No. 07-321

In the Supreme Court of the United States

RICHARD I. BERGER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether violation of petitioner's due process right to be present when the trial judge gave a supplemental *Allen* instruction to the jury was subject to harmless-error review.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

Statutes—Continued: Page

In the Supreme Court of the United States

No. 07-321

RICHARD I. BERGER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 473 F.3d 1080.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2007. A petition for rehearing was denied on June 11, 2007 (Pet. App. 60a-61a). The petition for a writ of certiorari was filed on September 7, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of conspiracy to commit loan fraud and wire fraud, to falsify corporate books and records,

and to make false statements in Securities and Exchange Commission (SEC) filings, in violation of 18 U.S.C. 371 (Count 1); five counts of loan fraud and one count of wire fraud, in violation of 18 U.S.C. 1014 and 2 (Counts 2-6 and 15); one count of falsifying corporate books and records, in violation of 15 U.S.C. 78m(b) and 78ff (Count 30); making false statements to accountants of a publicly-traded company, in violation of 15 U.S.C. 78m(a), 78j(b), and 78ff (Count 33); and three counts of making false statements in reports filed with the SEC, in violation of 15 U.S.C. 78m(a) and 78ff (Counts 34-36). He was sentenced to six months of imprisonment, to be followed by five years of supervised release, $3.14 million in restitution, and a $1.25 million fine. Pet. App. 15a. The court of appeals affirmed petitioner's convictions and restitution order but vacated and remanded his sentence and fine for resentencing. *Id.* at 1a-59a.

1. Petitioner was the President, Chief Executive Officer, and Chairman of the Board of Craig Consumer Electronics, Inc., a consumer electronics company that sold products such as car stereos, compact music centers, and small personal stereos to retail stores. Petitioner's conviction stemmed from his false representations to lending banks and the SEC in order to secure financing for the company's operations. Pet. App. 3a-7a. Specifically, petitioner reported inflated accounts receivable and distorted inventory figures to lending banks, and, in order to conceal the fraudulent nature of the reported information, petitioner deceived outside accountants and bank auditors. *Id.* at 5a-6a. The false reports caused the banks to lend millions of dollars to the company and the banks did not discover the fraud until after the company filed for bankruptcy. *Id.* at 6a-7a. Finally, petitioner failed to disclose the company's

true financial condition in several mandatory reports filed with the SEC. *Id.* at 7a.

After the case had gone to the jury and the jury had deliberated for three-and-a-half days, the court held a status conference with the parties and their counsel. The court discussed some jurors' scheduling conflicts that appeared to limit the number of days available for deliberation. Pet. App. 7a. The court believed that some of the requests for days off might be related to "the issue of stress and responsibility on the part of the jury." *Id.* at 8a.

The court suggested that it informally discuss the situation with the jurors on the record but outside the presence of the parties and counsel. The court explained:

> I think this is the time when the jurors need understanding and patience. This is the time when we do what we can to lead them not to make a rush to judgment and emotional unfair verdicts, chaos within the jury room and eventually a verdict of hung jury.
>
> If there had been any suggestions about an *Allen* instruction I want the record to indicate that I do not believe in the *Allen* instruction, I will not give it, never have given it.

Pet. App. 8a. The court said it wanted to quietly convey an understanding of the jury's problems, "to add a positive energy to the deliberations, and not to impose ridiculous time tables." *Id.* at 8a-9a.

After some discussion, counsel for both defendants indicated that "doing it informally" might be acceptable, but petitioner's lawyer asked to see in writing what the court intended to say. Pet. App. 9a. The court said that

it intended to address the issue regarding the jury request for days off. The court also said:

> And I want to make certain that I can convey to them the thought that a rush to judgment is probably the worst form of verdict you could receive. I feel very strong about that.

