Case # _____

IN THE SUPREME COURT OF THE UNITED STATES

LARRY WILKERSON,	**:**
	:
Petitioner;	**:**
	:
v.	**:**
	:
UNITED STATES OF AMERICA,	**:**
	:
Respondent	**:**

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

Sebastian K.D. Graber, Esq.
904 Sedgefield Street
Durham, NC 27705
skdgesq@gmail.com
(540) 226-9987

Counsel of Record

QUESTIONS PRESENTED

I. WHETHER THE COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS REGARDING THE STANDARD APPLICABLE TO DETERMINING WHEN THE SIXTH AMENDMENT PROHIBITS DISCHARGING A JUROR UNDER RULE 23(b)(3) WHO HAS EXPRESSED DISAGREEMENT WITH THE LAW BUT WHO ALSO MAY HAVE EVIDENCE-BASED CONCERNS

II. WHETHER, IN THE ABSENCE OF CLEAR EVIDENCE THAT A JUROR WHO EXPRESSES DISAGREEMENT WITH THE LAW DOES NOT ALSO HAVE EVIDENCE-BASED CONCERNS, THE TRIAL COURT MUST CONDUCT A NARROWLY TAILORED *VOIR DIRE* SUFFICIENT TO DETERMINE WHETHER THE JUROR ALSO HAS EVIDENCE-BASED DOUBTS ABOUT THE SUFFICIENCY OF THE GOVERNMENT'S CASE

LIST OF PARTIES AND DIRECTLY RELATED PROCEEDINGS

The parties in this case are those in the caption: Larry Wilkerson and the United States. Petitioner Larry Wilkerson, along with sixteen co-defendants, was charged in a superseding indictment returned on November 17, 2000, in the United States District Court for the District of Columbia. The district court severed defendants into three groups. The first and second groups were tried prior to petitioner, whose case was severed from all the other co-defendants and tried separately. The first group was tried in 2002, ending with guilty verdicts on most counts, which were affirmed in part and vacated in part by the U.S. Court of Appeals for the D.C. Circuit. *U.S. v. Moore*, 651 F.3d 30 (D.C.Cir. 2011), *aff'd in part sub nom. Smith v. U.S.*, 568 U.S. 106 (2013) (holding that withdrawal defense to conspiracy is an affirmative defense upon which the defendant bears the burden of proof).

The second group was tried in 2003, resulting in guilty verdicts and substantial sentences. The court of appeals affirmed in part and reversed in part in *U.S. v. McGill*, 815 F.3d 846, 877 (D.C.Cir. 2016), *cert. denied*, 138 S.Ct. 58 (2017).

Petitioner's trial was in 2004. *U.S. v. Wilkerson*, Cr.No. 00-157-15 (TFH) (D.D.C.). Verdicts were returned on September 22, 2004. Petitioner was

sentenced, and a judgment of conviction entered, on April 20, 2010. The issue presented in this case was presented both at trial and in a motion for new trial filed subsequent to trial. The district court's order and opinion denying the new trial motion appears at App. 14, *U.S. v. Wilkerson*, 656 F.Supp. 2d 1 (D.D.C. 2009). The district court's opinion was affirmed on July 24, 2020. App. 1, *U.S. v. Wilkerson*, 966 F.3d 828 (D.C.Cir. 2020) (docket No. 10-3037).

TABLE OF CONTENTS

APPENDIX (Separately Bound)

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES AND RULES

OTHER AUTHORITIES

OPINION BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit, *United States v. Larry Wilkerson*, 966 F.3d 828 (D.C.Cir. 2020), is reproduced in the appendix to this petition at App. 1. The Court's judgment is at App. 13. The Court's orders denying panel rehearing and rehearing en banc are at App. 23-24.

JURISDICTION

Petitioner Larry Wilkerson was charged in a superseding indictment returned on November 17, 2000, in the United States District Court for the District of Columbia, with varying offenses including engaging in a drug conspiracy and a RICO conspiracy, committing several Continuing Criminal Enterprise (CCE) murders (21 U.S.C. § 848(e)(1)(A)) and other related offenses. The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and D.C. Code § 11-502(3). Petitioner was convicted of the drug and RICO conspiracy counts, three CCE murder counts, and three D.C. Code murder offenses. Petitioner was sentenced to a term of life on April 20, 2010.

An appeal to the United States Court of Appeals for the District of Columbia Circuit was timely filed on April 30, 2010, pursuant to 28 U.S.C. § 1291. Petitioner's convictions were affirmed in a judgment filed on July 24, 2020

(App.13), and in an opinion filed on July 24, 2020, *United States v. Wilkerson*, 966 F.3d 828 (D.C.Cir. 2020). App. 1. A timely petition for rehearing and/or for rehearing en banc was filed on September 8, 2020 (ECF 1860376) (pursuant to an Order granting an extension of time in which to file the petitions). By separate Orders filed on October 6, 2020, the panel denied petitioner's petition for panel rehearing (ECF 1865162) (App. 23) and the full court of the U.S. Court of Appeals for the District of Columbia Circuit denied the petition for rehearing en banc (ECF 1865161) (App. 24). Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional, Statutory Provisions and Rules Involved

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rules of Criminal Procedure
Rule 23(b)(3)

(b) Jury Size.

(1) In General.

A jury consists of 12 persons unless this rule provides otherwise.

(2) Stipulation for a Smaller Jury.

At any time before the verdict, the parties may, with the court's approval, stipulate in writing that:

(A) the jury may consist of fewer than 12 persons; or

(B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins.

(3) Court Order for a Jury of 11.

After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.

STATEMENT OF THE CASE

Petitioner Larry Wilkerson, along with sixteen co-defendants, was charged in a superseding indictment returned on November 17, 2000, in the United States District Court for the District of Columbia, with varying offenses allegedly committed in the late 1980's to 1993, including engaging in a drug conspiracy, in violation of 21 U.S.C. § 846; a Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, in violation of 18 U.S.C. § 1962(d); four murders in connection with a continuing criminal enterprise, in violation of 21 U.S.C. § 848(e)(1)(A) (CCE murder) (three of which were charged through the aiding and abetting statute, 18 U.S.C. § 2); and four counts of murder while armed, in violation of D.C. Code §§ 22-2401 and 22-3202 (1996) (three of which were charged through the D.C. Code aiding and abetting statute, 22 D.C. Code § 105). The indictment alleged that petitioner was a street level drug dealer and an "enforcer" for the "Gray-Moore conspiracy" The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and D.C. Code § 11-502(3).

