No. 15-458

In the Supreme Court of the United States

ROCKY DIETZ, PETITIONER

v.

HILLARY BOULDIN

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General
WILLIAM A. GLASER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a district court may revoke an order discharging a jury before the jury had returned a legally acceptable verdict.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rules:

In the Supreme Court of the United States

No. 15-458

ROCKY DIETZ, PETITIONER

v.

HILLARY BOULDIN

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether a district court may revoke an order discharging a jury before the jury had returned a legally acceptable verdict. The United States has faced similar questions in criminal prosecutions and has an interest in the adoption of procedural principles that promote an efficient and fair system of adjudication.

STATEMENT

1. At an intersection in Bozeman, Montana, respondent failed to stop for a red light and collided with the passenger side of petitioner's vehicle. Petitioner sued respondent in Montana state court for negligence. Respondent removed the case to federal court on the basis of diversity jurisdiction. Pet. App. 2a; Resp. Br. 1-2 & n.1.

The district court held a jury trial, with a magistrate judge presiding. D. Ct. Doc. 9 (Aug. 9, 2011). Respondent conceded that his negligence had caused the accident, contesting only the amount of damages. Pet. App. 2a. His counsel told the jury during closing arguments that it had the "obligation under the law" to award "a little over 10,000" dollars for stipulated medical expenses, plus a reasonable amount for future expenses. 4/17/13 Tr. 242-244. Consistent with those concessions, the judge instructed the jury that the parties agreed that respondent was negligent and that the jury was required to award an amount that would compensate petitioner for his injuries. *Id.* at 224-225.

After retiring to deliberate, the jury sent the judge a note asking: "Has the $10,136 medical expenses been paid; and if so, by whom?" J.A. 36. The judge responded with a note stating: "The Court cannot provide this information. And it is not germane to the jury's verdict, in any event." J.A. 37. The judge considered whether the question reflected that the jurors did not understand that "their verdict may not be less than that amount." J.A. 36. But he ultimately concluded that respondent's counsel had "made it crystal clear that they have to award that amount," and that he had decided not to "include an instruction * * * saying that that sets the floor," because "for some people, that sets the ceiling." J.A. 37.

The jury returned a verdict awarding petitioner zero dollars. Pet. App. 22a. After the parties declined to request a poll, the judge thanked the jurors for their service and told them: "You're free to go. The jury's discharged." *Id.* at 25a.

As the judge explained for the record, "moments after having dismissed" the jurors, he had "a fairly

quick second thought" that the verdict was not "legally possible in view of stipulated damages exceeding $10,000," and he therefore "stopped the jury from leaving the building." Pet. App. 26a, 29a-30a. He concluded that "[c]learly, the verdict somehow is the result of misapprehension on the part of the jury," and he stated that he would "hate to just throw away the money and time that's been expended in this trial, not only by the Court but by the parties, when we all know that a new trial will be mandatory." *Id.* at 28a.

The jurors then reentered the courtroom. Pet. App. 29a. The judge explained to them that he could "[]not accept the verdict" because the "verdict had to be $10,136.75 plus some other and additional reasonable amount as compensation for the injury." *Id.* at 30a. To ensure that the jurors had not been exposed to any improper outside influence during the "brief interlude" since their discharge, the judge put that question to the jurors, asking "any of you" whether "anything occur[red] during * * * the few minutes after you were discharged where you talked to anybody about the case outside your immediate numbers." *Id.* at 30a-31a. They responded no, and one juror stated that "[m]ost of us were just outside the door here." *Id.* at 31a. Because a court clerk had told the judge that one juror had "left the building to go get his hotel receipt," the judge said to the jury that he understood that "one juror had gone to the first floor and it was maybe to get a hotel receipt." *Id.* at 28a, 31a. A juror responded that he "did that" but "didn't talk to anybody." *Ibid.*

The following morning, petitioner moved for a mistrial on the ground that "the discharge of the jury * * * is an issue that * * * can't be cured." Pet.

App. 35a. The judge denied the motion. *Id.* at 37a. The jury resumed deliberations and returned a verdict awarding petitioner $15,000 in damages. *Id.* at 38a, 40a.

2. The court of appeals affirmed. Pet. App. 1a-17a; J.A. 39-40. The court held that "a court may recall a jury shortly after it has been dismissed to correct an error in the verdict, but only after making an appropriate inquiry to determine that the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict." Pet. App. 12a. Applying a "totality of circumstances analysis" to the record in this case, the court concluded that the judge's "questioning adequately confirmed the jurors had not been exposed to prejudicial influences during the brief period between dismissal and recall," and therefore that the judge's "decision to recall the jurors was * * * not an abuse of discretion." *Id.* at 13a, 17a. The court found it significant that "the recall occurred very shortly after the dismissal," *id.* at 17a, and that the judge "specifically asked the jurors whether they had spoken to anyone about the case," *id.* at 15a.

Judge Bea concurred in the judgment, expressing the view that objecting parties, not the court, should initiate a prejudice inquiry. Pet. App. 18a-20a.

SUMMARY OF ARGUMENT

In this case, the district court realized a few minutes after discharging the jury that the verdict was legally impermissible. The court did not abuse its discretion in revoking the discharge order and resubmitting the case to the jury to render an acceptable verdict.

A. A district court has basic legal authority to revoke an order discharging a jury. A district court may vacate or revise an interlocutory order any time before final judgment, and no statute or rule carves out an exception from that general authority for jury-discharge orders. Most critically, the authority to vacate an order of discharge is appropriate in some circumstances to comply with the foundational precept of modern federal procedural law: that a trial error or defect should lead to a new trial only when "justice requires," that is, when the error cannot be remedied in a more tailored and less unsettling way that avoids impairing any party's "substantial rights." Fed. R. Civ. P. 61. Under that bedrock principle, a judge who mistakenly discharges a jury before it has returned a legally acceptable verdict has the authority to remedy that error by revoking the order of discharge and resubmitting the case to the jury, so long as doing so would not unfairly prejudice any party.

