  
4 jurors, but not as a jury. That's the critical point.  
5 It can call back the jurors, essentially, as witnesses,  
6 and the judge could subpoena the jurors if necessary,  
7 and take affidavits or oral testimony from the jurors to  
8 correct the verdict.

9 And, again, I think that that's an answer to  
10 the other significant category of cases that Respondent  
11 relies on. Those are cases where you have these various  
12 types of clerical errors, mistakes of a verdict being  
13 recorded. That's different from the verdict that was  
14 actually orally delivered in court. And all of those  
15 cases, under our interpretation, are readily correctable  
16 under Rule 60(a) and what does not need to be a  
17 particularly complex proceeding.

18 CHIEF JUSTICE ROBERTS: Well, but does, in a  
19 certain sense -- I don't know if I -- it's certainly not  
20 a clerical error, but it is a simple error. I mean, the  
21 point is the judge told the jury, you have to award this  
22 amount in medical expenses, and the jury didn't. Why  
23 doesn't that fall under a different category than the,  
24 you know, questions of certainly guilt or -- or  
25 liability or no liability?

1                   MR. SHANMUGAM: So, Mr. Chief Justice, I  
2 think it's certainly fair to say that the error in this  
3 case was an obvious one. Indeed, it was so obvious that  
4 less than an hour earlier when the jury issued a note  
5 asking about whether the damages had already been paid,  
6 again both the district court and Respondent's counsel  
7 acknowledged that if this was heading in the direction  
8 of a \$0 verdict, that verdict would be invalid.

9                   But I think it's critically important to  
10 realize that we're not dealing with a case here where  
11 the verdict is somehow facially invalid. I mean, if you  
12 look at the verdict form, which is at Page 22A of the  
13 Petition Appendix, the four corners of that verdict form  
14 are fine. The verdict simply says, we're finding in  
15 favor of Petitioner, but we're awarding \$0.

16                   This is a case that falls into the -- the  
17 category of cases where the verdict is contrary to the  
18 weight of the evidence.

19                   And, again, the remedy for that, both under  
20 the Federal rule --

21                   CHIEF JUSTICE ROBERTS: Well, you mean with  
22 respect to the amount they were -- they were obligated  
23 to award?

24                   MR. SHANMUGAM: Well, that is correct.  
25 Well, with regard to the award, more generally. In

1 other words, they could not have awarded \$0 as a matter  
2 of law by virtue of Respondent's stipulation, and  
3 that --

4 CHIEF JUSTICE ROBERTS: But the only sense  
5 -- the only sense in which it was contrary to the  
6 evidence was that they didn't award the \$10,000. They  
7 awarded zero.

8 MR. SHANMUGAM: Yes.

9 CHIEF JUSTICE ROBERTS: If they had --

10 MR. SHANMUGAM: Well, plus some amount for  
11 future medical expenses. But my point is simply that  
12 even at common law, the remedy in these circumstances  
13 has always been a new trial.

14 So in other words, Rule 59(b) is not some  
15 newfangled invention. If you go back and look at the  
16 cases prohibiting the recall of discharged jurors, going  
17 all the way back to Loveday's case, the case that we  
18 cite from the Exchequer from 1608, those cases say that  
19 the remedy in these circumstances is a new trial.

20 JUSTICE ALITO: May I ask you about the  
21 basis for the legal rule you're asking us to adopt? And  
22 let's just assume, for the sake of argument, that there  
23 isn't any Federal rule that sheds very much light  
24 directly on this question.

25 So then your argument seems to come down to



1 two points: One is that there's nothing that gives  
2 the -- the -- expressly, or maybe even by implication,  
3 gives the trial judge the power to do this. But trial  
4 judges do hundreds of things that are not expressly  
5 authorized by rule. So what -- we -- we certainly  
6 couldn't adopt that rule, a Federal judge -- a trial  
7 judge can't do anything unless there's a rule that says  
8 the judge can't -- can do it. Trials would come to an  
9 end.

10 The other is based on the common law. But  
11 there were all sorts of common law procedures, and  
12 procedures that continued into the 19th century, that  
13 have been abandoned in modern practice.

14 So you want us to say if there was a -- an  
15 established practice at common law, and into the --  
16 maybe the late 19th century. Trial judges today in the  
17 Federal courts today must follow that rule unless  
18 there's something that gives them a dispensation.

19 MR. SHANMUGAM: So Justice Alito, we're  
20 certainly not here arguing that there has to be an  
21 express grant of authority in the Federal Rules. And it  
22 certainly is true that Federal courts have brought  
23 authority to structure their proceedings as they see fit  
24 while the case is pending. And I think if you  
25 identified various specific procedures, you would find

1 that they would comfortably meet the standard for  
2 inherent authority.

3 And so to take the government's seemingly  
4 favored example, in limine rulings by district courts,  
5 district courts obviously have the inherent authority,  
6 and indeed the express authority to make evidentiary  
7 rulings. And the question of the timing of those  
8 rulings is simply incident to the exercise of that  
9 authority.

10 Our point is simply that to the extent that  
11 a court has that broader authority, it has never been  
12 understood to confer the specific authority to recall  
13 discharged jurors.

14 And to get back to the Federal Rules,  
15 because I really don't think that this is a case where  
16 the Federal Rules are silent on the issue --

17 MR. SHANMUGAM: Well, before you do that,  
18 what -- what rule should we adopt with respect to common  
19 law practices, common law trial practices where not --  
20 or 19th century trial practices? Courts have to follow  
21 them unless there's something that says they don't?