The trial court divided the co-defendants into three groups. Petitioner was severed from the other two groups, whose trials preceded his. The first group, comprised of the alleged "ringleaders" (including Gray and Moore) was tried in 2002, ending with guilty verdicts on most counts, which were affirmed in part and

vacated in part by the U.S. Court of Appeals for the D.C. Circuit. *U.S. v. Moore*, 651 F.3d 30 (D.C.Cir. 2011), *aff'd in part sub nom. Smith v. U.S.*, 568 U.S. 106 (2013) (holding that withdrawal defense to conspiracy is an affirmative defense upon which the defendant bears the burden of proof).

The second group was tried in 2003 and similarly resulted in guilty verdicts and substantial sentences. The court of appeals affirmed in part and reversed in part in *U.S. v. McGill*, 815 F.3d 846, 877 (D.C.Cir. 2016), *cert. denied*, 138 S.Ct. 58 (2017). None of those cases presented the question raised here.

Petitioner's trial commenced on July 12, 2004. The government's case was presented primarily through "cooperating witnesses," most of whom were co-conspirators charged in prior related indictments who had entered guilty pleas and were awaiting sentencing pursuant to cooperation agreements. There was no physical evidence linking petitioner to the charged murders.

Petitioner did not dispute that he has been a street level drug distributer, but he produced evidence that the Gray-Moore conspiracy had terminated prior to the statute of limitations period, thus precluding his conviction for the drug and RICO conspiracy counts. However, petitioner *strongly* disputed that he was involved in the four murders charged against him. He impeached the cooperating witnesses both through cross-examination and through defense witnesses, one of whom

testified that one murder for which he was charged had been committed by someone else known as "cat man." Other defense witnesses testified that cooperators were "putting" murders on petitioner in order to obtain reduced sentences.

The case was submitted to the jury for deliberations on September 8, 2004. On the third day of deliberations, September 15, 2004, Juror 0552 sent a note requesting removal stating:

> I strongly disagree with the laws and instructions that govern this deliberation, and I cannot follow them. Because I feel so strongly about this, it may affect my decisions in this matter. In other words a possible bias decision. In addition, I am experiencing emotional and mental distress. For this alone, I felt it was enough for me to ask for a replacement. I would not be asking for this request, if I didn't feel that this was a serious issue.

App. 25 (jury note), App. 26 (9/15/04:2-3) (transcript of hearing).

The court discussed with counsel how to handle the matter, noting that Rule 23(b)(3) and the D.C. Circuit's opinion in *U.S. v. Brown*, 823 F.2d 591 (D.C.Cir. 1987), provided guidance. App. 26 (9/15/04:3). The court noted, "I assume we'll have to talk with Juror 0552 to understand the concern *as to whether it's an evidentiary based concern or not* or if it's a legal based ... or a health base." App. 26 (9/15/04:4) (emphasis added). The government argued that, "as the record stands" the note clearly articulated the juror's intention not to follow the law and

that the court should dismiss the juror without any *voir dire*, quoting *U.S. v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001) ("Just cause exists to dismiss a juror when that juror refuses to apply the law or to follow the court's instructions"). *Id*. The government acknowledged that *Brown* "has perhaps the highest and most rigorous standard when it comes to excusing a juror for good cause .... the any possibility test." App. 27 (9/15/04:5). However, the government argued that other Circuits applied a "substantial possibility" test, citing *Abbell* and *U.S. v. Thomas*, 116 F.3d 606 (2d Cir. 1997). *Id.* [1] The government further argued that "a court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations." App. 27, 9/15/04:6.

The defense (Mr. Graber) argued that, "at a minimum, the court should *voir dire* the juror to find out whether or not this is an evidentiary at all based concern" emphasizing "[Wilkerson is] entitled to this juror unless ... it's *clearly* a matter of *simply* juror nullification. And ... the words used in this note which is a fairly brief note ... is not sufficient to deprive Mr. Wilkerson of his right to have this jur[or]

---

[1] Actually, as discussed *infra*, *Thomas* adopts the *Brown* "any possibility" standard. *See Thomas*, 116 F.3d at 621-22. *Abbell* adopted a standard permitting discharge of a juror "only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence," 271 F.3d at 1302, which the Eleventh Circuit described as "basically a 'beyond a reasonable doubt' standard." *Id.* at 1302-03.

decide this case." App. 27 (9/15/04:7) (emphasis added). Defense counsel argued that, in *Brown*, "the juror indicated at first glance there was a problem with the law-nullification issue. And then as the court was talking to the jur[or] it came out that there was an evidentiary basis for it, which I think is why the court should inquire of the juror." App. 9 (9/15/04:9). Graber also noted that, during *voir dire*, the juror had indicated concerns about how some people convicted of crimes were unjustly convicted and later exonerated, but did state that she "could view this case fairly based on ... what's going to be proved here."App. 46-47 (7/16/04am: 107-08).

The court noted *Brown's* admonition not to "delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations." App. 29 (9/15/04:13) (quoting *Brown*, 823 F.2d at 596). The court also noted that *Brown* left open the question whether a court "constitutionally [can] apply Rule 23(b) to discharge a juror for refusing to apply the law." App. 29 (9/15/04:13). *See Brown*, 823 F.2d at 597. Petitioner again implored the court to "*voir dire* this juror in a careful way ... so we can make a determination if there's any evidentiary basis whatsoever and the juror should continue to sit is our view." App. 29 (9/15/04:14). The court responded that "it's a very difficult and delicate matter. You do not want to intrude upon the jury process whatsoever in their deliberations..." *Id*.