Accordingly, revocation and resubmission are proper when jurors have not been exposed to prejudicial outside influence or otherwise been rendered incapable of reaching a fair verdict. District courts can draw upon a deep well of experience in conducting a prejudice inquiry, because courts apply the same prejudice standard in other contexts in which a question is raised about juror impartiality—including where a juror is actually exposed to improper outside influences or extraneous information about the case midtrial. Given the natural propensity of jurors to talk to friends and family about a completed trial, however, it will be the rare case in which a district court could conclude that revocation and resubmission are proper after jurors have returned to their homes

and daily lives. But in cases involving very short periods of discharge—here, a few minutes—courts should have the authority to resubmit the case to the jury rather than nullify an entire trial if the jurors were not exposed to any prejudicial taint. In this case, in light of the de minimis period of discharge and the jurors' statements that they did not discuss the case with anyone, the district court did not abuse its discretion in revoking the discharge and resubmitting the case to the jury.

B. This Court should reject petitioner's draconian rule, which would categorically bar revocation of the discharge of a jury. Apart from his erroneous contention that the revocation of a discharge is "implicitly prohibited" by Federal Rules of Civil Procedure addressing jury instructions and juror polling, petitioner relies principally on what he portrays as a uniform tradition in 19th-century state judicial systems. But early practice was not as uniform as petitioner suggests, and in any event petitioner's historical argument ignores two intervening legal events of overriding significance: the modern judicial system's rejection of the Founding-era rule that juries could not separate during deliberations, and the enactment of the first harmless-error statute in 1919, which superseded the older tradition in which even technical or trivial trial defects required a new trial.

Petitioner's categorical prohibition against revocation of the discharge of a jury would impose substantial costs on the judicial system, parties, witnesses, and jurors out of all proportion to its perceived benefits. Even where the jurors stepped out into the hallway or a court parking lot for only a few minutes after a mistaken discharge and did not talk to anyone about

the case, petitioner would unflinchingly require a complete do-over of a trial that might have lasted weeks or months. That rule would substantially burden the public by requiring the court to call into service another group of citizens to sit for the new trial when the first jury might have clarified or completed its verdict in short order.

C. The standard proposed here comports with the basic fairness requirement of the Due Process Clause, and petitioner was in no way deprived of his right to a jury trial under the Seventh Amendment when the court ensured that the jury completed its work.

ARGUMENT

When a jury returns a verdict that is facially incomplete, ambiguous, or invalid, the court must decide whether to resubmit the case to the jury or whether the jury's confusion is so severe that the court must declare a mistrial. See, *e.g.*, *Jones* v. *Southpeak Interactive Corp.*, 777 F.3d 658, 674 (4th Cir. 2015); see also Fed. R. Civ. P. 49(b)(3) and (4); accord Pet. Br. 14-15. In this case, the verdict revealed that the jurors had labored under the misapprehension that they did not need to award the agreed-upon baseline damages amount. As the case comes to this Court, the parties do not challenge the trial court's conclusion that the verdict was not "legally possible" and therefore could "not be accepted by the Court," Pet. App. 26a-27a. Nor do they dispute that the court had discretion to resubmit the case to the jury with a clarifying instruction before discharge. But the trial judge did not notice the error in the verdict until a "few minutes" after he had formally discharged the jury, while most of the jurors were just out in the hall. *Id.* at 31a. Petitioner contends that in a circumstance like

that, the only lawful course of action is to order a new trial, empanel a new jury, and try the entire case over again—even if the period of discharge was only a matter of minutes, and even if the trial had lasted weeks or months.

This Court should reject that rigid rule. As with any other interlocutory order, a district court has the basic legal authority to revoke an order discharging the jury before entering final judgment, but the court may resubmit the case to the jury only if doing so would not prejudice the substantial rights of any party. A foundational precept of modern federal procedural law, embodied in Federal Rule of Civil Procedure 61, is that technical errors or defects in a proceeding should be disregarded unless justice requires a new trial. That represented a conscious break with an older tradition in which the most trivial irregularity would nullify an entire trial. Under that core principle, where a district court can employ a remedy short of ordering a new trial to correct an error—here, mistakenly discharging the jury before it had returned a legally acceptable verdict—it has discretion to choose that course.

A. A District Court May Revoke A Discharge And Resubmit The Case To The Jury When Doing So Would Not Unfairly Prejudice Any Party

A district court has the legal authority to revoke a discharge order and resubmit the case to the jury when, applying the standard used in other contexts to ensure the impartiality of jurors, it determines that the jurors have not been exposed to any prejudicial outside influence or otherwise been rendered incapable of reaching an impartial verdict. The district court

did not abuse its discretion in making that determination here.

1. A district court has the authority to revoke an order discharging a jury

Petitioner's contention that district courts lack the power to revoke the discharge of a jury is incorrect.

a. District courts have broad authority to manage their proceedings, subject to limits imposed by the Constitution, federal statutes, and the rules of procedure and evidence. As this Court explained in 1936, there exists "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *North Am. Co.*, 299 U.S. 248, 254. "How this can best be done," the Court explained, "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254-255.

When this Court adopted the Federal Rules of Civil Procedure the following year, it expressly preserved in Rule 83 the authority of district courts to "regulate their practice in any manner not inconsistent with these rules." Fed. R. Civ. P. 83 (1938); accord Fed. R. Civ. P. 83(b) (current). As the advisory committee's note accompanying the 1944 adoption of the corresponding Federal Rule of Criminal Procedure explained, "it seemed best not to endeavor to prescribe a uniform practice as to some matters of detail, but to leave the individual courts free to regulate them, either by local rules or by usage." Fed. R. Crim. P. 57 advisory committee's note. Thus, for example, although the federal rules "do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the

course of trials." *Luce* v. *United States*, 469 U.S. 38, 41 n.4 (1984).