22 MR. SHANMUGAM: No, not at all. And the  
23 perfect example of that is sequestration. Again,  
24 certainly a -- a district court has the inherent  
25 authority to sequester the jury, but a district court is

1 not bound to adhere to that practice simply because that  
2 was the practice in 1789.

3 Our argument is simply that you have to look  
4 under this Court's decisions on inherent authority to  
5 the history. And in the absence of a long history, you  
6 should not be recognizing an inherent authority, at  
7 least absent some necessity. And that's really what  
8 this case boils down to.

9 Respondent and the government's argument at  
10 the end of the day turns entirely on considerations of  
11 efficiency. It turns on the argument that it's going to  
12 be more efficient, in at least some of these cases, to  
13 recall the jury rather than to conduct a new trial.

14 JUSTICE ALITO: But it has to be absolutely  
15 necessary. What should the -- what should the -- the  
16 trial judge -- at one point jurors weren't allowed to  
17 eat during deliberations -- so what did -- the first  
18 trial judge who said it might be a good idea to allow  
19 them to have lunch.

20 (Laughter.)

21 JUSTICE ALITO: What -- was that absolutely  
22 necessary? What -- what would be the thought process  
23 there?

24 MR. SHANMUGAM: A -- a district court surely  
25 has the authority to permit the jury to eat. And

1 that -- and this just sort of goes back to the question  
2 of, you know, what is the affirmative source of the  
3 authority here?

4 And this Court has never, in its inherent  
5 authority cases, as Respondent freely concedes at  
6 page 39 of his brief, said that efficiency alone is a  
7 sufficient justification for the exercise of inherent  
8 authority. And again, this is where the Federal --

9 JUSTICE BREYER: Why not? Why not? Why  
10 isn't it? I mean, it's very expensive to have new  
11 trials. Hardly anyone can use a court. You've been  
12 calling all these jurors back as witnesses costs money.  
13 And you're arguing that rather than -- it's going --  
14 okay, that's their efficiency argument. And -- and the  
15 difference here turns on whether the jury is still in  
16 the courtroom or whether they've gone into the hallway  
17 and is asked, did anybody talk to you? No. Okay.

18 Now, if it saves a lot of money, and that's  
19 the only difference, why don't we say the efficiency  
20 argument's what counts? It matters to people. It means  
21 whether they can get their cases resolved or not.

22 MR. SHANMUGAM: So Justice Breyer, in  
23 analyzing questions of inherent authority, this Court  
24 has never engaged in policy balancing, and it's focused  
25 on the three considerations: It's focused on history,

1 the rules and on necessity, and the availability --

2 JUSTICE BREYER: We never have. I'll look  
3 it up. Why don't we begin?

4 MR. SHANMUGAM: Well, if this Court wishes  
5 to engage in policy balancing --

6 JUSTICE BREYER: Well, we -- we don't need  
7 the words -- saves people a lot of money, this  
8 particular --

9 MR. SHANMUGAM: Well, and I --

10 JUSTICE BREYER: -- exercise, and there  
11 really isn't much reason in terms of fairness not to do  
12 it.

13 MR. SHANMUGAM: And I'm not sure that that  
14 is always going to be true. I think that Respondent and  
15 the government in their briefs try to sort of set up  
16 this dichotomy between technical defects in the verdict  
17 on the one hand and burdensome new trials on the other.

18 With regard to technical defects in the  
19 verdict, truly technical defects, those can be  
20 corrected, short of a new trial, under Rule 60(a). And  
21 recall of the jurors is going to be burdensome in cases  
22 such as this one where the jury is being asked, not  
23 simply to correct a technical defect, but to deliberate  
24 anew and to reach an entirely different verdict. And I  
25 would respectfully submit that of all of the cases in

1 Respondent and the government's briefs, they would be  
2 hard-pressed to identify any case that actually fits  
3 that pattern where a district court is being told --  
4 where a district court is telling a jury to go back and  
5 reach an entirely different verdict.

6           With respect to the policy considerations, I  
7 do think that there are policy considerations that  
8 strongly support the bright-line rule that we are  
9 advocating. As we point out in our brief, fairness and  
10 finality considerations point strongly in our direction.

11           And while it is certainly true the district  
12 courts are able to engage in prejudice inquiries, we  
13 think the risk of prejudice is particularly great in  
14 this context. And at least the government seems to  
15 recognize as much when the government attempts to cabin  
16 its rule under the guise of the abuse-of-discretion  
17 standard in various respects. And I'll come back to the  
18 defects with that proposed rule in a minute.

19           But the only other thing that I would say  
20 with regard to the policy balancing is that I think that  
21 there's a very strong workability argument in support of  
22 our position.

23           If you accept what I understand to be  
24 Respondent's position; in other words, to confer on  
25 district courts essentially an unbounded power to recall

1 discharged jurors subject only to the constraints of the  
2 outer bounds of due process, courts and litigants are  
3 going to have very strong incentive to pursue this  
4 option to correct all sorts of errors.

5           And I think this case actually illustrates  
6 the problem. There's a lot of back and forth in the  
7 briefs about who should have raised this issue before  
8 the district court before discharge. Well, in a case  
9 like this one, my co-counsel, Mr. Angle, would have had  
10 no incentive to raise this issue before discharge for  
11 the simple reason that the jury was last seen returning  
12 a verdict that, not only did not award the minimum  
13 amount, it awarded nothing at all to our shared client.