The court then indicated it wanted to look at some case law and took a recess. App. 30 (9/15/04:17). When the court returned, it indicated that it had reviewed some of the relevant cases, including *Abbell* and *Thomas*. App. 30 (9/15/04:18). The court indicated that *Brown* and *Thomas* were "most closely on point." The court quoted *Thomas,* indicating that where a court "receives a report that a deliberating juror [is] intent on defying the court's instructions ... the judge may well have no means of investigating the allegation without unduly breaching the secrecy of deliberations" because any inquiry "would generally need to intrude into the juror's thought processes. Such investigation must be subject to strict limitations." App. 31 (9/15/04:21-22) (quoting *Thomas*, 116 F.3d at 621). The court then quoted *Thomas*'s observation that, "[w]ithout such an inquiry, however, the court will have little evidence with which to make the often difficult distinction between the juror who favors acquittal because he [is] purposefully disregarding the court's instructions on the law, and the juror who is simply unpersuaded by the Government's evidence. Yet the distinction is a critical one." App. 31 (9/15/04:22) (quoting 116 F.3d at 621). The judge noted that *Thomas* adopted the *Brown* rule "as an appropriate limitation on a juror's dismissal..." (*id*) and that *Thomas* "rule[d] that a presiding judge faced with anything but unambiguous evidence that a juror refused to apply the law as instructed need go

no further in his investigation of the alleged nullification." App. 31 (9/15/04:23) (quoting 116 F.3d at 622).

The court then indicated:

> The court is going to do a very brief voir dire of the juror. Very limited voir dire to ask about this letter without asking anything about and trying to advise the juror not to go into anything about their deliberation or personal deliberations or the feelings about the case beyond what she says in her letter to ask her about whether or not she feels she can follow the law and instructions.

App. 31 (9/15/04:24).

Petitioner then argued, "'[i]n light of the Second Circuit's decision that Your Honor was just reading I think there should be at least one question about whether she has some difficulty with whether the evidence is sufficient." App. 32 (9/15/04:25). The court declined: "I don't think I can do that. *If she wants to volunteer* that's one thing." App. 32 (9/15/04:25) (emphasis added).

When the juror was brought into the courtroom, the following colloquy occurred:

> The COURT: ... In your note I just want to review it with you and ask you a couple of questions about it. And I cannot go into your deliberations or what's going on in the jury room. You understand that? I don't want to hear anything about the deliberations or intrude in any way, but because of your note I need to ask you a couple of questions. All right. Okay. You said that you request to be replaced because you strongly disagree with the laws and

instructions that govern this deliberation and you cannot follow them. In other words, I just need to ask you when you make that statement you mean the instructions and the law that I've given to you in this case we're talking about?

THE JUROR: Yes.

THE COURT: And although you took an oath to follow the instructions and the law you feel you cannot do so; is that fair?

THE JUROR: Yes.

THE COURT: And you were very fair about it. You wrote I feel so strongly about this it may affect my decisions in this matter. In other words, I may have possible bias decision. And because you're disagreeing with the law, is that what you're saying?

THE JUROR: Yes.

THE COURT: You also said you're feeling emotional and mental distress. You felt that alone was enough to ask for replacement. Is that just because of deliberations you mean? I don't want to get --

THE JUROR: The whole thing.

THE COURT: The whole case?

THE JUROR: The whole case.

App. 32 (9/15/04:26-27). The juror went on to affirm that she felt she could not follow the law "because I do not agree with it" (App. 32 (9/15/04:27) and that she was asking for removal because she felt "[i]t is serious. We're dealing with

somebody's life." App. 32 (9/15/04:28). [2]

After a few more questions, the juror was excused from the courtroom. The defense noted that, although the juror did say she had a problem with the law, "[s]he also said she had the problem with the whole case. And our view is ... that's indicating that she's got a problem with some of the facts and certainly the law applies to the facts. Our view is that there has to be some question framed in some way to find out if ... it's at all a fact based sort of concern, then Mr. Wilkerson has a right to that juror." App. 33 (9/15/04:29). Petitioner also argued that, "even if it's total law based he still under the Sixth Amendment has a right to that juror." *Id*. Recognizing that the D.C. Circuit had left that issue open, petitioner argued that, "unless there's actual evidence of juror misconduct I don't think she can be excused without compromising Mr. Wilkerson's right to a unanimous jury under the Sixth Amendment." App. 33 (9/15/04:29). Further, under *Thomas*, counsel emphasized "there must be at least enough of a questioning to determine whether it is at all an evidence-based concern. And simply asking if she has problems with the law is not sufficient .... She did say she had a problem with the whole case." App. 33 (9/15/04:30). The court responded: "[t]hat was as to her health concern"

---

[2] The entire colloquy is recited in 656 F.Supp.2d 1, 2-3 (D.D.C. 2009) (App. 15-16); App. 32 (9/15/04:26-28).

and then asked the court reporter to read back from the transcript. *Id.* After the reporter read back the transcript, the court concluded, "I don't *think* she's got an evidentiary issue." App. 33 (9/15/04:30)emphasis added).

Petitioner again acknowledged the "sensitivity" involved in any *voir dire* of the juror, "but it seems there needs to be some question that can be phrased the way it doesn't ask her to reveal the deliberative process that ask[s] whether any part of her problem has to do with the sufficient–the evidence." App. 33 (9/15/04:31). Petitioner noted, "it could be the laws applied to the facts." *Id.* The court responded that, "she didn't say that in her note [which] was very clear. She wants to be relieved of the duty because she disagree[s] with the law." App. 33 (9/15/04:32). The court remarked that the note did not indicate whether or not she was a holdout. *Id*. Petitioner then asked one final time for the court to frame "some sort of a question even if it's a yes or no question like is it the instructions in general or the instructions as applied to this situation or as applied to the evidence in this case that's causing you difficulty?" App. 33 (9/15/04:32.) [3] The court refused and then explained his decision to dismiss the juror (App. 34-35,

---

[3] Petitioner has included in the Appendix a table detailing his numerous requests for the trial court to conduct a limited, carefully tailored inquiry to determine if any of the juror's concerns or stress arose from any evidence-based concerns. App. 41-43.

9/15/04:33-39) stating that he did not find:

> any substantial possibility using the language of the *Brown* decision or in the *Thomas* case. I'm satisfied beyond a reasonable doubt as a judge of her credibility from her statements in the letter and her statements on the record that she will not follow the law, that she strongly disagrees with them and she'll not follow them contrary to her oath of office .... For those reasons under 23(b)(3), I find she is not available for good cause and I'll strike her as a juror in this case.