Id. at 9a-10a. Petitioner's counsel agreed with the court but qualified his consent on the condition that the court remind the jury that the government bore the burden of proof beyond a reasonable doubt. *Id.* at 10a. Based on the representations of counsel, the district court accepted petitioner's waiver of his right to be present for the court's meeting with the jury. The court also determined that waiver to be free and voluntary. *Ibid.*

In its discussion with the jury, the court first observed that several jurors had conflicting medical appointments. The judge stated that he had been hospitalized during trial with water in the lungs, but had recovered. Pet. App. 11a. The court then said:

> The problem we have here is we have to emphasize one thing. That is this. Jurors should not be forced to reach a verdict. Please understand that. Because any time you're forced to reach a verdict you're going to reach an improper verdict or for improper reasons.
>
> And so far as that's concerned, there's no time limit, except it interferes with your life because if one person takes off, the entire jury will be unable to continue. And we'd like to finish this before Christmas.

Ibid. Two jurors then indicated that they were willing to modify their plans so that deliberations could go forward on September 2 and 5. A third juror changed her

child care plans, and a fourth delayed her medical appointment. *Id.* at 11a-12a. When the fourth juror said she was not happy about the delay, the judge related that he had experienced difficulty sleeping and breathing for four days before instructing the jury. *Id.* at 12a.

The court then turned to dates for the week starting September 9th. One juror expressed her belief that the deliberations would be done by then, but another juror disagreed. Pet. App. 12a. In response, Juror Roux said, "I pretty much—I do—we all have our set minds pretty much." *Ibid.* The court then suggested that the jurors "calm down" and try to resolve their differences. Juror Roux indicated that there would not be a resolution, because the different camps were "dead set" in their views. *Ibid.* The foreperson then said that the jury had not reviewed all the evidence and, therefore, that nothing had been decided. At that point, Roux and another unidentified juror said they "would jump out this window" if the jury was still deliberating during the week of September 15th. *Id.* at 13a. In response to these concerns, the court told the jury:

> I don't know if I should or not, but with respect to those of you who reached a particular conclusion, and that you will not change your minds. It wouldn't be wrong for you to reconsider your position if you can be convinced that perhaps your position was not accurate, that it could be wrong.
>
> And you have to have that state of mind throughout the deliberations. Otherwise it's going to be like the Hatfields fighting the McCoys. It's not going to be promotive of a final conclusion. As long as you understand that.

Id. at 13a-14a.

On its return from its discussion with the jury, the court informed the parties that it "may" have gone beyond its own "script" by telling the jurors who blurted out that they had reached a final conclusion and were not going to change it to reexamine their views to see if they were correct. Pet. App. 14a. The court agreed to have a transcript of its colloquy made immediately available so that a corrective instruction could be given if necessary. *Ibid*.

At a mid-afternoon hearing that same day, petitioner moved for a mistrial based upon his review of the transcript. Counsel argued that the court's final comments to the jury misstated the burden of proof and took "the worst part of an *Allen* charge" without the balancing language. Pet. App. 14a. The court denied petitioner's motion for mistrial but brought the jury back into the courtroom and read the following clarifying instruction:

> You should not take from my remarks this morning any suggestion that you should change your views simply in order to reach an agreement or because other jurors think it is right. If at any time you believe that you are deadlocked and unable to reach a verdict, you should inform the Court. The government has the burden of proving every element of the charges beyond a reasonable doubt.

Id. at 14a-15a.

2. The court of appeals affirmed the conviction and restitution order but remanded the fine and sentence for resentencing. Pet. App. 1a-59a. The court of appeals rejected petitioner's claim that the district court had given an improper charge under *Allen* v. *United States*, 164 U.S. 492 (1896), or that the court had coerced the jury to reach a unanimous verdict. Pet. App. 19a-27a.

The court of appeals found that the form of the instruction was not coercive and that the district court had essentially told the jurors to hold on to their conscientiously held beliefs when the court told the jurors it was proper for them to maintain a "sincere" position that was based on a "recollection of the evidence and law." *Id.* at 12a-13a,19a-20a. In addition, the district court had given a supplementary instruction that "neutralized any coercive effect of the court's earlier informal comments." *Id.* at 20a-21a.