14           By contrast, in cases such as this one,  
15 parties like Respondent, upon recognizing that there is  
16 an obvious error with the verdict, are going to have  
17 every incentive to pursue recalling the jury as an  
18 alternative to a new trial, because after all, for the  
19 same reasons that my co-counsel probably didn't like  
20 this jury very much, Mr. Katyal's co-counsel presumably  
21 thought this jury was the best jury on earth. And so in  
22 every case --

23           CHIEF JUSTICE ROBERTS: The policy  
24 arguments, I think, ring a little hollow. This is just  
25 not going to come up very often, right? So the idea

1 that this is going to cause all sorts of problems, only  
2 in the rarest, rarest case.

3 MR. SHANMUGAM: But I think --

4 CHIEF JUSTICE ROBERTS: And yet, when it  
5 does come up, we have this concern that Justice Breyer  
6 pointed out, that it's a big waste of money to have the  
7 jury have to start -- I guess a new jury, right -- have  
8 to be a new jury -- start all over again.

9 MR. SHANMUGAM: But I think, Mr. Chief  
10 Justice, that that counts in our favor. I think we  
11 would freely acknowledge that this issue doesn't come up  
12 all that often, though it does seem to come up with some  
13 frequency in the State courts. And there are a number  
14 of cases cited in -- in the briefs going back all the  
15 way to the early days of the Republic. But I think what  
16 I would say is that to the extent that the Court thinks  
17 this isn't a problem that comes up very often, it  
18 indicates to us that it is simply not worth the candle  
19 to adopt either Respondent's approach, which would  
20 really create a motion to recall the jury, as an  
21 alternative to the remedy that's actually provided in  
22 the rules, a motion for a new trial, or the government's  
23 approach, this sort of presumptive, one-hour limit.

24 We simply don't think that there is any need  
25 for this Court to move the line from the point of



1 discharge to the point of discharge plus one hour and  
2 what other -- whatever other limitations the government  
3 wants to impose under the abuse of discretion standard,  
4 particularly because a court will have the ability to  
5 correct obvious defects before discharge.

6           And if this Court adopts our rule, it will,  
7 if anything, create incentives for courts and litigants  
8 going forward to pause for a moment at the point at  
9 which the jury's verdict is returned and published  
10 before discharge to determine whether there is an  
11 obvious error that can be corrected, consistent with the  
12 Court's power to do so prior to discharge.

13           And we freely acknowledge that if a court  
14 wants to, for instance, take a short recess at that  
15 point, it can do so.

16           And to the extent that the specter is given  
17 of elaborate new trials in complex cases where the  
18 trials have been particularly lengthy, I would  
19 respectfully submit that it is precisely in those cases  
20 where courts and litigants ought to have the incentive  
21 to do that.

22           And the last thing I would say before  
23 reserving the balance of my time for rebuttal, to get  
24 back to Justice Alito's question, is that with regard to  
25 the Federal Rules, we're not just pointing to the

1 specific rules like Rule 48 and Rule 51, the rules on  
2 polling and the rules on instructing juries. We're  
3 pointing as well to Rule 59(a)(2), which is the rule  
4 that says that in nonjury trials, a court has the  
5 authority upon receiving a motion for a new trial to  
6 conduct further proceedings to take evidence to reach a  
7 different judgment, but conspicuously does not confer  
8 any such power in jury trials. And that, to us, while  
9 not an express prohibition on the recall of discharged  
10 jurors, is the next best thing.

11 I would respectfully reserve the balance of  
12 my time.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
14 Mr. Katyal.

15 ORAL ARGUMENT OF NEAL K. KATYAL

16 ON BEHALF OF THE RESPONDENT

17 MR. KATYAL: Thank you, Mr. Chief Justice,  
18 and may it please the Court:

19 As the Chief Justice and Justice Breyer have  
20 indicated, under Petitioner's rule, a trial lasting a  
21 week, a month, a year would have to be entirely done  
22 just because one juror took one step outside one  
23 courtroom one minute after a verdict. Now, Petitioner  
24 says that new trial is required, not because of anything  
25 in the Constitution or, Justice Sotomayor, actual

1 prejudice, but because of inferences that he draws from  
2 the Federal rules.

3 JUSTICE SOTOMAYOR: Mr. Katyal, my problem  
4 is I have problems with his rules; I have problems with  
5 yours.

6 (Laughter.)

7 JUSTICE SOTOMAYOR: So you've got to --  
8 and -- and I think it's some of what the government is  
9 saying.

10 Putting aside the questioning here, which  
11 troubles me in its adequacy, okay, it's not uncommon --  
12 it was perhaps uncommon in this case for families to be  
13 crying outside of courtrooms, for families to be talking  
14 to each other and visibly expressing either their  
15 pleasure or displeasure at what a jury did. Not  
16 uncommon for court correction officers in the State of  
17 New York to get very close to juries -- when they used  
18 to sequester them, but even today -- and a corrections  
19 officer saying something like, good job, guys, at the  
20 end of the verdict, okay, when the jury's discharged.

21 There is expressions in the courtroom. If  
22 we do a prejudice test, how are we going to ensure that  
23 that concept of a fair trial is wholesome enough to not  
24 permit what I consider some -- could be potentially  
25 great contamination of the jury and of their emotional

1 state?

2 I mean, there are juries all of the time who  
3 have the right to think about a case who change their  
4 mind.

5 MR. BASH: So --

6 JUSTICE SOTOMAYOR: And the next day,  
7 they're reaching out to the court or they're reaching  
8 out to one of the party's attorneys and wanting to undo  
9 the verdict.