App. 35 (9/15/04:38). The court dismissed the juror (App. 36-37, 9/15/04:44-45), then agreed, upon request of counsel, to seat an alternate (App. 36, 9/15/04:44) and have the jury reconvene and begin deliberations anew. App. 39 (9/15/04:53-54). Three "trial days" later, on September 22, 2004, the reconstituted jury returned guilty verdicts, convicting petitioner on the drug and RICO conspiracy counts. The jury acquitted petitioner on one of the murder counts (Henson), but convicted on the other three murder counts (Goodman, Downing, Burton).

Subsequent to trial, petitioner filed a motion for new trial based on the court's dismissal of the juror. The court denied the motion in a written opinion. App. 14, 21-22, 656 F.Supp2d at 10-11. However, after discussing the *Brown* court's use of both an "any possibility" test (823 F.2d at 596) and what the trial court termed a "substantial possibility" test (*id*.), the court indicated that, "[i]t would be helpful for the Court of Appeals to clarify the applicable standard in this Circuit." App. 20, 656 F.Supp. 2d at 8.

On appeal, the D.C. Circuit affirmed. Significantly, the panel did not expressly reject petitioner's argument that the record, on its face, is ambiguous regarding whether the juror had any evidence-based doubts. Rather, it sustained the speculative "finding" of the district court that the juror did *not* have evidence-based concerns. App. 6, 966 F.3d at 834. The court of appeals held that "intent to disregard the law constitutes a valid ground for dismissing a juror and that the district court permissibly dismissed Juror 0552 on that basis." App. 6, 966 F.3d at 834, 835. The court recognized that Rule 23(b)(3) permits dismissal of a juror during deliberations for "good cause." App. 6, 966 F.3d at 834. The court identified several categories of issues that could justify dismissal, including illness, family emergency or various forms of misconduct. *Id.* However, the court previously had not addressed whether a juror's intent to disregard applicable law could justify removal of the jury. Recognizing that the Sixth Amendment constrains a trial court's discretion to remove a deliberating juror, the court joined several other circuits in concluding that "the Sixth Amendment does not afford a defendant the right to a juror who is determined to disregard the law." *Id.* (citing *Sparf v. U.S.*, 156 U.S. 51, 102 (1895) and *Adams v. Texas*, 448 U.S. 38, 45 (1980) (a juror intent on disregarding the law may be dismissed for cause during *voir dire*)). *Accord U.S. v. Litwin,* 972 F.3d 1155, 1169 (9th Cir. 2020)*; U.S. v. Fattah*,

914 F.3d 112, 148-149 (3d Cir. 2019); *U.S. v. Christensen*, 828 F.3d 763, 806 (9th Cir. 2015); *U.S. v. Oscar*, 877 F.3d 1270, 1287 (11th Cir. 2017); *U.S. v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997). [4]

The court of appeals recognized, however, that in *Brown*, 823 F.2d at 596, the D.C. Circuit had held that the Sixth Amendment constrains a court's discretion to remove a juror who had expressed disagreement with the law, but who also had indicated a concern regarding the evidence. The court instructed:

> While intent to disregard the applicable law constitutes a valid basis for dismissal "a court may not dismiss a juror during deliberations if the request stems from doubts the juror harbors about the sufficiency of the government's evidence."

App. 7, 966 F3d at 835 (quoting *Brown*, 823 F.2d at 596). The court noted that sister circuits had applied varying standards for determining whether a juror expressing disagreement with the law may also have evidence-based doubts precluding removal. App. 9, 966 F.3d at 838. The court also recognized that the circuit courts have applied differing approaches in determining the best balance between protecting juror secrecy and determining an appropriate scope of *voir dire* that is sufficiently protective of a defendant's Sixth Amendment right to retain a

---

[4] As noted below, petitioner does not raise the question whether a juror who expresses an intent to disregard the law - where the record is clear that the juror also has no evidence-based doubts - may be removed consistent with both Rule 23(b)(3) and the Sixth Amendment.

deliberating juror who harbors doubts about the government's evidence. App. 7, 966 F3d at 835-36.

In *Brown,* the D.C. Circuit applied an "any possibility" test. 823 F.2d at 596. In *Wilkerson*, after considering the approaches of other circuits, the court applied a more rigorous standard, diluting a defendant's Sixth Amendment guarantee of a unanimous verdict. The court held that "the pertinent question is whether there is a 'tangible' or 'appreciable' possibility, not merely whether there is literal[ly] 'any possibility,' even just a theoretical one." App. 9, 966 F3d at 838. The court found that the district court "made the requisite determination: that 'the record before [it] indicated no appreciable possibility that Juror 0552 harbored concerns about the evidence.'" App. 9, 966 F3d at 838 (quoting App. 18, 656 F.Supp.2d at 5 n.5).

Petitioner respectfully submits that the court of appeals opinion was both factually and legally erroneous, conflicts with the views of other courts of appeals and, most significantly, eviscerates the unanimity requirement enshrined in the Sixth Amendment. The record below simply fails to provide clear evidence that Juror 0552 did not harbor doubts about the sufficiency of the government's case or the credibility of its key witnesses, which was critical to supporting a finding of guilt beyond a reasonable doubt.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS REGARDING THE STANDARD APPLICABLE TO DETERMINING WHEN THE SIXTH AMENDMENT PROHIBITS DISCHARGING A JUROR UNDER RULE 23(b)(3) WHO HAS EXPRESSED DISAGREEMENT WITH THE LAW BUT WHO ALSO MAY HAVE EVIDENCE-BASED CONCERNS

The circuit courts of appeals have applied conflicting standards regarding the application of the Sixth Amendment unanimity requirement to cases involving removal of a deliberating juror under Rule 23(b)(3) where, although expressing disagreement with the law, the juror also may have concerns about the sufficiency of the evidence necessary to convict. As detailed below, the courts also have applied inconsistent standards regarding the scope of *voir dire* necessary to determine whether a juror who has expressed a problem applying the law also may have evidence-based concerns. Certiorari should be granted to resolve these constitutional issues.