Like other issues of trial management, "[t]he management of juries traditionally lies within the sound discretion of the trial judge." *United States* v. *Wiesner*, 789 F.2d 1264, 1268 (7th Cir. 1986). Federal law expressly addresses only a limited subset of procedural issues that might arise in jury trials. See 28 U.S.C. 1865, 1870, 1871; Fed. R. Civ. P. 48(a). The Federal Rules deliberately leave many such matters to judicial discretion, including "the mode of impaneling a jury, the manner and order of interposing challenges to jurors, the manner of selecting the foreman of a trial jury, the matter of sealed verdicts, * * * and other similar details." Fed. R. Crim. P. 57 advisory committee's note (1944).

Petitioner nevertheless contends (Br. 13) that a district court may not take any action in the course of a jury trial that is not spelled out in a federal statute or rule unless it is "necessary to the exercise of the judicial power." But the precedents that petitioner cites address whether courts have the inherent power to sanction parties for misconduct by imposing legal disabilities not otherwise authorized by law, see *Degen* v. *United States*, 517 U.S. 820, 821-823 (1996); *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 37, 44-51 (1991); *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 627-628, 630-631 (1962), or to take procedural actions that *conflict* with federal rules, see *Carlisle* v. *United States*, 517 U.S. 416, 417-418, 425-428 (1996); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988). This Court has never suggested that the myriad procedural decisions that judges make in the course of managing a trial must either be supported by an ex-

press federal rule or be "necessary to the exercise of the judicial power"—a demanding standard that would, for example, bar *in limine* rulings. And in any event, even the precedents on which petitioner relies state only that an exercise of inherent power must be a "reasonable response to the problems and needs that provoke it" (absent a conflicting statute or rule), not that it must be a necessary component of judicial power. *Degen*, 517 U.S. at 823-824.

b. No federal statute or rule addresses whether and in what circumstances a district court may revoke an order discharging a jury. Like other aspects of managing a petit jury, therefore, the revocation of a discharge order presumptively falls within a district court's "inherent authority to manage the course of trials." *Luce*, 469 U.S. at 41 n.4. Four features of federal procedural law confirm that presumption.

First, federal statutes and rules do not regulate jury discharge at all, so no negative inference can be drawn from the fact that they do not specifically authorize district courts to revoke an order of discharge. No rule prescribes when a jury must be discharged, what form a discharge must take, when a discharge becomes effective, or the legal consequences of erroneously discharging the jury. Indeed, no statute or rule even requires the jury to be formally discharged, although certain rules governing other actions assume that a discharge will occur. See pp. 16-19, *infra*. Discharge is simply not an aspect of a jury trial regulated by codified law.

Second, it is a long-settled principle of federal procedural law that "[a]s long as a district (or an appellate) court has jurisdiction over the case, then (in absence of prohibition by statute or rule), it possesses

the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *Melancon* v. *Texaco, Inc.*, 659 F.2d 551, 553 (5th Cir. 1981); see *John Simmons Co.* v. *Grier Bros. Co.*, 258 U.S. 82, 88 (1922); *Schoen* v. *Washington Post*, 246 F.2d 670, 673 (D.C. Cir. 1957) (Burger, J.); see also *Smith* v. *Massachusetts*, 543 U.S. 462, 475-476 (2005) (Ginsburg, J., dissenting on other grounds). When it adopted the Federal Rules of Civil Procedure, this Court deliberatively left undisturbed the district courts' preexisting authority to revoke interlocutory orders before final judgment. Thus, "[n]othing in the Rules limits the power of the court to correct mistakes made in its handling of a case so long as the court's jurisdiction continues, i. e., until the entry of judgment." *United States* v. *Jerry*, 487 F.2d 600, 604 (3d Cir. 1973); cf. Fed. R. Civ. P. 54(b); *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 12 n.14 (1983) ("[A]s Rule 54(b) provides, virtually all interlocutory orders may be altered or amended before final judgment if sufficient cause is shown."). Thus, for example, Justice Harlan concluded that, despite the absence of any rule on point, district courts have the authority to revoke bail "as an incident of their inherent powers to manage the conduct of proceedings before them." *Fernandez* v. *United States*, 81 S. Ct. 642, 644 (1961) (in chambers).

Petitioner has identified no sound basis to categorically exclude jury-discharge orders from that inherent authority. Although the discharge of a jury is an important moment in a civil proceeding, so is an order dismissing certain defendants from a case, denying summary judgment, or granting a new trial. But a district court may reconsider and vacate such orders

before a final judgment is entered. See, *e.g.*, *Langevine* v. *District of Columbia*, 106 F.3d 1018, 1022-1023 (D.C. Cir. 1997) (holding that a judge reassigned to a case may reconsider an order granting a new trial).

Petitioner contends (Br. 18-22) that jury-discharge orders are different because when a court discharges a jury, it irrevocably relinquishes legal control over "the former jurors *as a jury*." But while it is true that the legal effect of the discharge order is to relieve jurors of their obligation to "report to the courthouse" and deprive them of their "authority over the case" (Pet. Br. 19, 22), many other interlocutory orders have similar effects. For example, a district court may vacate an order dismissing a defendant from a case, reviving that party's obligation to appear, or an order dismissing the suit for lack of subject matter jurisdiction, reinstating the *court's* "authority over the case."

In the situation here, to remedy the error in discharging the jurors before they have returned a legally acceptable verdict, the court inevitably will have to direct *some* group of citizens to report to the courthouse and serve as a jury. There is thus no question that a court has the power to constitute a group of citizens into a jury as a remedy for the mistaken discharge. The question is only whether the court has discretion to exercise that power over the jurors who were discharged—who may be just out in the hall and may be able to clarify the verdict in a few minutes—or whether the court must always call into service a whole new slate of jurors for a full do-over of the trial. No established principle invariably prefers the latter course to the former.