10 But what's the rule that takes care of all  
11 of those things? Is -- is it the boundless ability to  
12 recall juries? What are the circumstances a court  
13 should look at? What's your rule? Give me a rule  
14 that --

15 MR. KATYAL: Justice Sotomayor, I'll give  
16 you a rule, and then, hopefully, I can explain why I  
17 think his rule is really problematic.

18 So our rule is very simple and deals with  
19 all of those things, which is that power after discharge  
20 is parallel to the power before discharge. So all the  
21 things --

22 JUSTICE SOTOMAYOR: I know, but you're  
23 making that up.

24 MR. KATYAL: No, no, no.

25 JUSTICE SOTOMAYOR: And it doesn't take care

1 of the things I talked about.

2 MR. KATYAL: Well, it does. I think it  
3 does. Because as this case comes to the Court -- and  
4 their reply brief at page 13 admits this -- the jury  
5 could have been resubmitted with this and had all of the  
6 things, the juror crying, the folks crying outside. All  
7 of those things could have happened if the judge just  
8 used a different word, "recessed" instead of  
9 "discharged."

10 We are not here defending some rule that  
11 says --

12 JUSTICE SOTOMAYOR: Well, it depends on the  
13 courthouse. In most courthouses, certainly the Federal  
14 system and a lot of State systems, the jury doesn't get  
15 to go out and mix with the public.

16 MR. KATYAL: Quite -- quite right,  
17 Your Honor. But all I'm saying is whatever the rules  
18 are for predischarge, those rules are just parallel  
19 after discharge so long as you have, like here, a  
20 discharge of a couple of minutes where there is no  
21 prejudice to the other side. And I think courts are  
22 well-versed in -- in kind of evaluating those prejudice  
23 inquiries. They do it all of the time. Governments  
24 would have --

25 JUSTICE SOTOMAYOR: Do you think --

1 JUSTICE KENNEDY: Would your rules --

2 JUSTICE SOTOMAYOR: -- but you're not --

3 JUSTICE KENNEDY: -- apply equally in a  
4 criminal case?

5 MR. KATYAL: We think that -- that you don't  
6 have to get into it, but we do think that they generally  
7 do here. And that underscore --

8 JUSTICE KENNEDY: What about impaneling the  
9 jury? Suppose the judge impanels the jury and then  
10 decides that the impanelment was defective -- one juror  
11 wasn't there -- and three hours later, reimpanels the  
12 jury. Is that proper?

13 MR. KATYAL: Well, I think in that  
14 circumstance, again, it's -- you know, the discharge has  
15 nothing to do with it. It's either proper --

16 JUSTICE KENNEDY: I'm talking about  
17 impanelment.

18 MR. KATYAL: Right. And so I don't think  
19 that, you know, we have a position on impanelment. Our  
20 position is just simply --

21 JUSTICE KENNEDY: Well, you said it applies  
22 in criminal and civil cases. And you say that what --  
23 in your brief, you say whatever the judge can do, he can  
24 undo.

25 MR. KATYAL: Correct.

1 JUSTICE KENNEDY: Which is a sweeping  
2 statement when we talk about -- but in double jeopardy  
3 rules, double jeopardy applies the moment there's an  
4 impanelment.

5 MR. KATYAL: Absolutely. They should have  
6 said that, Justice Kennedy --

7 JUSTICE KENNEDY: And I'm not -- and I'm not  
8 sure how your rule would accommodate that principle.

9 MR. KATYAL: So we have a very limited undue  
10 principle. It is not anything -- that anything goes,  
11 but rather it's tempered by the Constitution and by this  
12 Court's inherent power cases which say it's got to be a  
13 reasonable exercise.

14 So for the answer to that is it's a double  
15 jeopardy violation; it's a double jeopardy violation and  
16 the discharge has nothing to do with it.

17 Now, if I could go back and explain why I  
18 think their rule is really problematic.

19 JUSTICE KENNEDY: Well, but your -- your  
20 principle is whatever -- you say whatever the judge can  
21 do, he can undo. What -- what a court can do, it has an  
22 inherent power to undo.

23 MR. KATYAL: That's -- but we do make very  
24 clear that's tempered by the inherent power limitations  
25 of this Court, which are very extreme. And so I don't

1 think that we're here saying that you can undo anything.  
2 We're saying it's got to meet the Degen and Chambers  
3 test. The Chambers test is at page 49 and 50 of the  
4 opinion, which says that it's got to be actual  
5 legitimate response.

6 And -- and I think Mr. Shanmugam is  
7 absolutely wrong when he says, oh, if there's an  
8 alternative, that means there is no inherent power.  
9 Chambers on those two pages is absolutely crystal clear:  
10 The existence of an alternative doesn't deprive inherent  
11 power.

12 Now, our concern about their rule, and,  
13 again, going back to the first questions the Chief  
14 asked, it's not even clear what their rule is, because  
15 for most of this case, before the entire Ninth Circuit  
16 on the blue brief, the rule was the magic words rule,  
17 which was discharge ends things. Now -- the word  
18 discharge ends things. Now the rule happens to be a  
19 geographic limitation.

20 By the way, his reply brief at page 10 has  
21 yet an entirely different rule, which is the Burlingame  
22 rule, which is, you can, even after discharge, even the  
23 next day, have the jury come back and reorder -- and  
24 impose an additional verdict.

25 CHIEF JUSTICE ROBERTS: So I'm not -- I'm



1 not sure you're the one that should be complaining about  
2 a rule that's not very clear. I mean, yours is  
3 basically look at all the circumstances, have the judge  
4 ask the questions, and particularly -- it's a variant on  
5 what I asked earlier -- particularly if this doesn't  
6 come up very often. It seems to me to be -- make some  
7 sense to say it's a bright-line rule. We don't want to  
8 waste courts' time, you know, figuring out whether  
9 there's adequate prejudice, how far is too far.