The court of appeals further held that although the trial court's *Allen* instruction was not coercive, petitioner's waiver of his right to be present when the court addressed the jury did not extend to the full range of comments made by the court, including the *Allen* charge. Pet. App. 27a, 30a-31a. The court accordingly concluded that the court's challenged comments "impinged [petitioner's] due process right to be present at every critical stage of trial." *Id.* at 27a; see *id.* at 29a ("Our case law is clear that communication between the judge and jury outside of counsel's presence, without a proper waiver, violates a defendant's right to due process of law."). The court next observed that "[a] violation of a defendant's due process right to be present at critical stages of trial is subject to harmless error analysis." *Id.* at 31a. The court of appeals concluded that the government met its burden of showing the error was harmless beyond a reasonable doubt, explaining that the trial judge's comments were "at worst, the mildest form of an *Allen* instruction"; that the jury had deliberated for a substantial amount of time after the instruction; that the jury did not reach unanimous verdicts on all counts; and that the trial court gave a curative instruc-

tion the same day that it gave the challenged instruction. *Id.* at 32a.

ARGUMENT

Petitioner contends (Pet. 7-15) that the court of appeals erred in applying a harmless-error standard of review and that the circuits are divided on the question whether the deprivation of the Sixth Amendment right to counsel at a critical stage is structural error or whether it can be harmless beyond a reasonable doubt. Those claims do not warrant this Court's review.

Petitioner argued to the court of appeals that the deprivation of his right to have counsel present during the court's *Allen* instruction was subject to review for harmlessness. Pet. C.A. Br. 21 ("When a defendant and/or his counsel is absent during the giving of supplemental instructions, reversal is required unless the Government can prove beyond a reasonable doubt the absence is harmless."); Pet. Reply C.A. Br. 29 ("The Government has not met its heavy burden of proving beyond a reasonable doubt that the errors committed here were harmless and that there is no reasonable *possibility* of prejudice to [petitioner]."). The court of appeals can hardly be faulted for applying the very standard of review pressed by petitioner below.[*]

Moreover, the court of appeals did not pass on the question whether a *Sixth* Amendment deprivation of the right to assistance of counsel at a critical stage of proceeding was structural error. The court's only reference to counsel occurred in an earlier portion of its opinion

[*] Petitioner's briefs to the court of appeals also did not cite any of the cases relied on in the petition (Pet. 8-11) for the proposition that deprivation of the right to counsel at any critical stage is structural error.

addressing the due process violation in a judge's *ex parte* communication with the jury "outside of counsel's presence." Pet. App. 29a. The court of appeals cited (*ibid.*) to *United States* v. *Frazin*, 780 F.2d 1461, 1469 (9th Cir. 1986), which in turn held that "[e]x parte communications from the judge to the jury violate a defendant's right to due process of law." The court also cited (Pet. App. 29a) to *United States* v. *Rosales-Rodriguez*, 289 F.3d 1106, 1110 (9th Cir. 2002), with the parenthetical description that "delivery of a supplemental jury instruction is a 'critical' stage of a trial that requires a defendant's or defense counsel's presence." That decision held that the defendant's constitutional right to be present at trial was rooted in the Due Process Clause and the Confrontation Clause of the Sixth Amendment. *Id.* at 1109.

Similarly, when the court of appeals in this case turned to its harmless-error analysis, it addressed solely the violation of petitioner's *due process* right to be present during the court's supplemental instruction to the jury. Pet. App. 27a-32a. With respect to that holding, the court of appeals' decision was correct, see *Arizona* v. *Fulminante*, 499 U.S. 279, 306-307 (1991)l; *Rushen* v. *Spain*, 464 U.S. 114, 117-119 & n.2 (1983) (per curiam).

Petitioner does not argue to the contrary and concedes that "a *defendant's* Fifth Amendment due process right to be present at a critical stage of a trial" is "subject to harmless error analysis" and is "separate and distinct question" from "the deprivation of the [Sixth Amendment] right to *counsel*." Pet. 13. Yet the court of appeals did not resolve that "separate and distinct question." *Ibid.* This case therefore is not an appropriate vehicle to address the alleged conflict in the circuits identified by petitioner (Pet. 11) on how complete a de-

privation of the right to counsel must be to constitute structural error. The Court does not traditionally consider issues not pressed or passed on below, see, *e.g.*, *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 527 (1994); *United States* v. *Williams*, 504 U.S. 36, 41 (1992); *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977), and that rule is particularly apt here since petitioner embraced below the standard of review applied by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
LOUIS M. FISCHER
Attorney

NOVEMBER 2007