Third, and most critically, a rule requiring a new trial whenever a judge mistakenly discharges a jury

would violate a central precept of the Federal Rules, embodied in Rule 61, that "[u]nless justice requires otherwise, no error * * * by the court or a party[ ]is ground for granting a new trial," and that "[a]t every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." Fed. R. Civ. P. 61. When a mistaken discharge can be remedied in a way that does not unfairly prejudice any party—for example, by revoking the discharge moments after it was entered and resubmitting the case to the jury—Rule 61 generally counsels the district court to choose that course over ordering a new trial.

Rule 61 and its statutory predecessors represented a conscious break with an older legal tradition in which district courts were required to order new trials even for trivial defects. See *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553-554 (1984); *Kotteakos* v. *United States*, 328 U.S. 750, 757-760 & nn.9-14 (1946). "For a long period in legal history it was supposed that any error in the course of a proceeding, no matter how minor or technical, required either the trial court or the appellate court to order a new trial." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2881, at 610 (3d ed. 2012). But by 1919, Congress grew frustrated with the incessant reversal of trial outcomes on technical grounds and enacted the predecessor of today's harmless-error statutes and rules. Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181; see 28 U.S.C. 391 (1934); cf. 28 U.S.C. 2111 (harmless-error statute for courts of appeals). Recognizing that "[t]he expense and delay caused by the retrial of an action often defeats the ends of justice," H.R. Rep. No. 913, 65th Cong., 3d

Sess. 1 (1919), Congress thereby codified the "salutary policy" of "substitut[ing] judgment for automatic application of rules," *Kotteakos*, 328 U.S. at 758-760. Rule 61 and its analogues essentially embody "a very plain admonition: 'Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.'" *Id.* at 760.

Similar principles require a district court, "[b]efore granting a mistrial," to "consider whether the giving of a curative instruction or some alternative less drastic than a mistrial is appropriate." *United States* v. *Martin*, 756 F.2d 323, 328 (4th Cir. 1985) (en banc). And for like reasons, this Court has held that a district court must exercise its inherent remedial power in a manner that conforms with and complements harmless-error rules. In *Bank of Nova Scotia*, the Court held that a court may not dismiss an indictment to penalize prosecutorial misconduct where the misconduct did not prejudice the defendant. 487 U.S. at 254-257. The court explained that "a federal court may not invoke supervisory power to circumvent the harmless-error inquiry." *Id.* at 254.

That principle should guide the analysis here. Given that no statute or rule prohibits a district court from revoking a mistaken order of discharge, Rule 61 impels the conclusion that such remedial power is available to district courts. Where the remedy of revocation would rectify the mistaken discharge without prejudicing any party's substantial rights, the "salutary," congressionally mandated policy of disregarding harmless technical errors in trials requires district courts to choose that course over the drastic remedy of ordering a new trial.

Finally, federal statutes and rules generally leave protection of jury impartiality and guarding against outside influence to the sound judgment of district courts. No statute or rule, for example, requires a court to admonish the jurors to avoid outside influence during midtrial separations, a protective measure that has instead developed as a matter of judicial practice, or prescribes the content of such admonitions. Nor does any statute or rule address how a district court should evaluate an allegation that a juror actually has been subject to improper influence or extraneous information. That is significant because petitioner's principal justification for requiring a new trial whenever a discharged jury returned a legally unacceptable verdict is that the jurors could be exposed to prejudicial outside influences while no longer under an instruction to avoid them. But given that federal procedural law otherwise commits the policing of outside influence to the discretion of the district courts, it would be anomalous if the law were construed to deprive courts of authority to formulate case-specific remedies for the potential of improper outside influence only in erroneous-discharge cases—many of which, like this case, involve a period of only a few minutes.

c. Petitioner contends (Br. 14) that certain of the Federal Rules "necessarily imply" that district courts lack the power to revoke a discharge order. That argument, which petitioner raised for the first time in his merits brief in this Court (see Resp. Br. 11-16), should be rejected.

Petitioner principally relies (Br. 14-15, 23-24) on Federal Rule of Civil Procedure 51(b)(3), which provides that "[t]he court * * * may instruct the jury at

any time before the jury is discharged." Petitioner extrapolates (Br. 15) from that permissive rule that a court may not revoke an order of discharge, at least if the court intends to further instruct the jury, because in that circumstance the court would instruct the jury after the (revoked) discharge.

Petitioner's inference is unsound. Once a district court revokes an order discharging a jury, that order is a legal nullity. After the jury resumes deliberations and returns an acceptable verdict, or the court declares a mistrial, the jury will be discharged again, this time definitively and without error. Any clarifying instructions given after revocation of the first discharge order will have complied with Rule 51(b)(3), because they will have been given before the second and proper order of discharge. By analogy, Rule 51 generally requires parties to submit proposed instructions "before or at the close of evidence." Fed. R. Civ. P. 51(a) (capitalization omitted). But that provision does not imply that the court lacks the power to reopen the presentation of evidence after it has been closed. See, *e.g.*, *United States* v. *Cohen*, 888 F.2d 770, 775 (11th Cir. 1989); cf. *Link*, 370 U.S. at 630 (discerning no "negative implication" that a rule's "permissive language" was intended to "abrogate" judicial authority).

Petitioner has not identified any plausible basis to conclude that Rule 51(b)(3) was actually intended to foreclose a court from revoking a jury-discharge order. In fact, Rule 51 originally did not even mention discharge, providing only that "the court shall instruct the jury after the arguments are completed." Fed. R. Civ. P. 51 (1938). The reference to "discharge[]" was introduced in a 2003 amendment to "reflect[] common

practice." Fed. R. Civ. P. 51 advisory committee's note (2003). Petitioner has pointed to no evidence suggesting that the change was meant to resolve the question whether a district court may revoke a jury-discharge order. And indeed, the corresponding Criminal Rule (Rule 30(c)), which petitioner acknowledges (Br. 15 n.2) is designed to have "the same effect," still does not mention discharge.