10 Let's just have a clear rule. If the judge  
11 says discharged, you're discharged. And if he's made  
12 some mistake, you know, he'll be more careful in the  
13 future.

14 MR. KATYAL: Mr. Chief Justice, our rule is  
15 consistent with the way Federal courts deal with jury  
16 issues, the rules in the inherent power cases generally,  
17 which is to leave this and the hundreds of decisions to  
18 district courts to handle in the first instance. And I  
19 think it would be a terrible idea to adapt a bright-line  
20 rule for a -- this is a solution in search of a problem.  
21 It doesn't come up very much.

22 It's never come up -- all his worries -- in  
23 the Federal system, even once. He can cite to you two  
24 cases in his reply brief saying there is any problem.  
25 One is a California case that he cites and he tells you

1 that there's been a discharge of five months and a  
2 recall. He doesn't tell you that that case was reversed  
3 by the California Supreme Court for exactly the concerns  
4 we're talking about, which is it might be dangerous and  
5 prejudicial.

6 JUSTICE SOTOMAYOR: Suppose we tell -- I  
7 mean, look at the totality of the circumstances is a  
8 great test, but it doesn't give much guidance to courts  
9 below. Tell me what the guidance is that we give. I'm  
10 thinking of something like, if they've been exposed to  
11 any extraneous reactions, words, information,  
12 conversation -- I can go on with a list of verbs -- but  
13 you can't recall it? Are there any limits to this  
14 power?

15 MR. KATYAL: There -- there are strong  
16 limits. And those limits are found, for example, in the  
17 Ninth Circuit's decision below, which says that it's got  
18 to be a short recall. There's got to be an inquiry into  
19 whether or not there's contamination. And if there is  
20 any contamination, absolutely.

21 JUSTICE GINSBURG: How short is short?

22 MR. KATYAL: Well, I think, again, that  
23 should be left to the district court's decision --  
24 discretion for the following reason. Cases vary in all  
25 sorts of ways -- ways.

1           Sometimes the trial lasts a year, a year and  
2 a half, Justice Sotomayor. In Russo, I think your trial  
3 was one-and-a-half months, and you wouldn't want to  
4 necessarily throw something out for quite the same  
5 length of time. And in some cases, the jury is just  
6 asked a very simple question that they have to answer,  
7 and so it might be something that could be more than a  
8 couple of minutes. So I think --

9           JUSTICE GINSBURG: And what about  
10 geographic -- you wouldn't draw a line at, say, the  
11 courthouse door? Once they leave the courthouse, that's  
12 it. While they're in the court, it's okay.

13           MR. KATYAL: I think the Federal case law,  
14 and this is clear, actual prejudice is the inquiry. And  
15 if you adopt his test, what is that door? Do you have  
16 to have an NFL referee to adjudicate whether or not  
17 someone is outside the threshold of the door or inside?  
18 I just think that gets very unworkable. I think there  
19 is no reason to do that.

20           JUSTICE GINSBURG: They have to -- to  
21 question each juror. Now, when you went out on the  
22 street, did you talk to anybody?

23           MR. KATYAL: I think -- I think that would  
24 be preferable, but I do think an en masse, you know,  
25 questioning, depending on the circumstances of the case,

1 may be appropriate, or something like this in which it's  
2 just a couple of minutes and there's no allegation  
3 whatsoever of any actual prejudice that anyone talked to  
4 anyone besides the clerk of the court. You know, I  
5 think that that's perfectly appropriate. But in a  
6 different case, absolutely probably different.

7 JUSTICE KAGAN: Mr. Katyal, I wonder whether  
8 there's one difference between the postdischarge case  
9 and the predischarge case. You've been talking a lot  
10 about contamination and outside influence. In there it  
11 seems as though the inquiry is roughly the same, but  
12 there's no way in which the postdischarge case seems  
13 different, which is that once you are discharged, you  
14 just take off your juror hat psychologically, mentally,  
15 and you start thinking about a case in a different way,  
16 and you start even wondering whether, when you had your  
17 juror hat on, you were thinking about it in the right  
18 way. And I wonder whether that is a difference that  
19 makes a difference in this context.

20 MR. KATYAL: I can certainly see a Federal  
21 court, particularly if the length of discharge is  
22 lengthy, getting into that and saying, that's why we're  
23 not going to have a recall. But, you know, there -- no  
24 Federal court ever has adopted the version of -- has  
25 adopted that argument or Mr. Shanmugam's argument and

1 said, the courts lack authority for that reason.

2 Now, maybe the Rules Committee at some point  
3 wants to get into that and say, we're really concerned  
4 about people taking their hat off and this psychological  
5 difference. But that is not something either in the  
6 rules, and it's certainly not something in this Court's  
7 inherent power --

8 JUSTICE SOTOMAYOR: It's certainly not going  
9 to help courts if we adopt a Federal rule. I'm looking  
10 for a principle that would apply for where this problem  
11 occurs the most often, which is State court. So tell me  
12 how we rule in a way that, because this is what I  
13 mentioned before, how many jurors change their mind?

14 MR. KATYAL: Right. Well, with respect to  
15 State court, at least as I understood the new position  
16 now, nothing this Court will do will -- will solve that  
17 particular problem. So because this is -- is -- it's  
18 coming up, as he characterizes it, an Article III issue.