This case does not present the question whether the Sixth Amendment prohibits removal of a juror who disagrees with the law pursuant to Rule 23(b)(3) where the record *is* clear that the juror also does not harbor doubts about the sufficiency of the evidence. [5]

---

[5] Prior to *voir dire* of the juror, counsel argued that *voir dire* of the juror was necessary because her note alone was insufficient to establish the

The Sixth Amendment to the United States Constitution guarantees a criminal defendant "an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Amend VI. This Court recently reaffirmed that "[a] jury must reach a unanimous verdict in order to convict." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1395 (2020) (abrogating *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972)). This right "emerged in the 14th century England and was soon accepted as a vital right protected by the common law." *Id*. "As Blackstone explained, no person could be found guilty of a serious crime unless 'the truth of every accusation ... should ... be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion.'" *Id*. (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)). The *Ramos* Court expounded on the history and evolution of this view in this country (140 S.Ct. at 1396-97), concluding, "[t]here can be no question ... that the Sixth Amendment's unanimity requirement .... is 'fundamental to the American scheme of justice...'" *Id.* at 1397 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 148-150 (1968)). The Court further concluded that depriving Ramos of this fundamental right could not be deemed

---

absence of evidence-based concerns, thus the juror could not be discharged "unless ... it's *clearly* a matter of *simply* juror nullification. App. 27 (9/15/04:7) (emphasis added).

"harmless," reversing his conviction. *Id*. at 1408.

Moreover, "[t]he requirement of unanimity for a verdict in a federal criminal case 'is inextricably interwoven with' the standard of proof beyond a reasonable doubt." *U.S. v. Essex*, 734 F.2d 833, 841 (D.C.Cir.1984) (quoting *Hibdon v. U.S.*, 204 F.2d 834, 838 (6th Cir.1953)). Further, a defendant has a right to a unanimous verdict rendered by all twelve jurors who commence deliberations. *Essex*, 734 F.2d at 844. Particularly where a defendant faces a life sentence, courts must be vigilant in protecting the unanimity requirement. [6]

Over time, courts have recognized that, notwithstanding these fundamental principles, situations have arisen where removal of a deliberating juror becomes an issue. A juror may become ill or need to attend to a family emergency; or may be found to have engaged in some form of misconduct or have been influenced by extrinsic pressure or information. *See U.S. v. Litwin,* 972 F.3d 1155, 1169 (9th Cir. 2020).

The Federal Rules of Criminal Procedure address removal of a juror in Rule 23(b)(3). The Rule allows removal of a deliberating juror "if the court finds it necessary to excuse a juror for good cause." Fed.R.Crim.P. 23(b)(3). However,

---

[6] Fed.R.Crim.P. 23(b)(1) prescribes that the jury "consists of 12 persons unless this rule provides otherwise." Fed.R.Crim.P. 31(a) requires that "[t]he verdict must be unanimous."

where a defendant objects to removal of a juror, arguing there is a reasonable basis to believe that, despite the alleged basis for removal, the juror may also harbor doubts about the sufficiency of the evidence, a Sixth Amendment issue arises. In these circumstances, there must be a sufficient basis to support the court's finding of "good cause." Accordingly, the court must conduct a sufficient inquiry, including *voir dire* of jurors, to ensure that the juror does not also harbor doubts about the sufficiency of the evidence. While being careful not to intrude into the juror's deliberative process, view of the merits, or indication of any vote counts, the court must conduct an inquiry sufficient to satisfy a finding beyond a reasonable doubt that the juror does not have doubts about the evidence. Resolution of this issue must be resolved applying a *constitutional* standard of review, *not* an "abuse of discretion" standard applied to ordinary evidentiary rulings which do not touch upon the structural foundation of the trial itself. Such review must satisfy the rigorous "harmless error" standard required by *Chapman v. California* and not merely the lenient "abuse of discretion" standard applied to routine evidentiary issues. [7] *Chapman v. California*, 386 U.S. 18, 24 (1967) (error

[7] The court below failed to recognize that where the district court's erroneous application of the law results in a juror's dismissal in violation of the Sixth Amendment, the abuse of discretion standard is inapplicable because "[w]hen...the Constitution precludes a particular application of a rule or statute, that is the end of the matter." *U.S. v. Brown*, 823 F.2d 591, 597 (D.C.Cir. 1987).

is harmless if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"). *See also Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946); *U.S. v. Litwin,* 972 F.3d 1155, 1178 (9th Cir. 2020).

The lower courts have held that "juror nullification" is a proper basis for removal, and this Court has implied it would likely reach the same conclusion. *See Sparf v. U.S.*, 156 U.S. 51, 63-70 (1895)*; Adams v. Texas*, 448 U.S. 38, 45-46 (1980). [8] As noted above, petitioner does not seek certiorari on the question whether the Sixth Amendment permits discharge of a juror who refuses to apply the law.

The Sixth Amendment issue petitioner presents is whether a juror who has expressed disagreement with the law may be removed from a deliberating jury where the record also indicates – or may be ambiguous whether - the juror also may have evidence-based doubts.

---

[8] *See e.g., U.S. v. Fattah*, 914 F.3d 112, 147-149 (3d Cir. 2019); *U.S. v. Litwin,* 972 F.3d 1155, 1169 (9th Cir. 2020); *U.S. v. Christensen*, 828 F.3d 763 (9th Cir. 2015), *cert. denied*, 137 S.Ct. 628 (2017); *U.S. v. Oscar*, 877 F.3d 1270 (11th Cir. 2017).

A. Where the Record is Ambiguous Whether a Juror Who Has Expressed Disagreement with the Law or Instructions Also May Have Evidence-Based Concerns, Discharge Violates the Sixth Amendment Unless the Record is Clear Beyond a Reasonable Doubt that the Juror has no Evidence-Based Concerns

Perhaps the first significant opinion addressing this question was *U.S. v. Brown*, 823 F.2d 591 (D.C.Cir. 1987). In *Brown*, the D.C. Circuit held that where the record is ambiguous as to whether a deliberating juror who has expressed an objection to applying the applicable law also may have evidence-based concerns, dismissal of the juror under Fed.R.Crim.P. 23(b)(3) violates a defendant's Sixth Amendment right to a unanimous jury. 823 F.2d at 597. *Cf. U.S. v. Kemp*, 500 F.3d 257, 304, 305 (3d Cir. 2007) (evidence of juror's bias was "overwhelming" as contrasted to "much more equivocal evidence" in *Brown* and *U.S. v. Thomas*, 116 F.3d 606 (2d Cir. 1997),where "[t]he true basis for the juror's feelings was ... unclear").