Petitioner also relies (Br. 17-18) on Federal Rule of Civil Procedure 48(c), which provides that the jury may be polled "before the jury is discharged." That argument suffers from the same flaw as his Rule 51(b)(3) argument: The revocation nullifies the original discharge order, and the jury may be polled before the second order of discharge. And again, there is no indication in the history of Rule 48(c) or the Criminal Rule on which it is based (Rule 31(d)) that either was intended to bar revocation of jury-discharge orders.

The other rules that petitioner cites (Br. 15-17, 18-19) are still further afield. Civil Rule 59 and Criminal Rule 33(a) do not list revocation of a discharge order as an available judicial response to a motion for a new trial because it is not an appropriate response to such a motion. Accord Fed. Civ. P. 50(b) (motion for judgment as a matter of law). The movant is asking the court to empanel a *new* jury, not to revoke the discharge order. A party who believes that there are grounds to revoke the discharge order—*i.e.*, a facially unacceptable verdict, not merely a verdict against the weight of the evidence or resting on some other flaw that might call for a new trial—should move to revoke the discharge. And Rule 59 permits a district court to reopen a *bench* trial instead of holding a new trial presumably because the same judge would typically

be the adjudicator in the new trial (the judge was never discharged), and it may be more efficient to reopen the first proceeding to receive additional evidence.

Finally, petitioner cites (Br. 17-18) Federal Rule of Criminal Procedure 29(c)(1), which requires a criminal defendant to move for acquittal within 14 days of the jury's discharge. Petitioner posits that if a court has the power to revoke an order discharging a jury, the court could effectively circumvent that time limit. But our submission here is that a district court has power to revoke a discharge order as a means to address a facially invalid verdict. A district court would abuse its discretion if it revoked a discharge order for the sole purpose of circumventing a mandatory time limit, just as it would abuse its discretion if it delayed the initial discharge for the same illegitimate purpose.

2. A district court may revoke a discharge and resubmit the case to the jury only if doing so will not unfairly prejudice any party

For the foregoing reasons, a district court has the basic underlying authority to revoke an order erroneously discharging a jury before it has returned an acceptable verdict. But under Civil Rule 61, the court may resubmit the case to the jury, rather than ordering a new trial, only if doing so would not "affect any party's substantial rights," *i.e.*, only if the period of erroneous discharge did not expose the jurors to prejudicial outside influences or otherwise impair their ability to render an impartial verdict. That standard is readily administrable, because it is the same standard that district courts apply in other contexts in which a jury's impartiality is questioned. And under that standard, we expect that it would be the rare case

in which a district court would determine that revocation and resubmission were warranted after the jurors have gone home.

a. This Court "has long held that the remedy for allegations of juror partiality is a hearing in which [a party] has the opportunity to prove actual bias." *Smith* v. *Phillips*, 455 U.S. 209, 215 (1982). For example, in *Remmer* v. *United States*, 347 U.S. 227 (1954), this Court held, in a criminal case, that any "communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury"—there, an attempted bribe and ensuing FBI investigation—must be evaluated under a prejudice standard. *Id.* at 229. In other words, where it is established that there was *actual* improper influence brought to bear on the jury, the court must determine in a hearing "whether or not it was prejudicial." *Id.* at 230. Trial courts "retain wide latitude over how to conduct such hearings * * * and substantial discretion over the determination of whether the prejudice arising from an unauthorized contact is rebutted or rendered harmless," as well as "broad discretion in choosing how to remedy such prejudicial influences." *Evans* v. *Young*, 854 F.2d 1081, 1084 (7th Cir. 1988).

Courts conduct the same type of case-specific prejudice inquiry, and retain the same broad remedial discretion, to address a host of questions about jury impartiality, such as whether adverse pretrial publicity requires a transfer of venue or the exclusion of certain jurors, see *Skilling* v. *United States*, 561 U.S. 358, 377-399 (2010); whether adverse midtrial publicity requires jury sequestration, see, *e.g.*, *United States* v. *Salerno*, 868 F.2d 524, 540 (2d Cir.), cert. denied,

491 U.S. 907, and 491 U.S. 811 (1989); whether juror misconduct, such as premature deliberations, inattentiveness or sleeping during trial, or review of extraneous material about the case, requires a mistrial, see, *e.g.*, *United States* v. *Dominguez*, 226 F.3d 1235, 1246 (11th Cir. 2000), cert. denied, 532 U.S. 1039 (2001); and, as particularly relevant here, whether a district court's failure to instruct the jury to avoid outside influences during a midtrial separation requires a mistrial, see, *e.g.*, *United States* v. *Nelson*, 102 F.3d 1344, 1346 (4th Cir. 1996), cert. denied, 520 U.S. 1203 (1997); *Wiesner*, 789 F.2d at 1268 (7th Cir.); see also *United States* v. *Jadlowe*, 628 F.3d 1, 19-21 (1st Cir. 2010) (failure to admonish against premature deliberations), cert. denied, 563 U.S. 926 (2011). District courts thus have broad experience in determining whether any of a diverse array of events renders a jury incapable of reaching an impartial verdict.

In deciding whether to revoke an erroneous discharge order and resubmit a case to the jury, district courts should conduct the same prejudice analysis that they conduct in those other contexts. First, a court should inquire whether anything occurred during the period of discharge—which will often have been very brief, see pp. 23-24, *infra*—that might have tainted the jurors' impartiality. That purely factual inquiry is not qualitatively different from determining whether a juror has been exposed to improper outside influence, extraneous information about the case, or adverse publicity. If any juror has been exposed to potential taint, the district court should then evaluate whether it is so prejudicial as to impair the juror's ability to be impartial—as courts regularly do in far more factually complex contexts than the typical

mistaken-discharge case. See, *e.g.*, *Skilling*, 561 U.S. at 395-399.