19 I think State courts overwhelmingly have  
20 solved this problem. 21 different States permit  
21 recalls. Only 11 do not. And, yes, it's true in the  
22 old common law we had a different -- a difference in  
23 variable times. But starting in 1839, courts have  
24 permitted recall, and the Federal system has permitted  
25 recall.

1 JUSTICE KAGAN: I guess in answer to my  
2 question, I was not looking so much for a historical  
3 answer. You both have your historical arguments. But  
4 for an answer about why we should take this very  
5 seriously and think that it makes the postdischarge  
6 context different from the precharge -- pre-discharge  
7 context where the -- the inquiry that we do in the  
8 pre-discharge context about have you talked to anybody,  
9 have you read a newspaper, just really doesn't get to  
10 the heart of the matter in the postdischarge context,  
11 which is that you've just taken off your juror clothes  
12 and maybe started thinking about what you did when they  
13 were on in an entirely different way.

14 MR. KATYAL: Justice Kagan, I do think that  
15 you should take it seriously. I think district courts  
16 do that all the time, which is why recalls don't happen,  
17 except in circumstances like this, and why he can't  
18 point to any abuse. I'd caution the Court because of  
19 this -- if the Court is animated about the psychological  
20 concern about adopting some one-size-fits-all solution  
21 for the entire country and undoing trials that sometimes  
22 are lengthy, sometimes impose huge psychological costs  
23 to those who testify before them.

24 For example, the first time I was before you  
25 this year in *Kansas v. Carr*, the Court was concerned

1 about the Wichita murders and the witnesses having to  
2 retestify, but that's his rule. He's going to force  
3 redo in all of these cases. That is -- you know, that  
4 is certainly not the efficient result, and we're  
5 certainly not saying efficient is the only thing, as our  
6 brief makes clear on the pages. It says that --

7 JUSTICE GINSBURG: When the jurors come  
8 back, do they get -- do they get resworn? I mean, the  
9 judge just said, thank you very much for your service.  
10 You are now discharged. You are no longer jurors.

11 Then he recalls them. Do they get sworn in  
12 again as jurors?

13 MR. KATYAL: I think that would be the  
14 preferable thing to do. But what, again, in response to  
15 Justice Kennedy, what was happening in a case like this,  
16 they're undoing the earlier pronouncement of discharge.  
17 We're turning it to the status quo ante. And then you  
18 have that swearing again. You have the -- effectively  
19 that first swearing working out. And here, as this case  
20 comes to the Court, there is no allegation whatsoever  
21 that there was any prejudice to Mr. Dietz from the  
22 recall.

23 JUSTICE KENNEDY: Again, you would apply the  
24 same rule in a criminal case --

25 MR. KATYAL: Again, I think the Court

1 shouldn't get into it. But, in general, inherent power  
2 decisions are treated the same way. But, you know, that  
3 could be --

4 JUSTICE KENNEDY: A defendant who thinks  
5 he's been acquitted, five minutes later, an hour later  
6 can find out that he's guilty?

7 MR. KATYAL: Well, as the government in this  
8 last footnote points out, that does happen in the double  
9 jeopardy context with respect to mistaken  
10 pronouncements. And this Court already said that's not  
11 a problem. Now if, Justice Kennedy --

12 JUSTICE KENNEDY: But the jurors haven't  
13 been discharged in those cases.

14 MR. KATYAL: In those cases, yes, that's  
15 right. So Justice Kennedy, if you're concerned about  
16 that, I suspect that could be something that is  
17 determination -- the district court's determination as  
18 to what is and is not a reasonable response to the  
19 problem at hand. And there is no example whatsoever of  
20 anything like this hypothetical happening, and that's  
21 why, as the Court writes its opinion, we think you  
22 should bracket those types of concerns. See if they  
23 ever arise. They should first, I think, be dealt with  
24 by the Rules Committee, but not in a one-size-fits-all  
25 solution by this Court.



1 CHIEF JUSTICE ROBERTS: The rules -- the  
2 Rules Committee is, I would say, unlikely to address  
3 this for the simple reason that it doesn't come up very  
4 often. I gather no Federal cases at all. So the  
5 Federal Rules Committee probably has bigger fish to fry.

6 How -- how long was the trial in this case?

7 MR. KATYAL: The trial was two days.

8 And, Mr. Chief Justice, the Rules Committee  
9 does handle a lot of issues that do, you know, involve  
10 small issues. But here, of course, there have been six  
11 different Federal circuit courts that have ruled on this  
12 issue, which is what the cert. petition focused on. So  
13 I don't think that this is something that, you know,  
14 wouldn't attract the attention of the Rules Committee.  
15 And my friend's idea, which is somehow the Rules  
16 Committee has already resolved this issue, I think, is  
17 intentioned with that very -- very notion.

18 If there are no further questions.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Bash.

21 ORAL ARGUMENT OF JOHN F. BASH

22 FOR UNITED STATES, AS AMICUS CURIAE,

23 SUPPORTING THE RESPONDENT

24 MR. BASH: Mr. Chief Justice, and may it  
25 please the Court:

1           I'd like to begin by stating very simply  
2 what we think the rule is, and in doing so, hopefully  
3 clarify something about this case that I think generates  
4 a little bit of confusion.

5           The rule we would apply is that if this is a  
6 situation where before the discharge the judge could  
7 have sent it back to the jury with a clarifying  
8 instruction, then the mere formal pronouncement of  
9 discharge does not bar the judge from doing that in a  
10 situation where no actual prejudice would result.