In *Brown*, after five weeks of deliberation, a juror (Spriggs) sent a note indicating he was unable to discharge his duties and requested dismissal. 823 F.2d at 594. The trial judge *voir dired* the juror asking, "what the nature of the problem is." *Id*. Spriggs indicated his problem was with "the way the RICO conspiracy act reads" indicating, "I can't go along with that Act." *Id*. The judge asked a few more questions to better discern the problem. Spriggs explained: "[i]t's the way it's

written *and the way the evidence has been presented*...” *Id*. (emphasis added). The trial judge indicated that Spriggs’s remarks “*were not entirely clear*,” but felt that he could not probe further because additional inquiry would intrude on the secrecy of the jury’s deliberations. *Id*. at 595 (emphasis added). The court dismissed Spriggs, finding that he would not follow the law. *Id*. [9] The D.C. Circuit reversed.

Significantly, Spriggs never indicated a concern with the *sufficiency* of the evidence, but rather with “the way” the evidence was presented. The D.C. Circuit observed, “[Spriggs’s] statements, at the very least, *create an ambiguous record*.” *Id*. at 597 (emphasis added). The court noted: “unless the initial request for dismissal is transparent, the court will likely prove unable to establish conclusively the reasons underlying it. Given these circumstances, we must hold that if the record evidence discloses *any possibility* that the request to discharge stems from the juror’s view of the sufficiency of the government’s evidence, the court must deny the request.” *Id*. at 596 (emphasis added).

The panel decision departs from *Brown* in several crucial respects. First, the panel fails to apply the “any possibility” test to a record which, on its face, is ambiguous. Although recognizing that “this court in *Brown* decided to ‘err[] on

---

[9] *Brown* does not indicate whether Spriggs was a holdout or minority juror.

the side of Sixth Amendment caution'" (966 F.3d at 836) (quoting *U.S. v. McGill*, 815 F.3d 846, 867 (D.C.Cir.2016)*, cert. denied*, 138 S.Ct. 58 (2017)), the panel ignored this admonition.

Second, the panel erred in concluding the district court "applied the *Brown* standard, finding no substantial possibility" that Juror 0552 had any evidence-based doubts. 966 F.3d at 836. *Brown* adopted an "any possibility" standard, *not* a "substantial possibility" standard. As discussed below, the reasons offered by the panel in support of the district court's purely speculative "findings" are insufficient to dispel a reasonable possibility that the juror also harbored evidence-based concerns. Thus the findings were not entitled to deference.

Third, the panel's view that *Brown's* "any possibility" standard should be "clarified" to require "a 'tangible' or 'appreciable' possibility, not merely whether there is 'literal[ly] 'any possibility.'" (966 F.3d at 838) dilutes the *Brown* standard below the minimum protection required by the Sixth Amendment.

Fourth, the panel failed to apply precedent requiring that, in resolving an issue of juror misconduct, the trial court must "conduct[] an inquiry broad enough to lead it to a reasonable judgment" as to the claim. *United States v. Williams-Davis*, 90 F.3d 490, 499 (D.C.Cir. 1996). In *Brown*, the trial court conducted an adequate *voir dire* into "the nature" of Spriggs's concerns, which revealed the

existence of evidence related issues. Here, petitioner did not ask the judge to "delve deeply" (823 F.2d at 596) into Juror 0552's concerns, but to pose a narrowly tailored inquiry. *See* § I(B), *infra*.

The panel posits that its conclusion that there must be a "tangible" or "appreciable" possibility that a juror expressing an intent not to follow the law also has evidence-based concerns "follows naturally from our repeated recognition in *Brown* that the possibility of a juror's evidence-based concerns must be one that 'the record evidence discloses.'" 966 F.3d at 838 (quoting 823 F.2d at 596-97). However, where a juror indicates that "the whole case" (which certainly includes the evidence) is causing her serious stress, the record *does* indicate a possibility the juror has some problem with the evidence. Juror 0552 could not be dismissed without conducting a narrow, but sufficient inquiry to ask if any of her stress was evidence-based. *See Essex*, 734 F.2d at 844-45 (court failed to make "a reasonable investigation" prior to juror dismissal).

The critical point is that in *Brown*, the judge *voir dired* the juror asking, "what the nature of the problem is." 823 F.2d at 594. That never happened here. In response to that and other questions, Spriggs told the court that "his difficulty was with 'the way [the RICO act is] written *and* the way the evidence has been presented' (emphasis supplied)." 823 F.2d at 597. *Brown's* holding is that "Rule

23(b)(3) is not available when the record evidence discloses a possibility that the juror believes that the government has failed to present sufficient evidence to support a conviction." *Id*. The panel below failed to adhere to *Brown's* mandate. Juror 0552 may well have had a problem with "the way" the government presented its evidence, which primarily was through cooperating witnesses who were co-conspirators charged in the original indictment.

The panel indicates that the juror's statement that her distress stemmed from "the whole case" "does not evince an evidentiary concern *as such*." 966 F.3d at 837 (emphasis added). The panel basically concedes her statement was ambiguous. The panel's argument that it was upholding the district court's *factual* conclusion that the juror had no evidence-based doubts is not entitled to deference because the district court's conclusion was purely speculative. There was no credibility issue regarding whether she was suffering emotional stress. Rather, the question was whether her stress was due, at least in part, to her view of the evidence, or her view of the credibility of the cooperating witnesses, which likely conflicted with the views of other jurors. *See U.S. v. Symington*, 195 F.3d 1080, 1088 (9th Cir.1999) (limited evidence available did not support discharge).

The panel notes that Juror 0552's note came on the third day of deliberations after over two months of trial, which it somehow viewed as insufficient time in

which to form an opinion about the evidence. The panel postulated "[t]hat context, the [district] court understandably believed, was not suggestive of a holdout juror ..." 966 F.3d at 836. Of course, a Sixth Amendment violation does not require proof that a juror likely was a holdout. In *Essex*, the court instructed: "[t]he obvious and substantial right of appellant that was denied is her right to a *unanimous* verdict by the *jury of 12* who heard her case and began their deliberations." 734 F.2d at 844 (emphasis supplied). *Essex* noted that, although there was no indication whether or not the absent juror was a holdout juror, "that is exactly one of the possibilities the Rules are designed to avoid." *Id*. Given the substantial impeachment of the government's witnesses (both through cross-examination and defense witness testimony), the most critical of which were cooperating witnesses charged in the original indictment as co-conspirators, coupled with the lack of physical evidence linking petitioner to the alleged murders; after three days of deliberations Juror 0552 had ample basis to hold substantial doubts regarding the witness's credibility and sufficiency of the government's case. This is *not* a case where a juror indicates a problem only hours into deliberations. Her note came three *days* into deliberations.

Where, as here, a juror indicates that her mental distress stems from "the whole case," one must recognize that, from a juror's perspective, the "whole case"

includes the evidence, instructions, attorney's arguments, and deliberations. *See Sparf v. U.S.*, 156 U.S. 51, 69-70 (1895) (noting jury instruction in *Case of Fries*, 5 Fed.Case 126 (1800), that "while it was the duty of the court ... to state the law arising on the facts, the jury were to decide 'both the law and facts, on their consideration *of the whole case*.'"). Moreover, it *is* likely that her stress was due to being a holdout or minority juror. The government's theory of liability on two of the three murders resulting in convictions was aiding and abetting and vicarious liability. Significantly, the jury acquitted petitioner on one of the four murders charged in the indictment. Juror 0552 may have had doubts that testimony by the heavily impeached cooperators was sufficient to support the murder charges where on three of the four murder charges petitioner was not the "triggerman" and there was no physical evidence linking petitioner to any of the murders.

The circuit courts of appeal have applied varying and conflicting standards regarding the legal standard governing when a juror who expresses disagreement with the law, but who may also have evidence-based concerns, can be removed under Rule 23(b)(3) without violating the Sixth Amendment's unanimity requirement. In *U.S. v. Abbell*, 271 F.3d 1286 (11th Cir. 2001), the court adopted a "substantial possibility" test, which it defined as "basically a 'beyond reasonable doubt' standard." 271 F.3d at 1302. In *Thomas*, the Second Circuit, following

Brown, adopted the "any possibility" test. 116 F.3d at 622. The *Thomas* Court recognized that a court may dismiss a juror who has indicated an intent not to follow the court's instructions "*only where the record is clear beyond doubt* that the juror is not, in fact, simply unpersuaded by the prosecution's *case*." 116 F.3d at 608 (emphasis added). Petitioner submits that the Second Circuit's use of the term "prosecution's case" obviously means the prosecution's evidence, as well as the law applicable to the evidence.

The Third Circuit in *U.S. v. Kemp*, 500 F.3d 257, 304 (3d Cir. 2007), described the D.C. and Second Circuits as adopting an "any possibility" standard and the Ninth and Eleventh Circuits as adopting a "reasonable possibility" and "substantial possibility" standard. *Kemp* indicated preference for the approach of the Ninth and Eleventh Circuits, which it viewed as "allow[ing] us to avoid abstract 'anything is possible' arguments." *Id*. at 304. However, the court characterized the standard as "by no means lax: it corresponds with the burden for establishing guilt in a criminal trial..." *Id*. The *Kemp* court found evidence of misconduct "overwhelming." 500 F.3d at 304. In *Fattah,* the Third Circuit again emphasized that the Sixth Amendment requites "a high standard for juror dismissal." 914 F.3d at 150. In *Fattah*, after only four hours of deliberation, Juror 12 "stated unequivocally to the courtroom deputy that he was 'going to hang' the

jury, and that it would be '11 to 1 *no matter what*.'" *Id*. (emphasis supplied). After conducting a *voir dire* of Juror 12 and other jurors, and questioning the courtroom deputy, the court found Juror 12's testimony that he was deliberating in good faith to lack credibility and dismissed the juror. The Third Circuit affirmed. Four hours of deliberation were insufficient to raise a reasonable possibility that the juror had a good faith basis for finding reasonable doubt.

In *Symington*, the Ninth Circuit adopted a "reasonable possibility" standard, which it characterized akin to "the standard of reasonable doubt in the criminal law generally, [] a threshold at once appropriately high and conceivably attained." 195 F.3d at 1087 n. 5 (internal quotation omitted). In *Symington*, several days into deliberations after a lengthy, complex trial, the court received a note indicating one of the jurors (Cotey) was refusing to deliberate and refused to discuss her views of the case with other jurors. The trial court questioned each member of the jury including Cotey. Cotey testified that she was willing to deliberate and discuss her views but became intimidated by demands to justify her positions. 195 F.3d at 1084. The district court dismissed Cotey finding good cause because Cotey was "either unwilling or unable to participate in the deliberative process." *Id.* The Ninth Circuit reversed holding that, "[w]hile there may have been some reason to doubt Cotey's abilities as a juror, there was also considerable evidence to suggest

that the other jurors' frustrations with her derived primarily from the fact that she held a position opposite to theirs on the merits of the case." *Id.* at 1085. Significantly, the court found the district court "could not have been 'firmly convinced' that the impetus for Cotey's dismissal was unrelated to her position on the merits..." *Id*. At 1088 n.7. *See also U.S. v. Christensen*, 828 F.3d 763, 807 (9th Cir.2015) (juror indicated unwillingness to follow instructions shortly after deliberations began and lied to the court about his conduct), *cert. denied*, 137 S.Ct. 628 (2017).

The Ninth Circuit revisited this issue in *U.S. v. Litwin,* 972 F.3d 1155 (9th Cir. 2020), where the court reversed the district court's dismissal of a juror on the basis of the trial court's finding that Juror 5 refused to deliberate and harbored "potential malice toward the judicial process." *Id*. at 1171-1172. The trial court received complaining notes about Juror 5 early into the deliberations. Again, the Ninth Circuit reversed. While acknowledging the deferential standard of review to district court's findings, the Ninth Circuit concluded that "the record 'disclose[d] [a] reasonable possibility that the impetus for [the] juror's dismissal stems from the juror's views on the merits of the case." 972 F.3d at 1171. Despite extensive *voir dire* of the jurors and Juror 5, the court of appeals found "the court's findings give us very little to go on." *Id*. at 1173. Further, the appeals court found

insufficient evidence that the juror refused to deliberate noting "the jury's impasse may have stemmed from competing interpretations of a jury instruction or from Juror 5's views of the merits..." *Id.* at 1174.

On review, these standards are confusing and therefore invite clarification by this Court. The majority view – and petitioner submits the better view – is that a juror who expresses disagreement with the law or instructions can not be removed under Rule 23(b)(3) unless there is evidence, beyond a reasonable doubt, that the juror also does not harbor doubts about the sufficiency of the government's case. *See Abbell,* 271 F.3d at 1302 ("basically a 'beyond reasonable doubt' standard").

B. Absent Clear Evidence that a Juror Who Expresses Disagreement with the Law Does Not Also Have Evidence-Based Doubts, the Trial Court Must Conduct a Narrowly Tailored *Voir Dire* Sufficient to Determine Whether the Juror also has Evidence-Based Doubts

The panel below posited that its conclusion that there must be a "tangible" or "appreciable" possibility that a juror expressing an intent not to follow the law also has evidence-based concerns, "follows naturally from our repeated recognition in *Brown* that the possibility of a juror's evidence-based concerns must be one that 'the record evidence discloses.'" 966 F.3d at 838 (quoting 823 F.2d at 596-97). However, where a juror indicates that "the whole case" (which

certainly includes the evidence) is causing her serious stress, the record *does* indicate a possibility the juror has some problem with the evidence. Juror 0552 could not be dismissed without conducting a narrow, but sufficient inquiry to ask if any of her stress was evidence-based. *See Essex*, 734 F.2d at 844-45 (court failed to make "a reasonable investigation" prior to juror dismissal). Here, the trial court, although cautioning the juror not to disclose "anything about the deliberations," (App. 32, 9/15/04am:26) failed to pose a sufficiently tailored question asking about the nature of Juror 0552's stress. Instead, the judge stated that "[i]f she wants to *volunteer* that's one thing."*Id.* (emphasis added), Surely, the Sixth Amendment protection to a unanimous verdict can not depend on whether a juror fortuitously *volunteers* that she is under stress due to some problem with the evidence.

The Second Circuit noted in *Thomas* that where a court "receives a report that a deliberating juror [is] intent on defying the court's instructions ... the judge may well have no means of investigating the allegation without unduly breaching the secrecy of deliberations" because any inquiry "would generally need to intrude into the juror's thought processes. Such investigation must be subject to strict limitations." *Thomas*, 116 F.3d at 621. The court further observed that, *"[w]ithout such an inquiry*, however, the court will have little evidence with

which to make the often difficult distinction between the juror who favors acquittal because he [is] purposefully disregarding the court's instructions on the law, and the juror who is simply unpersuaded by the Government's evidence. Yet *the distinction is a critical one*." *Id*. (emphasis added).

Other circuit court of appeals decisions also recognize the need to conduct sufficient inquiry of misconduct, including, *e.g., U.S. v. Fattah*, 914 F.3d 112, 148-49 (3d Cir. 2019) (court questioned problematic juror and four other jurors); *U.S. v. Oscar*, 877 F.3d 1270, 1285-86 (11th Cir. 2017); *U.S. v. Litwin,* 972 F.3d 1155 (9th Cir. 2020) (district court conducted extensive *voir dire* of the jurors); *U.S. v. Christensen*, 828 F.3d 763, 809 (9th Cir. 2015) (several jurors questioned confirming that the juror had lied to the court *and* refused to follow instructions); *U.S. v. Kemp*, 500 F.3d 257, 301, 306 (3d Cir. 2007) (court conducted several rounds of individual *voir dire* of ten jurors "to isolate the root of the allegations of misconduct"). *See also U.S. v. Essex*, 734 F.2d 833, 844-45 (D.C.Cir. 1984) (court failed to make "a reasonable investigation" prior to juror dismissal).

The *Thomas*, Court observed:

> [T]o determine whether a juror is bent on defiant disregard of the applicable law, the court would generally need to intrude into the juror's thought processes. Such an investigation must be subject to strict limitations. *Without such an inquiry, however, the court will have little evidence with which to make the often difficult distinction*

> *between the juror who favors acquittal because he is purposefully disregarding the court's instructions ... and the juror who is simply unpersuaded by the Government's evidence*.

116 F.3d at 621(emphasis added) (citing *Brown*, 823 F.2d at 596). The district court's refusal to frame a limited inquiry to determine whether Juror 0552 had any evidence-based concerns was an abuse of discretion and a violation of the Sixth Amendment.

In *Abbell*, the Eleventh Circuit affirmed a district court's dismissal of a juror (Alfonso) who told other jurors she was not going to follow the instructions. The court did so, however, only *after* conducting a voir dire of several jurors, including Alfonso. Based on the record evidence, the appeals court sustained the trial court's credibility findings regarding Alfonso. 271 F.3d at 1303-04.

As noted *supra*, although the Sixth Amendment unanimity requirement does not hinge on whether a juror in question may be a holdout, where there is an indication that the juror may be a holdout or minority juror, the duty to inquire has an "enhanced" importance. *U.S. v. Ginyard*, 444 F.3d 648, 654 (D.C.Cir. 2006) ("[t]he presence of a holdout lends heightened significance to the district court's duty of inquiry").

The trial court's failure to conduct a sufficient, narrowly tailored *voir dire* to ascertain whether Juror 0552 harbored any evidence-based doubts deprived

petitioner of his Sixth Amendment right to a unanimous jury. The trial court's view that only if the juror "volunteered" (App. 32, 9/15/04:25) to express any problems she had with the evidence is too thin a reed upon which to rest petitioner's precious Sixth Amendment right to have his fate determined by a unanimous jury of his peers. [10]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

---

[10] Wilkerson has been incarcerated since September, 1993, from a Superior Court conviction in a related case. Upon rehearing, were his convictions vacated and a new trial ordered, having already served 28 years, there is a reasonable probability that the parties could reach agreement on a disposition that would not require a new trial. As noted above, petitioner did not dispute that he was a street level drug distributer, however, he strongly contested the murder charges. Upon vacating his convictions, it is likely the government would either not seek retrial or would be amenable to a plea to the drug conspiracy charges.

Respectfully submitted,

/s/

Sebastian K.D. Graber, Esq.
904 Sedgefield Street
Durham, NC 27705
540-226-9987
skdgesq@gmail.com

Counsel for Appellant
Appointed by the D.C. Circuit