In many cases, the prejudice inquiry will be straightforward. If, as here, the period of discharge lasted a "few minutes" and the jurors respond that they did not discuss the case with anyone, Pet. App. 31a, the lack of prejudice will be readily apparent. In contrast, if a juror states that he or she discussed the case with a party's counsel after dismissal, that would raise an exceptionally strong inference of prejudice that a district court should probe thoroughly. Although cases will arise that fall between those two extremes, as with all other questions of jury impartiality, district courts can be trusted to fairly "determine the circumstances, the impact thereof upon the juror[s], and whether or not [they were] prejudicial." *Remmer*, 347 U.S. at 230.

b. Petitioner asserts (Br. 38-39) that without a rule effectively requiring a new trial whenever a jury is erroneously discharged before it has returned a legally acceptable verdict, the potential for jurors to be recalled could last indefinitely, creating uncertainty for litigants and hardship for jurors. But the standard proposed here would not allow anything remotely so open-ended. Although district courts have the underlying authority to revoke a discharge order until a final judgment is entered, a court may resubmit the case to the jury only if it determines that doing so would not impair the substantial rights of any party.

Under that standard, we expect that once the jurors have returned to their homes and daily lives, a district court would ordinarily presume prejudice in light of the natural propensity of jurors to talk to friends and family about a completed trial. See *Unit-*

ed States v. *Richardson*, 817 F.2d 886, 889 (D.C. Cir. 1987). It would therefore be the exceptionally rare case, for example, in which a district court would revoke a discharge order and resubmit a case to the jury more than an hour after the jury was discharged. There may be circumstances in which that would be within a district court's discretion—for example, where the jurors would be asked only to clarify unclear handwriting in a damages amount on a verdict form. But in a case in which the jury would have to resume deliberations to correct or complete the verdict, it would ordinarily be an abuse of discretion to resubmit the case after jurors have had a material opportunity to discuss the case with family, friends, and others, and after the trial evidence and arguments have begun to recede from the jurors' memories.

This case does not present any question about the outer limits of a district court's discretion, because the period of discharge was de minimis—a "few minutes"—and no juror talked to anyone about the case. Pet. App. 31a. But were this Court inclined to provide additional guidance to lower courts, it could establish a strong presumption of prejudice once jurors have definitively dispersed from the courthouse and individually headed back to their daily lives.

It is important to bear in mind, however, that the cases in which the question presented has arisen in lower courts, including those involving the United States, have often involved very short periods of discharge, as here. For example, in *United States* v. *Figueroa*, 683 F.3d 69 (3d Cir. 2012), the judge realized "[i]mmediately upon [the jurors'] exit" from the courtroom after discharge that a bifurcated felon-in-possession count had to be tried. *Id.* at 72. Similarly,

in *United States* v. *Rojas*, 617 F.3d 669 (2d Cir. 2010), a court clerk made a mistake in reading a criminal verdict into the record that was not discovered until six minutes after the jury was "pronounced 'discharged,' and had returned to the deliberation room to await the thanks of the court for its service." *Id.* at 673, 678 n.3. Other cases involve similarly de minimis periods of discharge. See *Wagner* v. *Jones*, 758 F.3d 1030, 1032-1033 (8th Cir. 2014) (two minutes), cert. denied, 135 S. Ct. 1529 (2015); *Sierra Foods* v. *Williams*, 816 P.2d 466, 467 (Nev. 1991) (per curiam) (jury still in the courthouse); *Lapham* v. *Eastern Mass. St. Ry. Co.*, 179 N.E.2d 589, 590-591 (Mass. 1962) (within five minutes); *Masters* v. *State*, 344 So. 2d 616, 619 (Fla. Dist. Ct. App.) ("within minutes of [the] discharge"), cert. denied, 352 So. 2d 173 (Fla. 1977).

The standard proposed here would permit district courts to correct those kinds of momentary mistakes without having to redo a trial that might have lasted weeks or months. There is no reason to believe that conscientious district courts would revoke discharge orders days or weeks after dismissing jurors, and any such decision would be subject to reversal on appeal for an abuse of discretion. Nor is there reason to doubt that a district court is capable of ensuring that jurors were not prejudiced during a brief, minutes-long period of discharge, just as courts regularly do in all of the far more complex contexts discussed above.

c. In this case, the trial court did not abuse its discretion in determining that revoking the order of discharge would not prejudice any party (and petitioner does not contend otherwise). The period of discharge was extremely short—a "few minutes"—and the jurors stated that they had not discussed the

case with anyone. Pet. App. 27a, 30a-31a. In that circumstance, it was not an abuse of discretion to resubmit the case to the jury with a clarifying instruction. Although the court did not examine each juror individually, that too was not an abuse of discretion given the failure by petitioner to request such an examination, the exceedingly short period of discharge, and the jurors' clear responses to the court's inquiry that they had not been exposed to any outside influence.

B. This Court Should Reject A Categorical Rule Barring Revocation Of A Discharge

No convincing justification supports petitioner's draconian rule, which would invariably require courts to redo lengthy, costly trials even where jurors were discharged for a matter of minutes and were exposed to no prejudicial taint.

1. Petitioner's categorical rule is not compelled by old state common-law decisions

Apart from his erroneous contention that the Federal Rules foreclose revocation of a discharge order (see pp. 16-19, *supra*), petitioner's principal basis for a flat bar on revoking a discharge order is that "courts historically did not exercise such authority." Br. 25. Petitioner cites (Br. 26) four 19th-century state-court decisions, one of which contains no legal reasoning whatsoever. See *Mills* v. *Commonwealth*, 34 Va. (7 Leigh) 751 (1836). Those courts did not state that the rule they applied was a constitutional requirement or rested on any other basis that could be thought to bind federal courts today. Instead, they appear to have applied their own state common law of trial procedure.

Moreover, early American practice does not appear to have been nearly as uniform as petitioner's citations suggest. For example, in *Prussel* v. *Knowles*, 5 Miss. (4 Howard) 90 (1839), "after [the verdict] had been returned into court, and the jury discharged," and after all but one juror had left the courtroom, the trial judge called the jury back to correct an evident mistake in the verdict. *Id.* at 90, 95. Noting that there was no allegation of "misbehaviour in the jury," Mississippi's highest court rejected the argument that "the power of the court or the jury over the verdict ceased, as soon as it was handed to the clerk, and the jury dismissed," and ruled that the judge was not "bound to send the case to a new jury." *Id.* at 95-97.