11           The reason I said I think that relates to an  
12 area of confusion in this case is that in his argument  
13 up here, Petitioner's counsel has characterized this as  
14 a weight of the evidence problem. But that's not how  
15 Petitioner or the judge understood the problem below.  
16 They understood the problem as a legally impermissible  
17 verdict that demonstrated that the jurors were confused  
18 about the instructions, and Petitioner has not  
19 contested, as this case comes to the court, that the  
20 judge could have sent it back to the jury before  
21 discharge. I'm not sure that's true if the judge says,  
22 well, I think it's against the weight of the evidence.  
23 That would utterly be coercing a verdict.

24           So as the case comes to the court, it is  
25 conceded that the judge could have sent it back before

1 discharge. The only question, as I understand it,  
2 before this Court is whether the formal pronouncement of  
3 discharge irrevocably barred the court from rescinding  
4 the discharge and resubmitting the case.

5 And for reasons we've set out in the brief,  
6 we think the prejudice standard comports with how this  
7 Court always thinks about jury impartiality issues.

8 In far more extreme circumstances, take the  
9 foundational Remmer decision. That was a criminal case  
10 in which a juror -- there was an attempted bribe to a  
11 juror and then the FBI investigation of that juror for  
12 the attempted bribe. So the juror had a huge incentive  
13 to quit at that point because he had been bribed by the  
14 defendant to -- excuse me -- to convict, because he had  
15 been bribed by the defendant to convict. The FBI knows  
16 he's been bribed. And what the Court said in Remmer is  
17 that it is an actual prejudicial determination after  
18 hearing, and it's within the discretion of the district  
19 court, subject to abuse-of-discretion review, how to  
20 remedy even that kind of problem. And that's a very  
21 significant problem.

22 And it's the same thing when, for example, a  
23 judge forgets midtrial to admonish the jurors to avoid  
24 outside influence, which is parallel to a situation here  
25 with one caveat, which relates to Justice Kagan's

1 question earlier, in that jurors are exposed to outside  
2 influence without an instruction. And even in that  
3 case, courts have been uniform in saying -- courts have  
4 been almost uniform -- I think there's an Eighth Circuit  
5 that went the other way -- in saying that you conduct a  
6 prejudice inquiry.

7 Now, Justice Kagan's question was is there  
8 something different postdischarge. And I think it may  
9 be reasonable to think that at some point,  
10 postdischarge, it's kind of like getting out of the bar  
11 exam. Or you studied all the stuff, you remember it,  
12 but now the commercial paper information is, you know,  
13 receding from your brain in a way that it wouldn't  
14 before the bar exam.

15 (Laughter.)

16 MR. BASH: But I -- I don't think that's --  
17 and I think a district court could properly take that  
18 into consideration, but I don't think that's true a few  
19 minutes after the discharge.

20 It's one thing to say when you get home and  
21 you go back to your spouse or your friends and you say,  
22 this is what we did, and they say, wow, I can't believe  
23 you did that. That -- that's going to cause you to  
24 start to reconsider your verdict as a citizen, not what  
25 the juror had on. But here it was a few minutes.

1 Everybody concedes it was a few minutes.

2 At the time, Petitioner's counsel -- I think  
3 this is on 27(a) of the Ped AP -- said we -- I don't  
4 think the jurors talked to anybody about the case. They  
5 were talking to the clerk about other stuff, about  
6 reimbursement. Didn't talk to anybody about the case.  
7 It was a few minutes.

8 And given that where a juror is attempted  
9 bribed, or jurors sleep through trial, or jurors are  
10 actually exposed to extraneous information where jurors  
11 speak to counsel, we always conduct a prejudice inquiry.  
12 It would be entirely anomalous to say in this one  
13 circumstance there's a three-minute break, you can't  
14 bring the -- the jurors back and resubmit it.

15 JUSTICE SOTOMAYOR: So why can't we recall a  
16 jury six months later? Just this case.

17 MR. BASH: Well, I think that the --

18 JUSTICE SOTOMAYOR: I mean, they didn't talk  
19 about it afterwards. It's not an earth shattering case.  
20 Why can't we call them back the next day, the day after,  
21 just ask them did you talk to anybody? They say no.  
22 Then you go back and resubmit the case now.

23 MR. BASH: Well, Petitioner had -- we don't  
24 think that would be possible.

25 JUSTICE SOTOMAYOR: Why? Give me the

1 limiting prejudice.

2 MR. BASH: Because of the prejudice  
3 standard.

4 JUSTICE SOTOMAYOR: What prejudice? You  
5 haven't shown any prejudice. They didn't with anybody  
6 about the case. They didn't --

7 MR. BASH: I think it would be reasonable  
8 for -- so I guess we're in the situation where six  
9 months later some party says we'd like to call --

10 JUSTICE SOTOMAYOR: I'm talking about one to  
11 infinity, because if -- presumably I'm interested in  
12 some limits to this.

13 MR. BASH: And we think it would be  
14 reasonable for a district court to say, and even for  
15 this Court to say, as a matter of giving guidance to  
16 lower courts, that once jurors have returned to their  
17 daily lives, they've probably spoken to friends and  
18 family about the case. They've taken off their jury  
19 hats for more than a de minimis period. It's so likely  
20 that there's going to be prejudice that we're just not  
21 going to allow that anymore.

22 I'd also say there's a more formal  
23 limitation, which this Court has said in cases like  
24 Casey and Quackenbush, that once final judgment is  
25 entered, a court can't rescind interlocutory orders.

1           I think there would be a question about when  
2 that occurs in this case. We don't think it would ever  
3 get that far under the prejudice standard, but it might  
4 just be when the Rule 58 judgment is entered, which in  
5 this case happened the same day as the second verdict.  
6 In a case I did last year, it happened five days later.  
7 It often happens very soon. Or you might say that once  
8 the notice of appeal is filed, or once the time is  
9 expired for filing post verdict motions, that's when the  
10 final judgment occurs. So there'd be that more formal  
11 bound on the time limit, but I think in practice there  
12 would be an actual prejudice limit that would bound it  
13 very tightly.

14           I just want to emphasis, this case has come  
15 up -- this issue has come up for the United States.  
16 It's come up in, actually, a surprising number of lower  
17 court cases. And if you look at the cases cited in both  
18 parties' briefs, they're almost invariably very short  
19 periods.

20           I mean, this is a judge wanting a do over  
21 after a few minutes where he made a mistake. This is  
22 not people calling things back months later. There was  
23 the five-month case that Petitioner cites, but as Mr.  
24 Katyal noted, that was reversed as gross error by the  
25 California Supreme Court. We don't think our standard

1 would allow that. But where there's a minutes-long  
2 error, judges ought to have the opportunity to fix that  
3 if they can.

4 I know Mr. Shanmugam said that it hasn't  
5 been the case in any of the cases cited in the briefs  
6 that juries retired for future deliberations, but  
7 actually one of the circuit split cases that the United  
8 States was involved with, the Third Circuit case  
9 Figueroa, the judge discharged the jurors and then  
10 realized there was a bifurcated felony possession count  
11 to try. And it was only a few minutes, and the judge  
12 brought them back, and they were reinstructed. There  
13 was evidence presented on that count, and -- and then  
14 they deliberated further.

15 So it does happen. It's -- it's rare,  
16 hopefully, because it's a mistake. But it's not so rare  
17 that I think it -- it warrants a bright-line rule that  
18 would impose really serious costs on -- on parties and  
19 litigants.

20 If there are no further questions.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Four minutes, Mr. Shanmugam.

23 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

24 ON BEHALF OF THE PETITIONER

25 MR. SHANMUGAM: Thank you, Mr. Chief



1 Justice.

2           The rule that we are proposing to the Court  
3 is a simple one. It is that, consistent with the common  
4 law and the Federal rules, a district court lacks the  
5 authority to recall discharged jurors for further  
6 service in the same case, with "discharge" being defined  
7 as the point at which a jury released from service  
8 leaves the judge's presence and control.

9           In writing an opinion in that direction, we  
10 would respectfully submit that the Court should  
11 reiterate the district courts have multiple available  
12 remedies to cure the perceived problem here.

13           Again, we do freely concede, as Mr. Katyal  
14 points out, that a district court has the authority to  
15 reinstruct the jury and to order the jury to engage in  
16 further deliberations prior to discharge, and that will  
17 take care of many of the cases in the category of  
18 obvious errors.

19           After discharge, it is true that a court has  
20 the authority to recall jurors, but not for the purpose  
21 of reconstituting them as a jury. Instead, simply for  
22 the purpose of correcting clerical errors and other  
23 oversights in the judgment. And where the errors are  
24 more substantial, however --

25           JUSTICE GINSBURG: What about -- what about

1 clerical errors? I understand that's what the rule you  
2 pointed to deals with, clerical errors. But you said  
3 "and others," so what's the others?

4 MR. SHANMUGAM: Well, I think that the  
5 others are these cases like the ones I referred to in my  
6 opening argument where, you know, a jury returns two  
7 verdict forms and the question is which verdict form is  
8 the correct one.

9 In other words, courts have the authority to  
10 deal with situations where what you're trying to do is  
11 to intuit the jury's intent at the time of the original  
12 verdict; to take evidence on historical facts concerning  
13 what the jury actually did. And the relevant Federal  
14 Rule of Evidence, Federal Rule of Evidence 606(b), makes  
15 clear that that is an exception to the ordinary  
16 applicable rule that evidence from jury deliberations is  
17 inadmissible.

18 And of course, finally, the last available  
19 remedy is to order a new trial. And again, however you  
20 characterize the error at issue here, whether you  
21 characterize it as a verdict that's contrary to the  
22 weight of the evidence or an instructional error, a new  
23 trial has always been the default remedy in those  
24 circumstances.

25 I think that the problem with Respondent and

1 the government's rule was well pointed out in Mr. Bash's  
2 argument. To the extent that the driving concern here  
3 is prejudice, the government's limitations -- proposed  
4 limitations really don't make a lot of sense, and  
5 neither does Respondent's suggestion made for the first  
6 time at oral argument today that there is a limitation  
7 on the time period in which juries can be recalled.

8           And that is for the simple reason that you  
9 can have a jury that's been out for a long period of  
10 time where you don't have prejudice, and conversely you  
11 can have prejudice almost instantly, particularly in the  
12 world of smart phone communications. And the rule that  
13 this Court articulates here is going to apply in civil  
14 and criminal cases alike.

15           And Justice Ginsburg, the final judgment  
16 limitation really provides little solace in the criminal  
17 context because when a jury returns a verdict, final  
18 judgment is typically not entered until after  
19 sentencing, which again typically takes place sometime  
20 later.

21           And at bottom -- or the question in this  
22 case is really whether extending a court's power beyond  
23 the point of discharge is worth the candle. And again,  
24 in light of all the available alternatives in this  
25 situation, we would respectfully submit that it is not,

1 and the judgment of the Ninth Circuit should therefore  
2 be reversed.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 The case is submitted.

6 (Whereupon, at 12:03 p.m., the case in the  
7 above-entitled matter was submitted.)

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