Similarly, in *Nims* v. *Bigelow*, 44 N.H. 376 (1862), the jurors separated after the verdict "with the understanding that their duties had been discharged," and "when they might have considered their connection with the case ended" and believed that they were "at liberty to talk about it," but were then sent back for further deliberations after the judge noticed an error in the verdict. *Id.* at 380-382. New Hampshire's highest court upheld the revised verdict, explaining that although the jury's post-discharge separation "goes to the greater probability of abuse[,] * * * nothing of the kind is proved or suggested." *Id.* at 381-382; see *Dearborn* v. *Newhall*, 63 N.H. 301, 303 (1885).

Other early decisions appear to have applied a similar analysis focused on prejudice.[1] Some jurisdictions applied intermediate standards, such as permit-

---

[1] See *Boyett* v. *State*, 26 Tex. Ct. App. 689, 705 (1886); *Sigal* v. *Miller*, 25 S.W. 1012, 1013 (Tex. Civ. App. 1894); *Taggart* v. *Commonwealth*, 46 S.W. 674, 675 (Ky. 1898).

ting revocation to correct matters of "form," see, *e.g.*, *Schoolfield* v. *Brunton*, 36 P. 1103, 1104 (Colo. 1894), or so long as the jury had not "dispersed" and "mingled" with "bystanders," *Summers* v. *United States*, 11 F.2d 583, 586 (4th Cir.), cert. denied, 271 U.S. 681 (1926). And many (perhaps most) other jurisdictions appear simply never to have considered the question in an early decision.

In any event, even if petitioner were correct about the procedural law of the 19th century, his argument ignores how the background legal landscape has fundamentally changed since that period. Under pre-Founding English common law, jurors were not permitted to separate, or even to eat or drink, during deliberations, a rule that was designed at least in part just to force them to reach a verdict. L.S. Tellier, *Separation or dispersal of jury in civil case after submission*, 77 A.L.R.2d 1086 (1961). Early American courts followed the "rule of the common law" by requiring juries "to be kept together until they have agreed on a verdict," and "set[ting] aside" any verdict rendered after separation. *Lester* v. *Stanley*, 15 F. Cas. 396, 396-397 (D. Conn. 1808) (Livingston, J.) (riding circuit). Over the course of 200 years, however, American courts and legislatures gradually discarded the strict common-law rule against jury separation. Yet even in the 20th century, many courts continued to forbid juries from separating during deliberations. See *Richardson*, 817 F.2d at 889; see also 2 Seymour D. Thompson, *A Treatise on the Law of Trials* §§ 2551-2552, at 1827-1830 (2d ed. 1912). Indeed, the Seventh Circuit abandoned the rule that a criminal jury could not separate during deliberations

only in 1978. See *United States* v. *Arciniega*, 574 F.2d 931, 932, cert. denied, 437 U.S. 908 (1978).

Under a legal regime that prohibited a jury's separation at any time during deliberations, it was natural to conclude that the jurors could not be recalled after discharge once they had left the courtroom. Indeed, one of petitioner's 19th-century decisions expressly relied on the principle that "in no case, can the jury, after they have retired, to consider * * * their verdict, be permitted to separate and disperse, until they have agreed." *Sargent* v. *State*, 11 Ohio 472, 473 (1842).

But that is no longer the law. Today sequestration is the exception, not the rule, and juries are widely permitted to separate during recesses in deliberations under circumstances where no prejudice would result. Given that fundamental shift, it no longer makes sense to apply a categorical rule barring revocation of discharge in any circumstance. Rather, just as with midtrial separations—including, critically, when a trial judge forgets to give jurors an admonition against exposure to outside influence—the question should focus on whether the jury was exposed to prejudicial taint.

Most significantly, petitioner's historical argument ignores the adoption in 1919 of a harmless-error standard for new trials in federal court. See pp. 14-15, *supra*. As explained above, that standard was designed to do away with inflexible common-law rules requiring a new trial even for trivial or technical defects in a proceeding. In light of that sea change in procedural law, the unyielding rule once articulated by some state courts is no longer justifiable.

Indeed, in 1911, the Nebraska Supreme Court, applying a recently enacted state-law harmless-error statute materially identical to Rule 61, reached precisely that conclusion. In *Henkel* v. *Boudreau*, 130 N.W. 755, the jurors had been recalled two minutes after discharge, even though some jurors had made it to "the lower floor of the building," when a question was raised about the verdict's damages amount. *Id.* at 754-755. They were then "sent back to the jury room with [further] instructions" and revised the verdict. *Id.* at 754. The Nebraska Supreme Court explained that although "the inflexible rule of the common law" was "that no correction could be made after the receipt of a verdict and discharge of the jury," courts were no longer "bound to follow that ancient line of practice" in light of the harmless-error statute. *Ibid.* The court upheld the verdict after finding "no evidence of any improper action or conversation by any juror, or that any person approached them or spoke to them upon any question involved in the case." *Ibid.* That is the correct approach here.

2. Petitioner's categorical rule would impose substantial costs with virtually no benefits and would produce unjustifiable anomalies

There is no practical justification for a categorical rule barring revocation of a discharge order and resubmission of the case to the jury. Such a rule would require a new trial after even a minutes-long period of discharge and even where a district court, applying the same standard that courts regularly apply to other allegations of jury taint, has determined that the jurors were not prejudiced by any outside influence or extraneous information.

That senselessly formalistic regime would impose substantial costs on the judicial system, parties, witnesses, and jurors out of all proportion to any perceived benefits. As this Court has explained, "[t]rials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials." *McDonough Power Equip.*, 464 U.S. at 553. "A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean" for a defect shown to have been harmless. *Id.* at 555. Although petitioner frames his proposed categorical prohibition as solicitous of the rights of jurors, that rule would require a court to call into service an entirely different group of citizens to be present for a full do-over of a trial—which could last weeks or months—when the first jury might have clarified or corrected the verdict in short order.

Moreover, petitioner's rule would create a glaring legal anomaly in the federal system. As explained above, even when jurors have *actually* been exposed to improper outside influences, such as attempted bribes or contact with a party's counsel, or have engaged in misconduct, such as sleeping during trial or conducting premature deliberations, courts require a new trial only upon a finding of prejudice. See pp. 20-22, *supra*. But petitioner would have this Court adopt a blanket prohibition against revocation of a discharge and resubmission to the jury even where, during a brief period of discharge, jurors were subject to no improper outside influences at all. That distinction cannot be justified. Indeed, the situation here is similar to a district court's failure to admonish jurors to

avoid outside influences during a midtrial recess and separation. Yet that omission requires a new trial only upon a showing of prejudice.

Petitioner's efforts to justify the inflexibility of his rule lack force. Petitioner expresses concern that during the period in which jurors are discharged, they might discuss the case with interested parties or read press coverage (unlikely in the minutes-long period here for a routine case). A prejudice standard is more than sufficient to deal with that potential, just as it suffices for cases of actual improper influence, adverse publicity, juror misconduct, or failures to admonish.

Petitioner also hypothesizes (Br. 34-35) that the jurors' observation of the parties' reactions to the verdict might have a "psychologically significant" effect. Whatever its plausibility, that argument is logically flawed: Petitioner does not dispute that when a jury returns an ambiguous or otherwise unacceptable verdict, a district court has discretion to resubmit the case. In that situation, like the situation presented here, the jury could also gauge the parties' reactions to the verdict—and experience whatever psychological effect that entails. Whether the jury is erroneously discharged after announcing the unacceptable verdict has no bearing on that possibility. Likewise, there is no basis to believe that vacating a discharge order will entail any greater threat of coercion than resubmission of the case before discharge. See Pet. Br. 35.

In short, given that many mistaken-discharge cases involve a period lasting a few minutes, see pp. 23-24, *supra*, and given that district courts have substantial experience evaluating whether jurors have been exposed to prejudicial outside influences, there is no

practical justification for a rule that would invariably nullify an entire trial because the jurors stood in the hallway for a moment after a mistaken discharge.

C. A Prejudice Standard Comports With Due Process And The Seventh Amendment

Petitioner does not advance any argument that the revocation of the jury-discharge order was unconstitutional. But in any event, a prejudice standard necessarily comports with due process, because it is derived directly from this Court's constitutional precedents. As this Court explained in *Smith* v. *Phillips*, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation," because "[w]ere that the rule, few trials would be constitutionally acceptable." 455 U.S. at 217. Rather, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Ibid.*[2]

Nor does revocation of a discharge order violate the Seventh Amendment's jury-trial guarantee. The amendment did not freeze in place jury-trial procedural rules that existed at the time of the Founding. As discussed above, the rules for when a jury could separate evolved substantially over the last two centuries, and the current rules would be unrecognizable to

---

[2] In a criminal case in which a jury returns a verdict of acquittal, the question would arise whether the Double Jeopardy Clause restricts the judge's authority to revoke a discharge. Cf. *Smith* v. *Massachusetts*, 543 U.S. at 474 ("Double-jeopardy principles have never been thought to bar the immediate repair of a genuine error in the announcement of an acquittal, even one rendered by a jury.").

the Founding generation. There is no sound basis to conclude that the post-discharge rule applied by some 19th-century courts was constitutionally fixed, particularly after the fundamental shifts in the background legal context discussed above, and the early practice was not uniform in any event. See pp. 26-29, *supra*. The Seventh Amendment guarantees a right to trial by jury, and that is exactly what petitioner received. He has no right to a rematch.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General
WILLIAM A. GLASER
Attorney

APRIL 2016

APPENDIX

1. U.S. Const. Amend. V Due Process Clause provides:

No person shall be * * * deprived of life, liberty, or property, without due process of law * * * .

2. U.S. Const. Amend. VII provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

3. Fed. R. Civ. P. 48(c) provides:

Number of Jurors; Verdict; Polling

(c) **Polling.** After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

4. Fed. R. Civ. P. 49(b) provides:

Special Verdict; General Verdict and Questions

(b) General Verdict with Answers to Written Questions.

(1) ***In General***. The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

(2) ***Verdict and Answers Consistent***. When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

(3) ***Answers Inconsistent with the Verdict***. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

(A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

(4) ***Answers Inconsistent with Each Other and the Verdict***. When the answers are inconsistent with each other and one or more is also incon-

sistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

5. Fed. R. Civ. P. 50(b) provides:

Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

6. Fed. R. Civ. P. 51 provides in pertinent part:

Instructions to the Jury; Objections; Preserving a Claim of Error

(a) Requests.

(1) ***Before or at the Close of the Evidence.*** At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) ***After the Close of the Evidence.*** After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

* * * * *

7. Fed. R. Civ. P. 59 provides in pertinent part:

New Trial; Altering or Amending a Judgment

(a) In General.

(1) ***Grounds for New Trial***. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) ***Further Action After a Nonjury Trial***. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

* * * * *

8. Fed. R. Civ. P. 61 provides:

Harmless error

Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

9. Fed. R. Civ. P. 83(b) provides:

Rules by District Courts; Judge's Directives

(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

10. Fed. R. Crim. P. 29(c)(1) provides:

Motion for a Judgment of Acquittal

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion,

within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

11. Fed. R. Crim. P. 30(c) provides:

Jury Instructions

(c) Time for Giving Instructions. The court may instruct the jury before or after the arguments are completed, or at both times.

12. Fed. R. Crim. P. 31(d) provides:

Jury Verdict

(d) Jury Poll. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

13. Fed. R. Crim. P. 33 provides:

New Trial

(a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File.

(1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evi-

dence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

14. Fed. R. Crim. P. 52 provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

15. Fed. R. Crim. P. 57(b) provides:

District Court Rules

(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance.