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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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966 F.3d 828
United States Court of Appeals,
District of Columbia Circuit.

UNITED STATES of America, Appellee
v.
Larry WILKERSON, Appellant

No. 10-3037
|
Argued February 3, 2020
|
Decided July 24, 2020

Synopsis

Background: Defendant who was convicted of nine counts related to narcotics conspiracy and three murders moved for a new trial. The United States District Court for the District of Columbia, Thomas F. Hogan, Senior District Judge, 656 F.Supp.2d 1, denied the motion, and defendant appealed.

Holdings: The Court of Appeals, Srinivasan, Chief Judge, held that:

[1] in a matter of first impression, dismissal of juror based on her refusal to follow the law did not violate defendant's Sixth-Amendment rights;

[2] narcotics conspiracy constituted a predicate act of racketeering necessary for violation of RICO statute;

[3] the five-year limitations period for the offense of RICO conspiracy did not begin to run until the date of the conspiracy's termination, or defendant's withdrawal from the conspiracy;

[4] District Court did not plainly err by failing to sua sponte instruct the jury again after striking portion of prosecution's closing argument which suggested that defendant's decision to go to trial proved his continuing participation in the conspiracy;

[5] once it decided that conspiracy count could go to jury for resolution, it was not inappropriate for district court to give *Pinkerton* instruction;

[6] evidence was sufficient to support conviction for aiding and abetting continuing criminal enterprise (CCE) murder; and

[7] any failure by the Government to disclose the existence of a factual proffer in a co-conspirator's plea agreement related to the existence of a second conspiracy was immaterial to defendant's claim that the Government had withheld evidence in violation of *Brady*, or that the continuing criminal enterprise (CCE) murder he had been convicted of had been disbanded.

Affirmed.

West Headnotes (26)

[1] **Jury** Discharge of juror or jury pending trial

A variety of issues can constitute "good cause" to excuse a juror, including illness, family emergency, or, jury misconduct. Fed. R. Crim. P. 23(b)(3).

[2] **Jury** Discharge of juror or jury pending trial

Action by jurors that is contrary to their responsibilities can constitute good cause for their dismissal. Fed. R. Crim. P. 23(b)(3).

[3] **Jury** Competence for Trial of Cause

The Sixth Amendment did not afford murder defendant the right to a juror who was determined to disregard the law, and thus, dismissal of juror during deliberations based on juror's expressed disagreement with the laws and instructions that governed deliberation, and her refusal to follow the law in coming to a decision as to defendant's guilt or innocence, did not violate defendant's Sixth-Amendment rights. U.S. Const. Amend. 6; Fed. R. Crim. P. 23(b)(3).

[4] **Criminal Law** Selection and impaneling

Because a district court, based on its unique perspective at the scene, is in a far superior position than a court of appeals to appropriately consider allegations of juror misconduct, review of a district court's dismissal of a juror is only for an abuse of discretion. Fed. R. Crim. P. 23(b).

[5] **Jury** Competence for Trial of Cause

The Sixth Amendment constrains a district court's discretion to dismiss a juror based on allegations of juror misconduct. U.S. Const. Amend. 6; Fed. R. Crim. P. 23(b).

[6] **Criminal Law** Functions as judges of law and facts in general

A jury has no more right to find a guilty defendant not guilty than it has to find a not guilty defendant guilty; rather, it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence.

[7] **Jury** Competency for Trial of Issues in General

A juror intent on disregarding the law may be dismissed for cause during voir dire. Fed. R. Crim. P. 23(b)(3).

[8] **Jury** Competence for Trial of Cause

The Sixth Amendment provides no more right to a juror determined to disregard the law during deliberations than it does beforehand. U.S. Const. Amend. 6.

[9] **Constitutional Law** Verdict

Criminal Law Functions as judges of law and facts in general

While juries might sometimes abuse their power and return verdicts contrary to the law and instructions of the court, such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power. U.S. Const. Amend. 14.

[10] **Jury** Competence for Trial of Cause

The Sixth Amendment provides a defendant no right to a verdict that is contrary to the law and instructions of the court; on the contrary, when a juror's intent to disregard the law comes to the attention of the court, it would be a dereliction of duty for a judge to remain indifferent. U.S. Const. Amend. 6.

[11] **Jury** Discharge of juror or jury pending trial

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 for discharge stems from doubts the juror harbors about the sufficiency of the government's evidence. Fed. R. Crim. P. 23(b)(3).

[12] **Jury** Discharge of juror or jury pending trial

An effort by the court to clarify whether a juror intends to disregard the law or simply finds the evidence unpersuasive runs the risk of intruding on the secrecy of the jury's deliberations, and thus, a court considering whether to discharge a juror may not delve deeply into a juror's motivations because doing so may intrude on the secrecy of the jury's deliberations.

[13] **Jury** Discharge of juror or jury pending trial

In determining whether or not to deny a juror's request for dismissal due to evidence-based concerns, the pertinent question is whether there is a tangible or appreciable possibility that the request is based on an evidence-based concern that the record evidence discloses, not merely whether there is literally any possibility, even just a theoretical one.

[14] **Racketeer Influenced and Corrupt Organizations** Conspiracies

Narcotics conspiracy constituted a predicate act of racketeering necessary for violation of RICO statute; broad language of the statute encompassed related conspiracy offenses. 18 U.S.C.A. §§ 1962(c), 1962(d); Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841(a)(1), 846.

[15] **Criminal Law** Review De Novo

In general, the district court's legal conclusion concerning the scope of a conspiracy is reviewed de novo.

[16] **Criminal Law** Burden of showing error

When a defendant fails to object to an alleged error, the defendant bears the burden of demonstrating "plain error" on appeal.

[17] **Criminal Law** Continuing offenses

The five-year limitations period for the offense of RICO conspiracy did not begin to run until the date of the conspiracy's termination, or defendant's withdrawal from the conspiracy. 18 U.S.C.A. § 3282.

[18] **Criminal Law** Commission of offense in general

The five-year statute of limitations applicable to RICO conspiracy begins to run when a defendant last commits the "offense" of RICO conspiracy. 18 U.S.C.A. § 3282.

[19] **Criminal Law** Continuing offenses

The offense in conspiracy prosecutions, for limitations purposes, is not the initial act of agreement, but the banding-together against the law effected by that act, and that offense continues until termination of the conspiracy or, as to a particular defendant, until that defendant's withdrawal.

[20] **Conspiracy** Continuing conspiracy

A defendant who has joined a conspiracy continues to violate the law through every moment of the conspiracy's existence.

[21] **Criminal Law** Continuing offenses

Absent withdrawal, a defendant continues to commit the offense of RICO conspiracy until the date of the conspiracy's termination; it follows that a RICO conspiracy count is timely as long as the government charges the defendant within five years of that date. 18 U.S.C.A. § 3282.

[22] **Criminal Law** Requests for correction by court

District court did not plainly err by failing to sua sponte instruct the jury again after striking portion of prosecution's closing argument in narcotics conspiracy and murder prosecution which suggested that defendant's decision to go to trial proved his continuing participation in the conspiracy, given the court's previous instruction, the weight of the evidence of the defendant's continuing participation in the conspiracy, and the comparative dearth of evidence of his purported withdrawal.

[23] **Conspiracy** Particular Subjects of Conspiracy

Once it decided that conspiracy count could go to jury for resolution, it was not inappropriate for district court to give *Pinkerton* instruction, that jury could convict defendant of substantive counts either based upon his own acts or, if jury found that defendant was conspirator, based on acts of his co-conspirators.

[24] **Homicide** Parties to offense

Evidence was sufficient to support conviction for aiding and abetting continuing criminal enterprise (CCE) murder; a rational trier of fact could have found that members of the conspiracy murdered one victim in retaliation for an attack on one of its own, the defendant, and similarly, a rational trier of fact could have found that members of the conspiracy murdered a second victim as part of a botched plan to punish his partner for pulling out of a drug deal, and because such murders were committed with the conspiracy's resources to stifle threats to its members or its deals, they bore a substantive connection to the continuing criminal enterprise.

[25] **Criminal Law** Continuing offenses

Any failure by the Government to disclose the existence of a factual proffer in a co-conspirator's plea agreement related to the existence of a second conspiracy was immaterial to defendant's claim that the Government had withheld evidence in violation of *Brady*, or that the continuing criminal enterprise (CCE) murder he had been convicted of had been disbanded, and thus, that the five-year statute of limitations had run before he was charged; criminals could participate in more than one conspiracy, and the fact that the co-conspirator had participated in a second conspiracy was not inconsistent with the persistence of the conspiracy defendant was convicted of participating in. 18 U.S.C.A. § 3282.

[26] **Criminal Law** Parties Entitled to Allege Error

Generally a defendant does not have standing to complain on appeal of an erroneous ruling on the scope of the privilege of a witness.

***831** Appeal from the United States District Court for the District of Columbia (No. 1:00-cr-00157-15)

Attorneys and Law Firms

Sebastian K.D. Graber, appointed by the court, argued the cause for appellant. With him on the briefs was Timothy Cone, appointed by the court.

Nicholas P. Coleman, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were Jessie K. Liu, U.S. Attorney, at the time the brief was submitted, and Elizabeth Trosman, Washington, DC, and Suzanne Grealy Curt, Assistant U.S. Attorneys.

Before: Srinivasan, Chief Judge, Henderson, Circuit Judge, and Randolph, Senior Circuit Judge.

Opinion

Srinivasan, Chief Judge:

***832** In November 2000, a grand jury indicted appellant Larry Wilkerson and fifteen codefendants on 158 counts related to a violent narcotics-distribution conspiracy that operated in D.C. throughout the 1990s. Appellant was charged with conspiracy to distribute and possess with intent to distribute cocaine, cocaine base, heroin, and marijuana, conspiracy to participate in a racketeer-influenced corrupt organization, four counts of aiding and abetting first-degree murder, four corresponding counts of aiding and abetting a continuing criminal enterprise (CCE) murder, and one count of aiding and abetting first-degree felony murder.

Many of appellant's codefendants pled guilty and some also agreed to cooperate with the government. The rest went to trial in groups. "Group One" consisted of six defendants, including the conspiracy's leaders, Kevin Gray and Rodney Moore. That trial concerning the Gray-Moore conspiracy ended in guilty verdicts and substantial sentences, which this court affirmed in part and vacated in part in *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011), *aff'd in part sub nom. Smith v. United States*, 568 U.S. 106, 133 S.Ct. 714, 184 L.Ed.2d 570 (2013). "Group Two" consisted of six more defendants and similarly resulted in guilty verdicts and lengthy sentences, which this court affirmed in part and reversed in part in *United States v. McGill*, 815 F.3d 846, 877 (D.C. Cir. 2016), *cert. denied*, —— U.S. ——, 138 S. Ct. 58, 199 L.Ed.2d 43 (2017).

Appellant was tried separately from his codefendants. On September 22, 2004, a jury found appellant guilty on all counts except one count of aiding and abetting first-degree

murder and a corresponding count of aiding and abetting CCE murder. On April 20, 2010, the district court sentenced appellant to life imprisonment.

Appellant now appeals. He raises a number of challenges, including to the district court's dismissal of a juror during deliberations and to the district court's rejection of his motion to dismiss the RICO conspiracy count as time-barred. We reject his challenges and affirm his convictions and sentence.

I.

We first consider the district court's dismissal of a juror who, after deliberations began, expressed her disagreement with the applicable law and her inability to apply it. Appellant contends that the district court's dismissal of the juror violated his Sixth-Amendment right to conviction by a unanimous jury. We conclude that the district court did not err.

A.

On September 8, 2004, after two months of trial, the jury began deliberations. *United States v. Wilkerson*, 656 F. Supp. 2d 1, 2 (D.D.C. 2009) ("*Wilkerson I*"). Three-and-a-half ***833** days into deliberations, the district judge received the following handwritten note from a juror:

> "I, juror number 0552, request that I be replaced with an alternate in the deliberation of Larry Wilkerson. 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. Please take this request under strong consideration. I apologize, for the delay in this request, but if it is at all possible please remove me from this deliberation. Sincerely, Juror 0552."

Id.

The district court decided to ask Juror 0552 about her note. The following colloquy ensued:

> COURT: All right. Thank you. 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. ... 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?
>
> JUROR 0552: Yes.
>
> COURT: And although you took an oath to follow the instructions and the law you feel you cannot do so; is that fair?
>
> JUROR 0552: Yes.
>
> 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?
>
> JUROR 0552: Yes.
>
> 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 --
>
> JUROR 0552: The whole thing.
>
> COURT: The whole case?
>
> JUROR 0552: The whole case.
>
> COURT: Let me ask you about the law. You've read the instructions. You've heard my law [sic] we're talking about. And it's your opinion you cannot follow the law and apply it in this case? Is that what you're saying?
>
> JUROR 0552: I cannot follow it because I do not agree with it.
>
> COURT: You do not agree with the law?
>
> JUROR 0552: No.
>
> COURT: I don't want to get in your deliberations now.
>
> JUROR 0552: Okay.

COURT: You just don't agree with the law?

JUROR 0552: Uh-uh.

COURT: And you came to this belief after seriously considering you say here that you didn't, you know, you wouldn't ask for this but you didn't feel you felt it was such a serious issue?

JUROR 0552: It is serious. We're dealing with somebody's life.

***834** COURT: And under the law that I've given you you disagree with that? Is that what you're saying?

JUROR 0552: Yes.

Id. at 3.

After some further discussion with counsel, the district court decided to dismiss Juror 0552. *Id.* Based on Juror 0552's note, the above colloquy with her, the brevity of the jury's deliberations relative to the length and complexity of the trial, and the lack of any substantive jury questions, the district court found as a matter of fact that Juror 0552 sought to be dismissed because she disagreed with the applicable law rather than because of any concerns about the evidence. Trial Tr. 36–38, Sept. 15, 2004, 8 J.A. 2551–53.

Instead of proceeding with eleven jurors, the district court replaced Juror 0552 with an alternate. *Wilkerson I*, 656 F. Supp. 2d at 4 n.3. On September 22, 2004, the reconstituted jury returned guilty verdicts on all counts except one first-degree-murder count and an associated CCE murder count. Appellant moved for a new trial, arguing that the district court had violated his Sixth-Amendment rights by dismissing Juror 0552. The district court denied the motion. *Id.* at 10–11.

B.

Appellant renews his contention that the dismissal of Juror 0552 violated his Sixth-Amendment rights. Appellant challenges both the district court's finding that Juror 0552's concerns were with the law, not the evidence, and the district court's conclusion that disagreement with the law is a valid ground for dismissal. We disagree with both challenges. We hold 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.

1.

[1] **[2]** Federal Rule of Criminal Procedure 23(b) authorizes dismissal of a juror during deliberations for "good cause." Fed. R. Crim. P. 23(b)(3). "A variety of issues" can constitute "good cause" to excuse a juror, "including illness, family emergency, or, ... jury misconduct." *United States v. McGill*, 815 F.3d 846, 866 (D.C. Cir. 2016) (internal quotation marks omitted). "[A]ction by jurors that is contrary to their responsibilities" can constitute good cause. *Id.* (internal quotation marks omitted).

[3] **[4]** **[5]** Because a district court, "based on its unique perspective at the scene, is in a far superior position than [a court of appeals] to appropriately consider allegations of juror misconduct," we review a district court's dismissal of a juror "only for an abuse of discretion." *Id.* at 867 (quoting *United States v. Boone*, 458 F.3d 321, 329 (3d Cir. 2006). The Sixth Amendment, however, constrains that discretion. *Id.* This case presents a question we have previously left open: whether the Sixth Amendment precludes dismissing a juror "for refusing to apply the relevant substantive law." *United States v. Brown*, 823 F.2d 591, 597 (D.C. Cir. 1987). We now answer that question in the negative: the Sixth Amendment does not afford a defendant the right to a juror who is determined to disregard the law.

[6] **[7]** We have already decided as much with regard to trial proceedings that come before jury deliberations. In particular, we have held that the Sixth Amendment provides no right to a jury instruction on nullification. *United States v. Dougherty*, 473 F.2d 1113, 1130–37 (D.C. Cir. 1972). As we later explained, a "jury has no more '*right*' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant 'guilty.' " ***835** *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983). Rather, "it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence." *Sparf v. United States*, 156 U.S. 51, 102, 15 S.Ct. 273, 39 L.Ed. 343 (1895). Were it otherwise, juries would "become a law unto themselves," such that "our government [would] cease to be a government of laws, and [would] become a government of men." *Id.* at 101, 103, 15 S.Ct. 273. For the same reasons, a juror intent on disregarding the law may be dismissed for cause during voir dire. *See, e.g.*, *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

[8] The Sixth Amendment provides no more right to a juror determined to disregard the law during deliberations than it does beforehand. The Second Circuit thus has "categorically reject[ed] the idea that, in a society committed to the rule of law, ... courts may permit [jury nullification of the law] to occur when it is within their authority to prevent." *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997). The court reasoned that, "[i]nasmuch as no juror has a right to engage in nullification" of the applicable law, district courts "have the duty to forestall or prevent such conduct" if it can be done without "interfer[ing] with guaranteed rights or the need to protect the secrecy of jury deliberations." *Id.* at 616. The Third, Ninth, and Eleventh Circuits agree, and we are aware of no court of appeals to conclude otherwise. *See United States v. Fattah*, 914 F.3d 112, 149 (3d Cir. 2019); *United States v. Christensen*, 828 F.3d 763, 806 (9th Cir. 2015); *United States v. Oscar*, 877 F.3d 1270, 1287 (11th Cir. 2017). We join our sister circuits' unanimous view.

[9] **[10]** It is true, as we have recognized, that juries might sometimes "abuse their power and return verdicts contrary to the law and instructions of the court." *Washington*, 705 F.2d at 494. But "[s]uch verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power." *Id.* The Sixth Amendment provides a defendant no right to such an outcome. On the contrary, when a juror's intent to disregard the law comes to the attention of the court, "it would be a dereliction of duty for a judge to remain indifferent." *Thomas*, 116 F.3d at 616. Consequently, we hold that dismissal of a juror during deliberations for intent to disregard the law does not violate a defendant's Sixth-Amendment rights.

2.

[11] 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 for discharge stems from doubts the juror harbors about the sufficiency of the government's evidence." *Brown*, 823 F.2d at 596. If it were otherwise, "the government [could] obtain a conviction even though a member of the jury ... thought that the government had failed to prove its case," rendering a defendant's Sixth-Amendment right to a unanimous verdict "illusory." *Id.*; *accord Thomas*, 116 F.3d at 621. A court thus might face 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." *Thomas*, 116 F.3d at 621. "[A]n effort to act in good faith may easily be mistaken" for "purposeful disregard of the law." *Id.* at 618.

[12] Moreover, an effort by the court to clarify whether a juror intends to disregard the law or simply finds the evidence unpersuasive runs the risk of "intrud[ing] on the secrecy of the jury's deliberations." ***836** *Brown*, 823 F.2d at 596. Navigating the tension between the "duty to dismiss jurors for misconduct" and the "equally, if not more, important [duty to] safeguard[ ] the secrecy of jury deliberations" is a "delicate and complex task." *Thomas*, 116 F.3d at 618. "[A] court may not delve deeply into a juror's motivations because [doing so may] intrude on the secrecy of the jury's deliberations." *Brown*, 823 F.2d at 596.

Cognizant of those competing considerations, this court in *Brown* decided to "err[ ] on the side of Sixth-Amendment caution." *McGill*, 815 F.3d at 867. We held 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." *Brown*, 823 F.2d at 596. Applying that standard to the facts in *Brown*, we rejected the juror's dismissal because the record "indicate[d] a substantial possibility that [the juror] requested to be discharged because he believed that the evidence offered at trial was inadequate to support a conviction." *Id.* Several other circuits have since adopted our approach in *Brown*. *See, e.g.*, *United States v. Kemp*, 500 F.3d 257, 304 (3d Cir. 2007); *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001); *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999); *Thomas*, 116 F.3d at 622.

The district court here applied the *Brown* standard, finding no substantial possibility that Juror 0552's request to be dismissed stemmed in any way from her views about "the sufficiency of the government's evidence." *Brown*, 823 F.2d at 596. Rather, the juror asked "to be replaced because she strongly disagrees with the law[s] that govern this deliberation and cannot follow them." Trial Tr. 37, Sept. 15, 2004, 8 J.A. 2552. When defense counsel suggested that the juror might have had evidence-based reservations about "the law applied to the facts," as opposed to concerns about the law alone, the court rejected that possibility: "Her note was very clear. She wants to be relieved of the duty because she disagree[s] with the law." *Id.* at 32, 8 J.A. 2547. And she so explained, the court found, "without any reference whatsoever to any evidentiary concerns or the strength of the government's evidence or the dissatisfaction with the government's presentation of the case." *Id.* at 38, 8 J.A. 2553.

Instead, "her only expression [was] that she cannot follow the law and she disagrees with it and she reaffirmed that orally." *Id.* The court was "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[s], that she strongly disagrees with them and she'll not follow them contrary to her oath of office." *Id.* The court thus found no substantial possibility of an evidence-based concern. *Id.*

We see no basis to set aside the district court's finding to that effect. As the court explained, when Juror 0552 sent her note, the jury had yet to submit any substantive questions and had been deliberating for only three days, after a months-long trial involving an extensive amount of evidence covering numerous counts and a correspondingly complex set of instructions and verdict form. That context, the court understandably believed, was not suggestive of a hold-out juror based on the evidence. And more importantly, the juror's statements did not indicate any evidentiary concerns. As the court explained, her note stated unambiguously that she disagreed with the law without referencing any evidentiary concerns. In response to the court's questioning, she confirmed that she disagreed with the law seven times, never once referencing the evidence, much less suggesting any evidence-based concerns.

***837** To be sure, in her note, Juror 0552 conveyed that "[i]n addition" to her disagreement with the law, she was "experiencing emotional and mental distress." *Wilkerson I*, 656 F. Supp. 2d at 2. When the district court asked whether her distress was "because of deliberations," she replied that it was "the whole thing," i.e., "the whole case." *Id.* at 3. Appellant asserts that the whole case includes the evidence. But Juror 0552's statement that her emotional distress related to "the whole thing" does not evince an evidentiary concern as such —i.e., it did not amount to "record evidence disclos[ing] a possibility that [she] believe[d] that the government ha[d] failed to present sufficient evidence to support a conviction." *Brown*, 823 F.2d at 597. The district court understood her distress to stem from "concern[s] there was a lot at stake and she said a life at stake," not from any concerns associated with the evidence. Trial Tr. 38, Sept. 15, 2004, 8 J.A. 2553. On that record, the court did not err in discerning no substantial possibility that her distress derived from an evidentiary concern. (After the trial, it became apparent that the juror had "fallen for" and become "fixated" with appellant, and she visited him in jail some fifty times. *United States v. Wilkerson*, 656 F Supp. 2d 11, 16–17 (D.D.C. 2009) ("*Wilkerson II*")).

The contrast between the record in this case and the one in *Brown* is instructive. In *Brown*, the jury had been deliberating for five weeks when it sent the following note: "When is a defendant not guilty? When all jurors give a unanimous verdict vote of not guilty or, at least, one gives a vote of not guilty?" *Brown*, 823 F.2d at 594. The district court instructed the jury to continue deliberations to reach a unanimous verdict. *Id.* Later that day, the court received another note, reading: "I Bernard Spriggs am not able to discharge my duties as a member of this jury." *Id.* When the court questioned Spriggs, he indicated that he had concerns with "the way [the act is] written *and* the way the evidence has been presented," and that, had "the evidence [been] presented in a fashion in which the law is written, then, maybe, [he] would be able to discharge [his] duties." *Id.* at 597 (emphasis in original). We held that Spriggs's dismissal violated the defendants' right to conviction by a unanimous jury, reasoning that we could not conclude "with any conviction" that Spriggs's request "stemmed from something *other* than this view" of the evidence. *Id.* (emphasis in original). Because the "record evidence in th[e] case indicate[d] a substantial possibility" that Spriggs's request stemmed from evidentiary doubts, his dismissal violated the defendants' Sixth-Amendment rights. *Id.* at 596.

The record in this case is markedly different. First, in *Brown*, Spriggs's note came five weeks into deliberations and on the same day the court instructed the jury to keep deliberating after the jury asked whether it had to be unanimous. *Id.* at 594. That context suggested that Spriggs may have been a holdout. By contrast, Juror 0552's note came only three days after a two months-long trial covering many crimes over many years and the jury had yet to send a single substantive note. Second, in *Brown*, when asked about his disagreement with the law, Spriggs referenced his dissatisfaction with the evidence and even indicated that he would have had no problem if the evidence had been presented differently. *Id.* at 597. By contrast, Juror 0552 unambiguously indicated her disagreement with the law in her note without any reference to evidentiary concerns, and then confirmed that disagreement seven times in her colloquy with the district court without once mentioning evidentiary issues. In the context of that record, the district court was under no obligation ***838** to keep her on the jury even though she repeatedly and unequivocally stated that she strongly disagreed with the applicable law and could not follow it.

Lastly, we note an issue appellant raised in the district court. In *Brown*, as noted, we held that a juror cannot be dismissed if "the record evidence discloses any possibility"—or, alternatively, "a" possibility—"that the request to discharge stems from the juror's view of the sufficiency of the government's evidence." 823 F.2d at 596–97. And then in applying that standard, we said that the "record evidence in th[e] case indicate[d] a substantial possibility" that the juror "believed that the evidence offered at trial was inadequate to support a conviction." *Id.* at 596. The district court in this case, echoing that language, found that the record here indicated no such "substantial possibility." Trial Tr. 38, Sept. 15, 2004, 8 J.A. 2553. But the language in *Brown* might raise the question, does our standard call for denying a juror's dismissal when there is "any" or "a" possibility of an evidence-based concern or instead only when there is a "substantial" such possibility, insofar as there is a meaningful difference among those formulations?

Appellant raised that issue in the district court in his motion for a new trial. *Wilkerson I*, 656 F. Supp. 2d at 6–8. The district court understood *Brown* to call for examining whether there is a "tangible possibility" as opposed to "just a speculative hope." *Id.* at 7 (quoting *Abbell*, 271 F.3d at 1302 n.14); *accord Kemp*, 500 F.3d at 304; *Symington*, 195 F.3d at 1087 n.5. The court found no such possibility indicated by the record in this case. *Wilkerson I*, 656 F. Supp. 2d at 8. The court further said that it "would be helpful for the Court of Appeals to clarify the applicable standard in this Circuit." *Id.*

[13] We do so now, and we agree with the district court 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. *Id.* That understanding 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." 823 F.2d at 596–97. Here, the district court made the requisite determination: that "the record before [it] indicated no appreciable possibility that Juror 0552 harbored concerns about the evidence." *Wilkerson I*, 656 F. Supp. 2d at 5 n.5. We see no basis to reject the court's assessment.

II.

We next address appellant's claim that the district court erred in not dismissing the RICO conspiracy count against him as time-barred. We hold that the RICO conspiracy count was not time-barred.

A.

The statute of limitations applicable to RICO conspiracy is five years. *Smith v. United States*, 568 U.S. 106, 111 n.4, 133 S.Ct. 714, 184 L.Ed.2d 570 (2013). Here, because the grand jury indicted appellant on November 17, 2000, the cutoff for statute of limitations purposes was November 17, 1995.

The original November 2000 indictment alleged sixty-three racketeering acts in support of the RICO conspiracy count, including many after 1995. The indictment alleged appellant's specific involvement, however, in only seven predicate acts, one of which—narcotics conspiracy—the indictment alleged he committed after 1995.

In November 2002, the government filed a retyped indictment, which was largely the same as the original indictment but with some predicate racketeering acts that ***839** had been dismissed removed. In June 2003, appellant moved to dismiss the RICO conspiracy count from that indictment as time-barred. The district court denied appellant's motion.

While that motion was pending, in July 2003, the district court severed appellant's trial from that of his codefendants. Accordingly, prior to trial, in July 2004, the government filed a second retyped indictment, deleting predicate racketeering acts that did not specifically reference appellant. The second retyped indictment's RICO conspiracy count thus alleged seven predicate acts of racketeering, only one of which—narcotics conspiracy—appellant allegedly committed after 1995. The verdict form submitted to the jury also referenced only those seven predicate acts.

B.

[14] Appellant contends that narcotics conspiracy does not constitute a predicate act of racketeering, and that even if it does, RICO conspiracy requires two predicate acts of racketeering within the statute of limitations period. We disagree on both scores.

[15] **[16]** In general, we review the district court's legal conclusion concerning the scope of the conspiracy de novo.

United States v. Hitt, 249 F.3d 1010, 1016 (D.C. Cir. 2001). But when a defendant fails to object to an alleged error, the defendant bears the burden of demonstrating "plain error" on appeal. *United States v. Moore*, 651 F.3d 30, 50 (D.C. Cir. 2011). Although the government contends that the plain-error standard applies here, we need not decide that issue because we conclude that the district court did not err in the first place. We hold that narcotics conspiracy constitutes a predicate act of racketeering and that a RICO conspiracy count is timely if the government charges the defendant within five years of the conspiracy's termination or the defendant's withdrawal.

A person commits the offense of RICO conspiracy by conspiring to "conduct or participate ... in the conduct of [an interstate] enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c)–(d). Section 1961 lists offenses that constitute racketeering activity, including "any offense involving ... the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance ... punishable under any law of the United States." *Id.* § 1961(1)(D). Here, both the first and second retyped indictments charged appellant with conspiracy to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." *See* 21 U.S.C. §§ 841(a)(1), 846.

By its plain terms, section 1961(1)(D)'s language—"any offense involving ... dealing in a controlled substance"—encompasses a Section 846 offense—conspiracy to "distribute, or dispense ... a controlled substance." The structure of section 1961 bolsters that conclusion: section 1961's "subsections (B) and (C) ... conspicuously lack the broad 'any offense involving' language of subsection (D)," instead limiting their predicate acts to those "indictable under specifically enumerated sections of the criminal code." *United States v. Weisman*, 624 F.2d 1118, 1124 (2d Cir. 1980). Several circuits have thus held that section 1961(1)(D) encompasses related conspiracy offenses. *See United States v. Echeverri*, 854 F.2d 638, 648–49 (3d Cir. 1988); *United States v. Phillips*, 664 F.2d 971, 1015 (5th Cir. 1981); *Weisman*, 624 F.2d at 1124. We agree and now hold that a narcotics conspiracy offense constitutes racketeering activity under section 1961(1)(D).

[17] Appellant argues in the alternative that, even if narcotics conspiracy constitutes ***840** a predicate act of racketeering, the RICO conspiracy count was time-barred because it alleged his specific involvement in only one rather than two predicate acts within the limitations period. We disagree.

[18] **[19]** **[20]** The statute of limitations applicable to RICO conspiracy bars prosecution unless an indictment is returned "within five years next after such offense shall have been committed." 18 U.S.C. § 3282. Thus, the statute of limitations begins to run when a defendant last commits the "offense" of RICO conspiracy. A defendant who conspires to participate in an enterprise's affairs "through a pattern of racketeering activity," 18 U.S.C. § 1962(c)—i.e., through commission of at least two predicate acts of racketeering, *id.* § 1961(5)—commits the offense of RICO conspiracy, *id.* § 1962(d). As the Supreme Court has explained, however, "the offense in ... conspiracy prosecutions [is] not the initial act of agreement, but the banding-together against the law effected by that act." *Smith*, 568 U.S. at 113, 133 S.Ct. 714. That offense "continues until termination of the conspiracy or, as to a particular defendant, until that defendant's withdrawal." *Id.* Put simply, "a defendant who has joined a conspiracy continues to violate the law through every moment of [the conspiracy's] existence." *Id.* at 111, 133 S.Ct. 714 (citation omitted).

[21] Absent withdrawal, then, a defendant continues to commit the offense of RICO conspiracy until the date of the conspiracy's termination. It follows that a RICO conspiracy count is timely as long as the government charges the defendant within five years of that date. *See United States v. Saadey*, 393 F.3d 669, 678 (6th Cir. 2005); *United States v. Gonzalez*, 921 F.2d 1530, 1547–48 (11th Cir. 1991); *United States v. Torres Lopez*, 851 F.2d 520, 525 (1st Cir. 1988); *United States v. Persico*, 832 F.2d 705, 713–14 (2d Cir. 1987).

Here, as noted, both the first and second retyped indictments alleged appellant's participation in a narcotics conspiracy as a predicate racketeering act within the limitations period. Thus, both indictments alleged appellant's commission of the offense of RICO conspiracy within the limitations period.

III.

Appellant raises five additional challenges. He contends (i) that certain statements made by witnesses and the prosecution deprived him of a fair trial; (ii) that the district court improperly gave a *Pinkerton* instruction; (iii) that the evidence for two of the CCE murder counts was insufficient; (iv) that the prosecution withheld *Brady* evidence and advanced inconsistent theories of prosecution; and (v) that the testimony of a witness named Donney Alston was secured in

violation of Alston's Fifth Amendment rights. None of those challenges has merit.

[22] Appellant first contends that certain statements made by witnesses and referenced in the prosecution's closing argument deprived him of a fair trial. Appellant particularly emphasizes one statement that suggested that his decision to go to trial proved his continuing participation in the conspiracy. Appellant objected to that testimony and requested the district court to strike it, which the court did. Appellant did not object to the prosecution's reference to that testimony in closing argument. Because appellant failed to preserve any claim for relief beyond striking the testimony, *see United States v. Tate*, 630 F.3d 194, 197 (D.C. Cir. 2011); *United States v. Taylor*, 514 F.3d 1092, 1095–96 (10th Cir. 2008), we review his claim for plain error, *Moore*, 651 F.3d at 50.

He cannot meet that standard. It is neither "clear" nor "obvious" that the district ***841** court should have sua sponte granted curative action beyond striking the challenged testimony. *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Nor did the court's failure to sua sponte instruct the jury again or take other curative action following the prosecution's single reference thereto affect appellant's substantial rights, given the court's previous instruction and the weight of the evidence of appellant's continuing participation in the conspiracy and the comparative dearth of evidence of his purported withdrawal. *See McGill*, 815 F.3d at 890; *Moore*, 651 F.3d at 54.

[23] Appellant next contends that, because of that testimony, the district court should have dismissed the narcotics conspiracy count, and that the court further erred in giving an instruction under *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), as to that conspiracy count and the RICO conspiracy count. But as discussed, the district court did not err in sending those conspiracy counts to the jury. And "once the trial court determined to send the conspiracy charge[s] to the jury, it could not have been error to also give a *Pinkerton* instruction." *United States v. Henning*, 286 F.3d 914, 920 (6th Cir. 2002).

[24] Appellant challenges the sufficiency of the evidence for the CCE murders of Christopher Burton and Scott Downing. In particular, appellant challenges the sufficiency of the connection between those murders and the continuing criminal enterprise. Assuming such a substantive connection is required, *see, e.g.*, *United States v. Aguilar*, 585 F.3d 652, 658 (2d Cir. 2009), a "rational trier of fact could have found" it here, *United States v. Wahl,* 290 F.3d 370, 375 (D.C. Cir. 2002). A rational trier of fact could have found that members of the Gray-Moore conspiracy murdered Christopher Burton in retaliation for an attack on one of its own (appellant). Similarly, a rational trier of fact could have found that members of the conspiracy murdered Scott Downing as part of a botched plan to punish his partner for pulling out of a drug deal. Such murders, committed with the conspiracy's resources to stifle threats to its members or its deals, bear a substantive connection to the continuing criminal enterprise. *See United States v. Aquart*, 912 F.3d 1, 58 (2d Cir. 2018); *Aguilar*, 585 F.3d at 658; *United States v. Jones*, 101 F.3d 1263, 1267 (8th Cir. 1996).

[25] Appellant next contends that the government withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and relied on inconsistent theories in its prosecutions in violation of his due-process rights. Both contentions rely on the same post-trial discovery: the factual proffer in Rodman Lee's plea agreement, which described Lee as the leader of a conspiracy counting Gray among its members. *United States v. Wilkerson*, 656 F. Supp. 2d 22, 31 (D.D.C. 2009) ("*Wilkerson III*"). Appellant contends that that evidence was material to his claim that the Gray-Moore conspiracy had disbanded prior to 1995 and is inconsistent with the prosecution's theory that Lee joined the Gray-Moore conspiracy. Both contentions fail for the same reason: "[c]riminals may of course participate in more than one conspiracy." *Moore*, 651 F.3d at 65. Evidence that Gray participated in the Lee conspiracy is not inconsistent with the persistence of the Gray-Moore conspiracy. Such evidence is immaterial, as we held for the same factual proffer for several of appellant's original co-defendants, *id.*, and the prosecution's theories were not inconsistent, as the district court held, *Wilkerson III*, 656 F. Supp. 2d at 32–34.

***842** **[26]** Finally, Appellant contends that his indictment unlawfully relied on testimony from Donney Alston obtained in violation of Alston's Fifth Amendment privilege. But generally "a defendant does not have standing to complain of an erroneous ruling on the scope of the privilege of a witness." *Ellis v. United States*, 416 F.2d 791, 799 (D.C. Cir. 1969). Nor does any alleged violation of Alston's Fifth-Amendment rights fit the exception for cases in which a constitutional violation would otherwise evade review. *See id.* at 799–800; *accord Barrows v. Jackson*, 346 U.S. 249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953).

* * * * *

For the foregoing reasons, we affirm the judgment of the district court.

So ordered.

All Citations

966 F.3d 828

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-3037 **September Term, 2019**

FILED ON: JULY 24, 2020

UNITED STATES OF AMERICA,
APPELLEE

v.

LARRY WILKERSON,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:00-cr-00157-15)

Before: SRINIVASAN, *Chief Judge*, HENDERSON, *Circuit Judge*, and RANDOLPH, *Senior Circuit Judge*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the District Court's judgment of convictions and sentence appealed from in this cause be affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

Date: July 24, 2020

Opinion for the court filed by Chief Judge Srinivasan.

656 F.Supp.2d 1
United States District Court,
District of Columbia.

UNITED STATES of America
v.
Larry WILKERSON, Defendant.

Cr. No. 00–0157–15 (TFH).
|
July 10, 2009.

Synopsis
Background: Defendant who was convicted of nine counts related to narcotics conspiracy and three murders moved for a new trial.

Holdings: The District Court, Thomas F. Hogan, J., held that:

[1] trial court was not required to ask juror if she harbored concerns about the sufficiency of the evidence before dismissing juror;

[2] court was not required to deny juror's request for dismissal; and

[3] rule of criminal procedure authorized the trial court to discharge juror.

Motion denied.

West Headnotes (5)

[1] Jury
Discharge of juror or jury pending trial

At defendant's trial on charges related to narcotics conspiracy and murder, before dismissing a juror who sent a note to the trial court during deliberations asking to be replaced with an alternate juror, the trial court was not required to ask the juror if she harbored concerns about the sufficiency of the evidence.

1 Cases that cite this headnote

[2] Jury
Discharge of juror or jury pending trial

Courts generally enjoy wide latitude in determining the type of investigation to conduct when request is made to dismiss juror based on allegations of juror misconduct arise.

Cases that cite this headnote

[3] Jury
Discharge of juror or jury pending trial

At defendant's trial on charges related to narcotics conspiracy and murder, after a juror sent a note to the trial court during deliberations asking to be replaced with an alternate juror, the trial court, in order to protect the defendant's right to a unanimous jury verdict, was not required to deny the juror's request for dismissal, since the court found that there was no substantial possibility that the juror's request to be discharged stemmed from doubts the juror had about the sufficiency of the government's evidence. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[4] Jury
Discharge of juror or jury pending trial

In prosecution for charges related to narcotics conspiracy and murder, the rule of criminal procedure authorizing the trial court to discharge a juror during deliberations authorized the trial court to discharge a juror during deliberations on the ground that the juror intended to disregard the governing law. Fed.Rules Cr.Proc.Rule 23(b), 18 U.S.C.A.

Cases that cite this headnote

[5] Jury
Discharge of juror or jury pending trial

The rule of criminal procedure authorizing the trial court to discharge a juror during deliberations permits discharge of a juror

who refuses to apply the governing the law. Fed.Rules Cr.Proc.Rule 23(b), 18 U.S.C.A.

Cases that cite this headnote

1 *MEMORANDUM OPINION

THOMAS F. HOGAN, District Judge.

Pending before the Court is defendant Larry Wilkerson's Motion for a New Trial Based on Violation of Defendant's Sixth Amendment Right to a Unanimous Jury Based on the Court's Improper Removal of Juror Number 0552 During Deliberations ("Improper Removal Motion") (Docket No. 2195). Finding that the removal of Juror Number 0552 from the deliberating jury ***2** was not improper, the Court will deny the motion.

BACKGROUND

After a two-month long trial, on September 22, 2004, a jury found Wilkerson guilty on nine counts related to narcotics conspiracy, RICO conspiracy, and the murders of Marvin Goodman, Christopher Burton, and Scott Downing.[1] Wilkerson filed numerous post-trial motions attacking the validity of the proceeding, of which the Improper Removal Motion is one. Because of these pending post-trial motions, Wilkerson has yet to be sentenced.

1 The jury found Wilkerson not guilty of two counts related to the murder of a fourth person, Darrell Henson.

The Improper Removal Motion concerns the Court's dismissal of Juror 0552[2] from the jury in the midst of deliberations. The jury commenced deliberations on the afternoon of Wednesday, September 8, 2004, and continued to deliberate on the ensuing Thursday, Monday, and Tuesday. On the morning of Wednesday, September 15, 2004, the Court received a handwritten note from Juror 0552 bearing the time of 9:30 a.m., which read as follows:

2 The 0552 designation represents the juror's number from the venire. Within the empaneled jury, this juror's number was 9.

> I, juror number 0552, request that I be replaced with an alternate in the deliberation of Larry Wilkerson. 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 [sic]. 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. Please take this request under strong consideration. I apologize, for the delay in this request, but if it is at all possible please remove me from this deliberation. Sincerely, Juror 0552
>
> Improper Removal Motion, Attach. B (copy of the note).

The Court consulted with counsel about how to proceed and reviewed the leading case law, in particular *United States v. Brown,* 823 F.2d 591 (D.C.Cir.1987) and *United States v. Thomas,* 116 F.3d 606 (2d Cir.1997) (interpreting and following *Brown*). *See* Trial Tr. at 2–25, Sept. 15, 2004. Drawing on these precedents, the Court recognized that this situation required it to strike a delicate balance between two duties: (1) not to intrude upon the process of jury deliberations, and (2) to discharge a juror who engages in misconduct such as not following the law. *See Thomas,* 116 F.3d at 618("Once a jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more, important—safeguarding the secrecy of jury deliberations.") Over the government's objection, the Court conducted a further voir dire of Juror 0552 to confirm her statements in the note. Over defense counsel's opposition, the Court did not ask the juror directly whether her discomfort reflected doubts about the sufficiency of the government's evidence. The colloquy between the Court and Juror 0552 is reproduced in full below:

> COURT: Good morning, ma'am. Thank you for coming in. I appreciate it. For the record I need to identify who you are. I need to ask a couple of questions of your note. You're Juror 0552?
>
> JUROR: Yes.

***3** COURT: Ma'am, you wrote me a note this morning?

JUROR: Yes.

COURT: All right. Thank you. 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?

JUROR: Yes.

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

JUROR: Yes.

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?

JUROR: Yes.

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—

JUROR: The whole thing.

COURT: The whole case?

JUROR: The whole case.

COURT: Let me ask you about the law. You've read the instructions. You've heard my law we're talking about. And it's your opinion you cannot follow the law and apply it in this case? Is that what you're saying?

JUROR: I cannot follow it because I do not agree with it.

COURT: You do not agree with the law?

JUROR: No.

COURT: I don't want to get in your deliberations now.

JUROR: Okay.

COURT: You just don't agree with the law?

JUROR: Uh-uh.

COURT: And you came to this belief after seriously considering you say here that you didn't, you know, you wouldn't ask for this but you didn't feel you felt it was such a serious issue?

JUROR: It is serious. We're dealing with somebody's life.

COURT: And under the law that I've given you you disagree with that? Is that what you're saying?

JUROR: Yes.

COURT: All right. Let me ask you to step back and not talk to the other jurors about your situation and talk with counsel for a minute. Can I do that for a minute, please, ma'am. Thank you very much.

Trial Tr. at 26–28. After further discussion with counsel, *id.* at 28–33, the Court decided to dismiss Juror 0552 pursuant to FED.R.CRIM.P. 23(b)(3) based on her representation, both in the note and during the voir dire, that she strongly disagreed with the laws governing the deliberation and could not follow them. *Id.* at 36–38.

Wilkerson claims that the Court erred in four ways. Improper Removal Mot. at 2. First, he argues procedurally that *Brown* ***4** required the Court to ask Juror 0552 if she harbored concerns about the evidence. Second, Wilkerson asserts that the Court applied an incorrect legal standard to dismiss Juror 0552, as it found that there was no "substantial possibility" that the juror harbored evidentiary concerns even though *Brown* commands an "any possibility" standard. Third, Wilkerson contends on the merits that the record was ambiguous as to whether Juror 0552 had concerns about the evidence, so the Court was wrong to remove her

regardless of her perceived intent to disregard the law. Fourth, Wilkerson submits that, leaving aside concerns about the evidence and assuming *arguendo* that Juror 0552 intended to disregard the law, the prospect of jury nullification is not a proper basis to dismiss a juror under Rule 23(b).

Based on these alleged errors, Wilkerson argues that the Court wrongly dismissed Juror 0552 in violation of his right to a unanimous verdict. *See United States v. Essex,* 734 F.2d 832, 840–41 (D.C.Cir.1984) (finding that right to unanimous verdict derives from Sixth Amendment and Federal Rules of Criminal Procedure). As his remedy, Wilkerson seeks a new trial. In the alternative, he requests that the Court summon Juror 0552 for another voir dire to explore more conclusively whether evidentiary concerns motivated her request to be discharged.

ANALYSIS

FED.R.CRIM.P. 23(b)(3) provides that "[a]fter 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." [3] The D.C. Circuit, interpreting this Rule's "good cause" requirement, [4] has held that "a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the government's evidence." *Brown,* 823 F.2d at 596. "If a court could discharge a juror on the basis of such a request, then the right to a unanimous verdict would be illusory." *Id.*; *see also Thomas,* 116 F.3d at 621 ("To remove a juror because he is unpersuaded by the Government's case is to deny the defendant his right to a unanimous verdict.").

3 In this case, the Court granted Wilkerson's unopposed request to maintain a twelve-member deliberating jury by replacing Juror 0552 with an alternate juror, pursuant to FED.R.CRIM.P. 24(c)(3).

4 At the time *Brown* was decided, Rule 23(b) used the term "just cause" rather than "good cause." The distinction is immaterial. The commentary to the rule states that the wording was changed only because "good cause" is a "more familiar term" than "just cause," and that "[n]o change in substance is intended." *See* FED.R.CRIM.P. 23 Advisory Comm. notes to 2002 Amendments.

While this rule provides a bright line conceptually, its application in practice is not always clear-cut:

> [A court] must, however, confront the problem that the reasons underlying a request for a dismissal will often be unclear [A] court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations. Thus, unless the initial request for dismissal is transparent, the court will likely prove unable to establish conclusively the reasons underlying it. Given these circumstances, ... 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.

Brown, 823 F.2d at 596.

In *Brown,* the D.C. Circuit held that the district court erred in dismissing a juror ***5** because the record indicated a "substantial possibility" that the juror's discharge request stemmed from a belief that the evidence offered at trial was inadequate to support a conviction. *Id.* at 596. The juror in that case sent out a note saying that he was "not able to discharge [his] duties as a member of this jury." *Id.* at 594. Upon questioning by the trial judge, however, the juror stated that his difficulty was with "the way [the act is] written and the way the evidence has been presented." *Id.* The juror noted further that "[i]f the evidence was presented in a fashion in which the law is written, then, maybe, I would be able to discharge my duties." *Id.* The Court of Appeals found that these statements evinced a possibility that the juror wished to quit deliberations because of evidentiary concerns, and that this ambiguity should have blocked the district court from excusing the juror. *Id.* at 597. Accordingly, the Court of Appeals remanded for a new trial.

With this legal framework in mind, the Court below addresses each of Wilkerson's four arguments for why the dismissal of Juror 0552 was improper.

I. Whether the Court was required to ask Juror 0552 if she harbored concerns about the sufficiency of the government's evidence

[1] After receiving Juror 0552's note, the Court consulted with counsel before conducting the voir dire. During that consultation, the following exchange took place between defense counsel and the Court:

> COUNSEL: In light of the Second Circuit's decision that Your Honor was just reading [*Thomas*] I think there should be at least one question about whether she has some difficulty with whether the evidence is sufficient.
>
> COURT: I don't think I can do that. If she wants to volunteer that's one thing. The way it reads I can't do that.

Trial Tr. at 25. In the subsequent colloquy with Juror 0552, the Court did not ask if she had any difficulty with the sufficiency of the evidence. After the colloquy and before the Court ruled, defense counsel again sought unsuccessfully to have the Court ask Juror 0552 whether she had evidentiary concerns. *Id.* at 29–33.

Revisiting this point, Wilkerson now argues that the Court was required to ask Juror 0552 whether she harbored concerns about the sufficiency of the government's evidence. Wilkerson stresses that he did not and does not contend that the Court should inquire into the substance of the juror's views on the merits of the case; rather, Wilkerson contends that a question could have been propounded to elicit a simple "yes" or "no" answer as to whether she had concerns about the evidence. Wilkerson argues that such a question was required particularly in light of Juror 0552's statement that she was experiencing "emotional and mental distress" stemming from "the whole case." According to Wilkerson, this representation possibly signaled that Juror 0552 was struggling with the evidence,[5] triggering a duty for the Court to inquire further to confirm whether she was troubled by the evidence in the case.

[5] The Court disagrees with this contention. Notwithstanding defense counsel's wishful speculation, *see, e.g.,* Def.'s Mem. of P. & A. at 7 & n. 7, the record before the Court indicated no appreciable possibility that Juror 0552 harbored concerns about the evidence. *See infra* Part III.

[2] The Court rejects the proposition that it was required to ask Juror 0552 if she harbored concerns about the sufficiency of the evidence. At most, *Brown* and ***6** *Thomas* indicate that a court *may* ask such a question; nowhere do those cases suggest that a court *must.* To the contrary, courts generally enjoy wide latitude in determining the type of investigation to conduct when allegations of juror misconduct arise. *See Essex,* 734 F.2d at 845 ("The trial court has a great deal of discretion in deciding to excuse a juror for cause. An appellate court ordinarily will not second-guess such a determination...."); *United States v. Boone,* 458 F.3d 321, 329 (3d Cir.2006) ("[W]e emphasize that a district court, based on its unique perspective at the scene, is in a far superior position than this Court to appropriately consider allegations of juror misconduct, both during trial and during deliberations."); *United States v. Baker,* 262 F.3d 124, 129 (2d Cir.2001) ("[W]e have emphasized that the questions whether and to what extent a juror should be questioned regarding the circumstances of a need to be excused are also within the trial judge's sound discretion." (internal quotation and citation omitted)); *United States v. Register,* 182 F.3d 820, 840 (11th Cir.1999) ("[T]he court also enjoys substantial discretion in choosing the investigative procedure to be used in checking for juror misconduct." (internal quotation omitted)); *United States v. Sears,* 663 F.2d 896, 900 (9th Cir.1981) ("The District Court has broad discretion to decide whether to conduct an evidentiary hearing into alleged juror misconduct, and to determine its extent and nature."). Nothing in *Thomas* or *Brown* indicates that this widely accepted rule trusting in a court's sound discretion has been supplanted by an opposite rule directing exactly what questions a court must ask.

Wilkerson's argument demonstrates the folly of attempting "to leap a chasm in two jumps," to borrow a phrase from British Prime Minister David Lloyd George (1863–1945). Wilkerson makes much of the statement in *Brown* that a court "may not delve deeply into a juror's motivations." 823 F.2d at 596. While it could follow from that statement that a court *may* delve *shallowly*, Wilkerson's reading further jumps to the conclusion that a court *must* delve shallowly. Yet, it hardly follows from the statement in *Brown* that a court must delve at all.

To the contrary, the dominant thrust of the reasoning of *Thomas,* in which the Second Circuit elaborated on *Brown,* is that inquiries into a juror's views on the merits of a case are highly disfavored. As between competing values of preserving the secrecy of jury deliberations and preventing jurors from subverting the law, the secrecy of deliberations is paramount:

> Where the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in favor of the lesser of two evils—protecting the secrecy of jury deliberations.... To open the door to the deliberation room any more widely and provide opportunities for broad-ranging judicial inquisitions into the thought processes of jurors would, in our view, destroy the jury system itself.

Thomas, 116 F.3d at 623; *see also id.* at 620 ("The mental processes of a deliberating juror with respect to the merits of the case at hand must remain largely beyond examination and second-guessing, shielded from scrutiny by the court as much as from the eyes and ears of the parties and the public"). Following this precept, the Court in its discretion endeavored to preserve the sanctity of Juror 0552's thought process in this case. Accordingly, it was not error to decline any inquiry into the juror's views of the evidence.

II. Whether the Court applied an incorrect legal standard to dismiss Juror 0552

[3] Wilkerson argues that, in deciding to dismiss Juror 0552, the Court did not ***7** apply the controlling legal standard prescribed in *Brown*: "[I]f 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." 823 F.2d at 596 (emphasis added). According to Wilkerson, rather than this "any possibility" standard, the Court erroneously applied a standard requiring a "substantial possibility." Wilkerson bases his conclusion on part of the oral opinion the Court delivered in dismissing Juror 0552:

> [H]er only expression is she cannot follow the law and she disagrees with it and she reaffirmed that orally. She was concerned about the case and concerned there was a lot at stake and she said a life at stake. That does not indicate to me any *substantial possibility* [of concern about the sufficiency of the evidence] using the language of the *Brown* decision or in the *Thomas* case.

Trial Tr. at 38 (emphasis added). That language did appear in *Brown,* where the D.C. Circuit found a "substantial possibility" that the juror "requested to be discharged because he believed that the evidence offered at trial was inadequate to support a conviction." 823 F.2d at 596. The *Thomas* opinion, however, nowhere uses the phrase "substantial possibility."

As it stated in open court while reviewing the case law, *see* Trial Tr. at 22, the Court rejects a legal distinction between the "any possibility" and "substantial possibility" formulations. As the Eleventh Circuit has explained, these nominally different formulations must be treated as expressions of the same standard: "In *United States v. Brown,* the D.C. Circuit used both the term 'any possibility' and the term 'substantial possibility.' We believe the terms are interchangeable, both meaning a tangible possibility, not just a speculative hope." *United States v. Abbell,* 271 F.3d 1286, 1302 n. 14 (11th Cir.2001) (per curiam).

This reading is necessary because, if taken literally, the "any possibility" standard announced in *Brown* would impose the unworkable requirement of proving a negative beyond the slightest scintilla of wildly speculative possibility. The Ninth Circuit, in adopting a "reasonable possibility" standard, recognized the impracticality of a true "any possibility" approach:

> We emphasize that the standard is any *reasonable* possibility, not any

> possibility whatever [T]o prohibit juror dismissal unless there is no possibility at all that the juror was dismissed because of her position on the merits may be to prohibit dismissal in all cases. We believe that the standard of "reasonable possibility" in this context, like the standard of "reasonable doubt" in the criminal law generally, is a threshold at once appropriately high and conceivably attained.

United States v. Symington, 195 F.3d 1080, 1087 n. 5 (9th Cir.1999) (internal quotation omitted).

As invoked in *Brown,* "any possibility" must be read to refer to some kind of qualified possibility. The Third Circuit, also adopting a "reasonable possibility" standard, reached the same conclusion in its review of the approaches that various Circuits have taken:

> While there is a slight difference in the standards as expressed by the D.C. and Second Circuits ["any possibility"] as compared to the Ninth and Eleventh Circuits ["reasonable possibility" and "substantial possibility"], we believe that the difference is one of clarification and not disagreement. To the extent that there is a difference, we believe that the articulation of the Ninth and Eleventh Circuits is superior. That standard will allow us to avoid abstract "anything is ***8** possible" arguments, provide district courts with some leeway in handling difficult juror issues, and protect each party's right to receive a verdict rendered by a jury that follows the law. At the same time, the standard is by no means lax: it corresponds with the burden for establishing guilt in a criminal trial, so we are confident that it will adequately ensure that jurors are not discharged simply because they are unimpressed by the evidence presented.

United States v. Kemp, 500 F.3d 257, 304 (3d Cir.2007).

It would be helpful for the Court of Appeals to clarify the applicable standard in this Circuit. The Court used "substantial possibility" in its oral opinion because that language appeared in *Brown.*[6] Several other qualifiers —reasonable, appreciable, realistic, genuine, credible, tangible—could be employed. Whatever the magic word, the Court is confident that it correctly applied a standard of qualified possibility and that Wilkerson's argument for a literal "any possibility" standard must fail.

6 The Court also stated that it was "satisfied beyond a reasonable doubt" of its conclusion. Trial Tr. at 38.

III. Whether the record was ambiguous as to Juror 0552's concerns about the evidence and therefore the Court was wrong to discharge her

Challenging the Court's ruling on the merits, Wilkerson asserts that the record was ambiguous as to whether Juror 0552 harbored concerns about the sufficiency of the government's evidence. In light of this alleged ambiguity, Wilkerson argues that, notwithstanding what the Court perceived as Juror 0552's intent to disregard the law, *Brown* prohibited her dismissal from the jury.

The Court rejects Wilkerson's premise that the record exhibits ambiguity. As the Court found when ruling from the bench, the evidence is clear that Juror 0552's request to be dismissed stemmed from her inability to follow the governing law, not from any evidentiary concerns: "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...." Trial Tr. at 38. Indeed, the Court had asked Juror 0552 seven times, in multiple ways, whether she was unable to follow the law as instructed, and each time she confirmed that she could not. *Id.* at 26–28. The Court found that, in her communications, Juror 0552 made no "reference whatsoever to any evidentiary concerns or the strength of the government's evidence or the dissatisfaction with the government's presentation of the case making her

concern[ed] about proof beyond a reasonable doubt....” *Id.* at 38. To the contrary, the Court found that both her written and oral statements confirmed repeatedly that her discharge request was motivated by disagreement with the law: “[H]er only expression is that she cannot follow the law and she disagrees with it and she reaffirmed that orally.” *Id.*

The Court's factual findings are entitled to substantial deference. *See United States v. Taylor,* 487 U.S. 326, 337, 108 S.Ct. 2413, 101 L.Ed.2d 297 (1988) (“Factual findings of a district court are, of course, entitled to substantial deference and will be reversed only for clear error.”). Moreover, Juror 0552's clear-cut statements contrast starkly with the record in *Brown,* where the juror traced his difficulty ***9** to “the way [the act is] written and the way the evidence has been presented,” and then suggested that “[i]f the evidence was presented in a fashion in which the law is written, then, maybe, I would be able to discharge my duties.” *Brown,* 823 F.2d at 594.

Despite such a straightforward record, Wilkerson attempts to divine ambiguity from Juror 0552's statement that she was experiencing “emotional and mental distress” stemming from “the whole case.” In Wilkerson's view, this representation possibly signaled that Juror 0552 was concerned about the sufficiency of the evidence, as “the whole case” would include the evidence in the case.

Wilkerson's reading is simply not credible in light of all the circumstances. Two other considerations explain what Juror 0552 meant about “the whole case” causing her distress. First, her statement later in the colloquy—“It is serious. We're dealing with somebody's life.” Trial Tr. at 28—indicates that what distressed her was the stakes involved in the whole case, not the sufficiency of the evidence. Second, the grueling length and complexity of Wilkerson's trial, as described by the Court in its oral opinion, *see* Trial Tr. at 36, further explains how “the whole case” caused the juror distress. On that second point, it is instructive to note that Juror 0552's reference to “the whole case” was prompted only in response to the Court's inquiry into the health concerns mentioned in her note, not during any discussion of the merits of the case. Specifically, the Court asked whether her distress was related to the jury's deliberations:

> 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—
>
> JUROR: The whole thing.
>
> COURT: The whole case?
>
> JUROR: The whole case.

Id. at 27. What Juror 0552 was trying to communicate was that her distress was not a product of the deliberations specifically, but of the entire, exhausting proceeding.

Indeed, Juror 0552's clarification that her distress was not triggered in particular by the deliberations rebuts an inference that she was struggling with the sufficiency of the evidence. Deliberations—the stage when the jury finally evaluates the evidence in light of the controlling law—are precisely when a juror's dissatisfaction with the sufficiency of the evidence would manifest itself most clearly, yet that phase of the case was not especially distressing to Juror 0552.

Finally, Juror 0552's implication that the deliberations were not a particular cause of distress undercuts Wilkerson's conjecturing, *see* Def.'s Mem. of P. & A. at 7 & n. 7, 17, that she was a holdout juror of the sort that *Brown* and *Thomas* seek to protect from being bullied into seeking a discharge. *See Thomas,* 116 F.3d at 622 (explaining that *Brown* rule guards against wrongful removal in scenario where group of jurors favoring conviction unfairly characterizes a lone holdout juror as unwilling to follow the law). Wilkerson's supposition of a bullied juror is also belied by the absence, in over three days of deliberation, of any note or other indication from the jury demonstrating that tension existed among the jurors. *See* Trial Tr. at 36. Juror 0552 never hinted in any way of such pressure.

In sum, Juror 0552's statements very clearly identify her motivation for seeking to be discharged from the jury: she disagreed with the governing law and felt herself unable to follow it. Contrary to Wilkerson's suggestions about why “the whole ***10** case” would have caused Juror 0552 “emotional and mental distress,” the record viewed in light of all the circumstances exhibits no substantial (or reasonable, appreciable, realistic, genuine, credible, or tangible) possibility that Juror 0552's request for discharge stemmed from doubts about the sufficiency of the government's evidence.

IV. Whether a juror's intent to disregard the law is a proper basis under Rule 23(b) to dismiss that juror

[4] In *Brown,* the D.C. Circuit "specifically [left] open the question ... whether a court may constitutionally apply Rule 23(b) to discharge a juror for refusing to apply the relevant substantive law." 823 F.2d at 597. Taking up this question, Wilkerson contends that, even if Juror 0552 plainly intended to disregard the law, such jury nullification is not a proper basis to dismiss a juror under Rule 23(b). He offers minimal substantive discussion in support of this proposition. *See* Def.'s Mem. of P. & A. at 13 n. 9.

[5] This Court now answers that Rule 23(b) permits discharge of a juror who refuses to apply the governing the law. Facing the same issue in *Thomas,* the Second Circuit, with Judge Cabranes writing, fulminated against the theory that Wilkerson advances:

> We categorically reject the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent. Accordingly, we conclude that a juror who intends to nullify the applicable law is no less subject to dismissal than is a juror who disregards the court's instructions due to an event or relationship that renders him biased or otherwise unable to render a fair and impartial verdict.

116 F.3d at 614. The Second Circuit continued that:

> Inasmuch as no juror has a right to engage in nullification—and, on the contrary, is in violation of a juror's sworn duty to follow the law as instructed by the court—trial courts have the duty to forestall or prevent such conduct, whether by firm instruction or admonition or, where it does not interfere with guaranteed rights or the need to protect the secrecy of jury deliberations, by dismissal of an offending juror from the venire or the jury.

Id. at 616 (internal reference omitted). Addressing precisely the point that Wilkerson raises, the Second Circuit held that "a juror who is determined to ignore his duty, who refuses to follow the court's instructions on the law and who thus threatens to undermine the impartial determination of justice based on law, is subject to dismissal during the course of deliberations under Rule 23(b)." *Id.* at 617 (internal quotation omitted); *accord Kemp,* 500 F.3d at 303 ("[C]ourts agree that a district court has the authority to dismiss a juror—even during deliberations—if that juror refuses to apply the law or to follow the court's instructions." (internal quotation omitted)); *Abbell,* 271 F.3d at 1302 (" 'Just cause' exists to dismiss a juror when that juror refuses to apply the law or to follow the court's instructions."). The Court agrees with the Second, Third, and Eleventh Circuits, and rejects Wilkerson's claim.

CONCLUSION

The Court finds no merit in Wilkerson's arguments that the dismissal of Juror 0552 was improper. It was not necessary to ask the juror whether she harbored concerns about the sufficiency of the evidence, nor did the record contain ambiguity on that point. The Court applied the correct legal standard in reaching its decision to ***11** discharge the juror, and Rule 23(b) permitted it because she had expressed her intent to disregard the law. Because all of Wilkerson's arguments fail, the Court will deny his motion.

An order accompanies this Memorandum Opinion.

All Citations

656 F.Supp.2d 1

End of Document

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-3037 **September Term, 2020**

1:00-cr-00157-TFH-15

Filed On: October 6, 2020

United States of America,

Appellee

v.

Larry Wilkerson,

Appellant

BEFORE: Srinivasan, Chief Judge, Henderson, Circuit Judge, and Randolph, Senior Circuit Judge

O R D E R

Upon consideration of appellant's petition for panel rehearing filed on September 8, 2020, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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United States of America,

Appellee

v.

Larry Wilkerson,

Appellant

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Garland, Millett, Pillard, Wilkins, Katsas, Rao, and Walker, Circuit Judges; and Randolph, Senior Circuit Judge

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

Sept. 5
9:30 A.M.

I, juror number 0552, request that I be replaced with an alternate in the deliberation of Harry Wilkerson. I strongly disagree with the laws and instructions that goveen 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. Please take this request under strong consideration. I apologize, for the delay in this request, but if it is at all possible please remove me from this deliberation.

DE 2528?

Sincerely,
Juror 0552

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA .
Plaintiff, .
. Docket No. CR-00-157-15
.
LARRY WILKERSON, . Washington, D.C.
. September 15, 2004
.
Defendant. .
. . . . . .

Day 33 - AM SESSION
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE CHIEF JUDGE THOMAS HOGAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Court Reporter: Cathryn J. Jones, RPR
Official Court Reporter
Room 4808A, US District Court
333 Constitution Ave., NW
Washington, D.C. 20001

Proceedings recorded by machine shorthand, transcript produced by computer-aided transcription.

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PROCEEDINGS

THE DEPUTY CLERK: This is criminal record 00-157, United States versus Larry Wilkerson. Glenn Kirschner present for the government. Sebastian Graber and Christopher Leibig for the defendant. Mr. Wilkerson is now present, Your Honor.

THE COURT: We received a notice. Counsel have been made apprised of the note. I will read it for the record so it's in the record. From Juror number 0552 -- do we know which position that is?

THE DEPUTY CLERK: Seat number nine, Your Honor.

MR. GRABER: It's in the back, Your Honor. The second from the monitor.

THE COURT: As follows, and this is the note 9:30 a.m., so it was written first thing this morning. Today is Wednesday, September 15th. They went out last week, Tuesday afternoon. In the latter part of the afternoon, deliberated Wednesday and Thursday and deliberated Monday and Tuesday. So they've had four full days of deliberation and a few hours Tuesday afternoon.

"I Juror 0552, request that I be replaced with an alternate in the deliberation of Larry Wilkerson. I strongly disagree with

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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 period.

In addition, I am experiencing emotional and mental distress. This alone I felt was enough for me to ask for a replacement. I would not be asking this for this request if I didn't feel that this was a serious issue. Please take this requesting under strong consideration. I apologize for the delay in this request, but if it is all possible please remove me from this deliberation. Sincerely, Juror 0552."

So I would like to speak with counsel as they look at the possibilities of how we handle this. Either under rule 23(b)(3) I believe it is. Or and the guidance United States versus Brown in this circuit. I remember that case very well, a Mikva case. And I think recently a couple of judges addressed something similar although the circumstances were a little different in each one of them.

As to their input on this I assume we'll

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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 certain or a health base concern. So let me hear from the government and I'll hear from Mr. Graber for the defendant.

MR. KIRSCHNER: Thank you. Good morning, Your Honor.

THE COURT: Good morning.

MR. KIRSCHNER: Your Honor, we wrestled with this same situation albeit a slightly different factual setting as we have here. We wrestled with it in trial two. I think the Court's first inclination was the same as the government's first inclination, which is we may have to individually voir dire this juror. However, upon reflection and consultation with the chief of our appellant section and review and re-review of the note and the case law we actually don't know that that's necessary and here's why.

The Brown case has perhaps the highest and most rigorous standard when it comes to excusing a juror for good cause. And that is the any possibility test. A number of courts in the aftermath of Brown, notably the 11th Circuit and the 2nd Circuit, in the Abell case and the Thomas case respectfully. I believe Thomas was the 2nd Circuit, have said well, we

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certainly don't interpret the any possibility test as, as being the any possibility test because anything is theoretically possible.

They basically interpret it as some substantial possibility that the juror's decision or the juror's request for an excusal as the case may be is based on the evidence. If there is some substantial possibility that the juror's decision or the juror's problem is based on the evidence in the case, you know, then the Court is not permitted to remove that juror. What we have here factually Your Honor as the record stands is we suggest a situation where the note itself passes the any possibility test, which is the highest most exacting test which is presently the test in this jurisdiction.

I guess if you look at the note, Your Honor, this juror has said clearly and unequivocally that she, I believe it's a juror in the back row, she strongly agrees with the law and the instructions. And I believe it is the Abell case at 271 F.3rd 1286, the 11th Circuit case decided in 2001, that says, "A juror's stated refusal to follow either the law or the instructions warrants removal." This juror has unequivocally said she can follow neither the law nor the instructions that govern this deliberation. And

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she says quote "I cannot follow them." Because she feels so strongly about this in her note it may affect her decision and could possibly lead to a bias decision.

There is nothing in this note that suggests that this is an evidentiary based issue. We believe that based on this note alone this juror should be removed and we will defer to the Court and to the defense as to whether they want, the defense wants to proceed with 11 or replace the removed juror with an alternate. But we don't think individual voir dire is necessary because the strength and the clarity and the conviction stated in this note that disqualifies this juror on it's four corners.

THE COURT: Thank you. She did say or he, he or she did say that they cannot follow the law or the instructions. I recognize that. But let me hear from the Mr. Graber.

MR. KIRSCHNER: Your Honor, can I add one point. Because even the Brown court cautions against going into the reasons for her refusal to follow the law and instructions. And it specifically the Brown opinion, it says, "That the Court may not delve deeply into a juror's motivations because it, the Court may not intrude on the secrecy of the jury's

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deliberations." That's the Brown court militating against to the extent possible delving into why this juror has said I cannot and will not follow the law and the instructions. So that again we think even the Brown court's caution militates against individual questioning.

THE COURT: All right. Thank you. Mr. Graber.

MR. GRABER: Thank you, Your Honor. Your Honor, the our view is at minimum the court should voir dire the juror to find out whether or not this is an evidentiary at all based concern. Because Mr. Wilkerson we feel very strongly he's entitled to this juror unless there's, it's clearly a matter of simply juror nullification. And just because the words used in this note which is a fairly brief note in our view is not sufficient to deprive Mr. Wilkerson of his right to have this jury decide this case.

The other point I have not unlike Mr. Kirschner I have not read through the Brown decision. I got just now a copy of it from Mr. Kirschner. I haven't had an opportunity to read through the whole thing. And so I feel somewhat at a lost to argue from any kind of depth of knowledge what the Brown case stands for. It appears to be concerned

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about dismissal of jurors if there's any possibility that a juror is having difficulty based on how the law applies to the facts of the case.

THE COURT: Okay. I had another Brown case well in a sense it was tried when I was here for -- actually the printout is wrong. It was tried by Aubrey Robinson. It says Spottswood Robinson was the trial judge. Aubrey Robinson tried it. It was a multiple month to month long trial and had weeks and weeks of deliberations and several notes saying it was hung. And then this one note came out from this one juror saying I can't follow the law. In questioning that juror he said I can't follow the law, but I'm concerned about the evidence. That's what really blew it when he said that.

Judge Robinson had felt he already said he couldn't follow the law, so it didn't make any difference. Once he refused to follow the law so he excused him and he got it back. And the Brown case I think is far reaching as they go. I've looked at this before in some other context about the Rule 23(b)(3) and what happens and other circuits have not fallen under circuit law.

MR. GRABER: Because of Brown there was an inquiry if the court had stopped. I did get a chance

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to look at the colloquy that's in the Court of Appeals decision. And clearly the jurors indicated at first glance there was a problem with the law nullification issue. And then as the Court was talking to the jury it came out that there was an evidentiary basis for it, which I think is why the court should inquire of the juror. I did get the transcript of the voir dire of this juror, which was July 16, 2004 the a.m. session.

And this juror was under some questions asked by Ms. Carlson-Lieber about whether she could be fair to law enforcement. Because she had expressed a view that some, in her view a lot of people are unjustly convicted. She mentioned DNA evidence and that sort of thing. And she indicated that she could follow the evidence in the case notwithstanding that view and that she could be fair to both sides. So she has previously indicated a willingness to following the law. And so I just wanted to point that out for the record.

THE COURT: I appreciate your looking that up.

MR. GRABER: What she said was Ms. Carlson-Lieber after the juror mentioned that some people she thought were unjustly convicted.

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Ms. Carlson-Lieber said:

"That's fair. With sort of that view some what can be characterized as unjustice within the criminal justice system where folks are doing time they should not be."

As a backdrop it says, "You know, a criminal case involving allegations about drug dealing and murders and all sorts of criminal activity that the government alleges Mr. Wilkerson was involved in. Do you think that you'd feel comfortable putting aside sort of your concerns about that type of problem and face the evidence in this case? I'm sorry view the evidence in this case fairly based just on what you hear and see in this courtroom and not bring in with you your concerns about what's happened to other folks in other places.

THE JUROR: Right. I could view this case fairly based upon from what I've seen and concerned about other people's injustice. But it's about what's going to be proved here."

And then Ms. Carlson-Lieber says okay, thank you. Thank you very much.

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So I think in light of that we should at least, the court should voir dire the juror and determine if her problem is based on the facts as the law applies to those facts. And if that's the case then that's the situation where we definitely believe the juror should continue to sit. Her other concerns about being under mental distress and so forth, experiencing emotional and mental distress. Being on a jury is note an easy task. And I think she should not be excused simply because of that.

THE COURT: She did say that that alone I felt was enough for me to ask for a replacement. On the Brown case correct, the note was one that said the defendant was not guilty. And the court answered that note. And the next day the juror came in with a note saying I cannot discharge my duty as a member of the Jury. And the court did a very brief voir dire about the health problem.

And that, "It's not a personality problem." And then he volunteered, "It's the way the RICO conspiracy act reads." And the judge he asked, "Do you understand it?" He said, "Yes. But at this point I cannot go along with that act. If I had known at the beginning of the trial what the act said I would not have said I could be impartial."

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And then he goes onto say, "I disagree with it." And Judge Robinson says, "You disagree with the law?"

He said, "Yes.

And if you had known that you would have indicated on the voir dire?

Yes sir."

The Court said, "When I asked you the question, would you follow the court's instructions, you would have said no, because I don't like the law?"

Then he says, "It's the way it's written and the way the evidence has been presented."

And he says, "If the evidence was presented in a fashion which the law is written, then, maybe, I would be able to discharge my duties."

The court cut him off said, I don't want to hear your individual verdict or expression. I just want to know finally what the problem is since you've been deliberating for five weeks and haven't missed a beat until now.

When he talked about the evidence and how it applies that's one that drove the court to write as they did. Although I think when it talks about any possibility I think also as Judge Mikva wrote that. Judge Ginsburg is on it and Bork.

United States District Court
For the District of Columbia
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Official Court Reporter

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MR. GRABER: I don't believe Judge Ginsburg was sitting, Your Honor.
THE COURT: Mikva, Bork and Ginsburg.
MR. GRABER: I think the older -- not Justice Ginsburg?
THE COURT: No. The present chief judge.
MR. GRABER: I think the holding is on page --
THE COURT: "A court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations. 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."
And then, "The record evidence in this case indicates a substantial possibility juror, Spriggs requested to be discharged because he believed that the evidence offered at trial was inadequate to support a conviction."
MR. GRABER: I think what the court --
THE COURT: They leave open whether the constitutionally apply Rule 23(b) to discharge a juror for refusing to apply the law. Although other court

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-- this was an '86 case involved. The Rule was amended in '83 to add this striking a juror for good cause. Which really came about for long trials where a juror got sick, which is the original basis of that Rule, the original juror began ill. All right.
MR. GRABER: So I think the court should voir dire this juror in a careful way. And so we can make a determination if there's any evidentiary basis whatsoever and the juror should continue to sit is our view.
THE COURT: Well it's a very difficult and delicate matter. You do not want to intrude upon the jury process whatsoever in their deliberations and the deliberations of the other jurors. They've been deliberating four days approximately full-time and a little bit of an earlier --
MR. GRABER: It's been three full days, I believe.
THE COURT: Is it three full days and a couple of hours.
MR. GRABER: They went out on Wednesday afternoon --
THE COURT: I thought it was Tuesday.
MR. KIRSCHNER: Late Wednesday afternoon.
THE COURT: Three full days plus a couple of

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hours.
MR. KIRSCHNER: If the Court will permit me, I want to comment on one or two things Mr. Graber said. And I think most importantly Mr. Graber said well, they individually voir dired Mr. Spriggs. They print his name in the Brown opinion. But I think what we have to look at is the question that Mr. Spriggs or the note Mr. Spriggs sent to court that that sort of militated in favor of individual voir dire. He said I Bernard Spriggs am not able to discharge my duties as a member of this jury period. I think that leaves no legal room.
THE COURT: That's after a note when he said, someone sent a note out asking when do you find a defendant not guilty?
MR. KIRSCHNER: Correct. Suggesting --
THE COURT: One vote of not guilty is that sufficient.
MR. KIRSCHNER: -- suggesting maybe they had reached some verdicts. But I think then when the juror sends out a note saying I can't discharge my duties the court has no option but to individually voir dire even given Brown's caution against delving into such matters. We think that really the primary question or answer for Mr. Spriggs was the one that

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the court quoted last which is that when Mr. Spriggs, the juror said, if the evidence was presented in a fashion in which the law is written then maybe I would be able to discharge my duties. That is clearly an announcement or arguably an announcement of an evidentiary based problem even though he had made conflicting replies earlier that he could not follow the law at all as written.
Here again because we don't have a situation we think lends itself to delving into this juror's concerns when the juror announces I can't follow the law and I can't follow the instructions, you know, the inclination is perhaps natural for a juror if you begin quizzing him or her to either be led into saying well maybe it's the evidence too or maybe it's this or that and we'll delving into things that we don't think we need to delve into given the clear and unequivocally announcement from this juror that she can't follow the law and or the instructions.
And the final point was that the juror may have said before during voir dire at the beginning of the case, she may have very well said and she may have believed I can follow the law and instructions. Of course, that was at a time when she hadn't been instructed. We do our best to apprise them during

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individual voir dire through the questionnaire and through direct questions of how we think the case may play out. But it's not until she receives the final instructions and the law and then comes back with after three days, look, I can't follow the law and the instructions that the government suggests that that note really ought to be the beginning and the ending of the inquiry.

THE COURT: All right. What I'd like to do is have the Brown case here. I don't have a couple of the cases. I have the circuits in front of me. I do have the synopsis, but I want to look at a couple of those that may have looked at this exact issue since our court is not Brown case specifically reserved on this issue; although, I think it's up there now perhaps. It may be up there now on the case stream crew and being argued.

MR. KIRSCHNER: If it would exists I have that section of the government's brief which has been filed in the case that addresses the removal of the juror for slightly different reasons in that case, but if the court wants I'll provide it.

THE COURT: I want to get the Abell case and the other case from the 11th Circuit it was you mentioned that did not follow the law or the

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instructions and look at those for a few minutes and come back out. When will they go to lunch?

THE MARSHAL: 12:30.

THE COURT: I want to resolve this before they go out for lunch. Let me go look at these cases and come right back. We'll take a short break and be back and see where we're going to go on this.

[Thereupon, recess taken at 11:57 a.m., resuming at 12:25 p.m.]

THE COURT: All right. I've gone through the case law cited, looked at some other case law as well of the circuits that have had to consider this problem since the 1983 amendment to the Rule 23(b) allowing the court to remove a juror for incapacitated unable to serve for a particular reason. And the discussion in the 2nd Circuit case by Judge Cabranes in the Thomas case is instructive of that is 116 F.3rd 606 along with the 11th Circuit cases that have had opportunity to develop the law on this beyond the Brown case which also referred to the Brown case and discussed it as well.

The U.S. versus Ge -- Geffrard, 87 F3rd 448, 11th Circuit, with regard to a juror during deliberations submitting a letter saying religiously she could not follow the law in the case. And that

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the victim's are entrapped, although there was no instruction about entrapment. And it was not an issue in the case. And she was prepared to nullify the law set forth in the court's instructions. And the letter alone they held that was enough to dismiss the juror. And then in the subsequent Abell case as mentioned by the government in the same circuit, somewhat similar to concerns we have; although, I think our Brown case is most closely on point along with this Thomas of the 2nd Circuit.

Judge Cabranes goes in great detail discussing three things. One he concludes is the obvious relation to the juror's oath and duty he refused to apply the law set forth by the court constitutes grounds for dismissal under 23(b). They conclude also the importance of safeguarding the secrecy of the jury deliberation room coupled with the need to protect against dismissal of a juror based upon the doubts about the guilt of a criminal defendant require that a juror be dismissed for refusal to apply the law instructed only where the record is clear beyond doubt. And they define that later as beyond a reasonable doubt that the juror is not in fact simply unpersuaded by the prosecution's case. And there they felt the court erred in

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dismissing the juror after giving the juror and other jurors about the problems where he indicated he had evidentiary concerns as well as other concerns.

But he goes great detail in the secrecy of the jury deliberations. And the court's fundamental that is and that the trial court cannot in any way intercede in their deliberations or learn of their deliberations. Citing judge's duty to dismiss juror's misconduct comes into complex with the duty that is equally if not more important safeguarding the secrecy of jury deliberations. Courts face a delicate and complex task whenever they undertake to investigative reports of juror misconduct or bias during the course of a trial. This undertaking is a particularly sensitive where, as here, the court endeavors to investigate allegations of juror misconduct during deliberations.

So the general rule, the judge presiding at a trial has no right to know how a jury, or any individual juror, has deliberated or how a decision has been reached. How they reached a decision. It goes into great length in many pages discussing that. It says, "There are strict limitations on intrusion from those who participate in the trial process including counsel and the presiding judge. The court

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must limit its own inquiries of jurors once the deliberations have begun." The underlying facts in this case the judge had done extensive ex parte in camera rulings of other jurors concerning the problem. Very different than the normal process. He had done a lot of talking with the jurors on the record but out of the presence of counsel and then revealed to counsel what some of the things the jurors were saying. I think some of the discussions where Judge Cabranes was advising his District judges about how far they should go doing that.

"In many cases, the presiding judge is able to determine whether there's just cause to dismiss a deliberating juror without any inquiry into the juror's thoughts on the merits of the case." And he talks about incapacitation, et cetera. "The need to protect the secrecy of jury deliberations begins to limit the court's investigatory powers where the asserted basis for a deliberating juror's possible dismissal is the juror's alleged bias or partiality."

And then he says, "Where the presiding judge receives reports that a deliberating juror intent on defying the court's instructions on the law, the judge may well have no means of investigating the allegation without unduly breaching the secrecy of deliberations.

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Rather, to 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 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 purposefully disregarding the court's instructions on the law, and the juror who is simply unpersuaded by the Government's evidence. Yet this distinction is a critical one." Then they cite the Brown rule. The Brown rule is determined really being not just any possibility, but a substantial possibility. I believe the language in the Brown or the Brown court was talking about despite the phrase used on the record any possibility.

They say, "We adopt the Brown rule as an appropriate limitation on a juror's dismissal in any case where the juror allegedly refuses to allow the law. Whether the juror himself requests to be discharged from duty or as in the case under advisement, fellow jurors raised allegations of this form of misconduct." And they say it has to be a high evidentiary standard before he would strike a juror.

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Or another way of saying lowering evidentiary standard could lead to the removal of jurors where they shouldn't be removed.

They rule 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. So they say there has to be standard -- buttress is the course principle of the secrecy of jury deliberations, leaves open the possibility that jurors will engage in irresponsible activity that will remain outside the court's powers to investigate or correct, but it's a public policy decision.

The reason they gave in this one is that the juror who was excused besides saying he didn't like the law assured the court that his opinions was based upon his view of the evidence. I want substantive evidence against him. I want to know it's clear in my mind guilt beyond a reasonable doubt. And that's what the juror said when the court asked him about his concerns. He said he didn't like the law as well which really is similar to the Brown case.

Here I have a juror saying they will not follow the law and instructions. Government says that's sufficient without an inquiry because of the

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need to protect the secrecy of the jury deliberations. Defense says we should do an voir dire. 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 the instructions. Or in good conscience or cannot follow the instructions despite the oath she's taken to follow that. And that as she said means that she cannot deliberate in this matter.

In the Brown case Judge Robinson had asked -- she also raised a health issue, but I'm not sure if that's necessary at this point to go into that with her. Judge Robinson had the note that had the one simple statement. He confirmed he had written that note. The note obviously was not clear. Had simply asked he had volunteered he could not follow the conspiracy laws as it reads. And next discussion he had with him, he said, obviously Robinson asked him you agree with the law? He said, he would have indicated that in voir dire when he said he couldn't be fair. Then he answered about the evidence

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presented in the fashion written. That was in conjunction with the note that had been sent out about the one juror vote not guilty.

Here we've had not notes although they've had three days and a couple of hours deliberations with the jury apparently working when we get this one note. Over objection of the Government I'm going to have the Juror 0552 come in and briefly ask her a few questions about this note and whether she can follow the law on her oath to do so or not, and be guided by her answers. All right.

MR. GRABER: In 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.

THE COURT: I don't think I can do that. If she wants to volunteer that's one thing. The way it reads I can't do that.

THE MARSHAL: Your Honor, Juror 0552.

THE COURT: Good morning, ma'am. Thank you for coming in. I appreciate it. For the record I need to identify who you are. I need to ask a couple of questions of your note. You're Juror 0552?

THE JUROR: Yes.

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THE COURT: Ma'am, you wrote me a note this morning?

THE JUROR: Yes.

THE COURT: All right. Thank you. 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

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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.

THE COURT: Let me ask you about the law. You've read the instructions. You've heard my law we're talking about. And it's your opinion you cannot follow the law and apply it in this case? Is that what you're saying?

THE JUROR: I cannot follow it because I do not agree with it.

THE COURT: You do not agree with the law?

THE JUROR: No.

THE COURT: I don't want to get in your deliberations now.

THE JUROR: Okay.

THE COURT: You just don't agree with the law?

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THE JUROR: Uh-uh.

THE COURT: And you came to this belief after seriously considering you say here that you didn't, you know, you wouldn't ask for this but you didn't feel you felt it was such a serious issue?

THE JUROR: It is serious. We're dealing with somebody's life.

THE COURT: And under the law that I've given you you disagree with that? Is that what you're saying?

THE JUROR: Yes.

THE COURT: All right. Let me ask you to step back and not talk to the other jurors about your situation and talk with counsel for a minute. Can I do that for a minute, please, ma'am. Thank you very much.

[Thereupon, juror exits courtroom.]

THE COURT: All right. Any comment? Start with the government.

MR. KIRSCHNER: This reinforces that she cannot, will not follow the law. She was clear and unequivocal and forceful about that. And it reinforces what she already informed us through her note. I think as the opinion say we really have a duty under these circumstances to dismiss this juror.

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THE COURT: Well it's certainly discerning of a juror to come in like this after being on trial several weeks and listening to the instructions and voir dire where she indicates she'd follow the law. Let me hear from Mr. Graber on behalf of Mr. Wilkerson.

MR. GRABER: Your Honor, the juror indicated that her problem is she did say she had a problem with the law. She also said she had the problem with the whole case. And our view is that 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 part of the problem is having to do with whether the evidence in the case -- she's having a problem with applying the law to that evidence or because this in the Thomas case the part, the court read this part which is at 621. The whole difficulty, the whole point the law is making is if it's at all a fact based sort of concern then Mr. Wilkerson has a right to that juror.

And our view is even if it's total law based he still under the Sixth Amendment has a right to that juror. I understand that our circuit has left that issue open so-called nullification. I don't know if

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that's the proper term for it. But 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.

But in addition to that, what the Thomas case is saying that there must be at least enough of a questioning to determine whether it is at all an evidence based certain. And simply asking if she has problems with the law I think is not sufficient to get that out from the juror. She did say she had a problem with the whole case.

THE COURT: She said it's the whole case. It's the whole case. I'll look at that language in a second on the transcript.

MR. KIRSCHNER: Said it's the whole thing when the court was asking about the law and the instructions. She said it's the whole thing.

THE COURT: That was as to her health concern. Let me look at the transcript for a second.

[Thereupon, the question was read back by the Reporter.]

THE COURT: She did say in response to the evidence the question was of the law it's a, it's her concerns, but I don't think she's got an evidentiary issue. Under the case law it's very difficult for the

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court to that I've given you you disagree with that is that what you're saying? You think it's a murder issue here and there's not enough evidence. Then I'm getting into deliberations and I cannot do that. Judge Cabranes wrote a very interesting opinion on that. He understand the -- let me go look at his language again because I'm guided by that and our circuit's statement. And he cited our circuit twice, three times in the Brown rule in proving it.

MR. GRABER: I understand the sensitivity to that, 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 asked whether any part of her problem has to do with the sufficient -- the evidence --

THE COURT: The problem with that is I'll get into -- they haven't finished their deliberations. It's a long trial. They've have three days worth. They haven't reviewed it all yet, so I'm sort of breaking into the beginning or middle deliberations trying to get her to, inquiring about various concerns. I'm very leery. I recognize that's a problem's attention but it's very hard to come to grip with. The law in that circuit and other circuit concluded it.

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MR. GRABER: Because it could be the laws applied to the facts.

THE COURT: She didn't say that in her note to me. Her note was very clear. She wants to be relieved of the duty because she disagree with the law. She didn't say everybody wanted to vote not guilty. She didn't say everybody wants to vote guilty. That's what happened in the Brown case. Indication that he was a lone hold out. Obviously Robinson excused him. I'm trying to see if I have in the records they talk about here Thomas case and the Brown case.

MR. GRABER: Your Honor read this was 116 F.3rd 621. "Rather, to determine whether a juror has bent on defiant disregard of the applicable law, the court would generally need to intrude into the juror's thought process." That's what Your honor's concerned about. "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's purposedly disregarding the court's instructions on the law and the juror who is simply unpersuaded by the Government's evidence."

And it seems like some sort of a question

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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?

THE COURT: All right. Thank you. What I'm going to do is as follows in reading the Brown case and the Thomas case together in that same paragraph Judge Cabranes has just referred to defense counsel Brown at 596, Brown, Judge Mikva said, "A court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations. Thus, unless the initial request for a juror's dismissal is transparent, the court will likely prove unable to establish conclusively for 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 sufficient of the government's evidence, the court must deny the request."

It goes onto to say, "We adopt the Brown rule as an appropriate limitation on juror's dismissal in any case where the juror allegedly refuses to follow law. Given the necessary limitation on a court's investigatory authorize in cases involving a juror's alleged refusal to follow the law,

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it goes to evidentiary standard which I already referred to and the need to be very careful obviously considering removal of a juror." I don't think I've ever removed a juror in my 21 years frankly. "And again cites according to Brown case for the record raises any possible that the juror's views on the merits of the case, rather a purposeful intent to disregard the court's instructions, underlay the request that he be discharged, the juror must not be dismissed.

Evidentiary standard protects not only against the wrongful removal of jurors; it also serves to protect against overly intrusive judicial inquiries into substance of the jury's deliberations. A presiding judge faced with anything but unambiguous evidence that a juror refuses to apply the law as instructed need go no further in his investigation of the alleged nullification; in such circumstances, the juror not subject to dismissal on the basis of his alleged refusal to follow the court's instructions."

And as I said earlier they discuss what that high asked and go to the Ginsberg goes to the Brown case that the juror didn't like the law. The juror said it's the way it's written and the way the evidence has been presented.

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In other words, I asked this juror she said the law and instructions governing deliberations you cannot follow them. Could you strongly disagree. Was that true? She said, yes. It's a life at stake. This juror in the Brown case added the way the evidence has been presented. And the court asked another question, "If the law were different could you go along with it?" He answered, "If the evidence was entered in a fashion the way the law is written maybe I can discharge my duties." Then the court cut him off because the court realized he was getting into the jury deliberations.

So he said, "I don't want to know anything about your individual verdict or expressions. I'm trying to find out the nature of your problem because you've been here through the 3rd of March and haven't missed a beat." And that was the end of the colloquy. The circuit then set the standard as a possibility that as an evidentiary issue and not a legal issue and said you can't excuse him even if he said he had a legal issue but that is an issue with the law. And reserved whether or not constitutionally applies 23(b) juror refusing to apply the relevant substantive law.

I think that's the point answered in the Thomas case where they conclude an obvious violation

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of juror's duty to apply the law set forth by the court constitute grounds for dismissal. But only where the report is clear beyond doubt they find that basically as a reasonable doubt the jury has not been unpersuaded by the prosecution's case.

Here the record evidence is as follows and I'm going to make findings. And that is, I'm going to excuse Juror 0552 under 23(b) following the case law and rule for the following reasons; they have sent no notes out of substance only notes asking for water and when they'll be able to go home in the evening, things like that since the instruction of this case last Wednesday afternoon, that the case is in its 30th day at this time, I believe including deliberations. And in that process this long trial they've heard a tremendous amount of evidence and testimony. And have been given a complex instructions and verdict form involving a conspiracy, narcotics conspiracy of many years in length. RICO conspiracy with multiple acts, racketeering acts and four murders, aiding and abetting direct involvement theories against Mr. Wilkerson deliberated upon.

After the instructions which had been given orally and in written form to each of the jurors they have been deliberating as I said for three days and

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approximately two hours until 9:30 this morning when the note was first sent out. It's now 12:45. The note I've already read for the record, but I asked this lady asked to be replaced because she strongly disagrees with the law that govern this deliberation and cannot follow them. No indication in that first paragraph anything about any evidentiary concerns or cause me to hesitate to apply the law she didn't like.

Next statement is, Because I feel so strongly about this it may affect my decisions in this matter. In other words, a possible bias decision. She understands her concerns and her obligations and is telling the court she cannot be a juror in this case, so like voir dire in picking her she would have been stricken for cause.

In addition, I am experiencing emotional mental distress. I asked about that. She said the whole case, the whole thing. This alone I felt is enough for me to ask for replacement. I would not replacement on the grounds at this time. I would not be asking for this request if I didn't feel it was a serious issue. I asked her about that she said she did. Please take this request under strong consideration.

Based upon her equivocal statements in her

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letter without any reference whatsoever to any evidentiary concerns or the strength of the government's evidence or the dissatisfaction with the government's presentation of the case making her concern about proof beyond a reasonable doubt about her only expression is she cannot follow the law and she disagrees with it and she reaffirmed that orally. She was concerned about the case and concerned there was a lot at stake and she said a life at stake. That does not indicate to me 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 that I had mentioned.

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. Exercising as I understand it the right that the court has recognizing that the serious nature of this decision as I've indicated in 21 years plus that I have not excused a juror previously for concerns about deliberations and ability to follow the law. The rule does not provide

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as I have in front of me here for a substitution necessarily.

The language behind the rule indicates that it is better not to substitute because of various problems that occur. That is the 11 or majority nine or ten may have already made up their minds and it may be pressure for one new one to come in. You come in after the people have been operating as a unit for a long period of time. And it puts them at a disadvantage when they're attempting to review the evidence and discuss it. Also the fact they must have been tainted during their week or more that they've been excused, the week they've been excused at this point. So the court is not going to replace them with another juror.

MR. GRABER: Can I be heard on that point?

THE COURT: I'll give you an opportunity. I'm sorry.

MR. GRABER: We request that the court invoke rule 24(c)(3).

THE COURT: Let me look at that. I didn't have it.

MR. GRABER: 24(c)(3) which does allow for the replacing a juror that has been discharged as an alternate.

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THE COURT: That's the alternate jurors where you can do it after --

MR. GRABER: After deliberations.

THE COURT: Three, you're right. I'm sorry, I misspoke. I was talking about (b) didn't have it. It's set forth in (b), but it's set forth in (c), (c) does have it. The court may retain alternate jurors must assure retained juror not discuss this case until it replaces the juror discharged. The alternate replaces the discharged jury and begins the deliberations and the court must instruct the jury anew.

MR. GRABER: The perquisites of that rule have been met. Your Honor was careful to advise the alternates not to discuss the case and that one of them might have to be called back. In light of the fact that deliberations have been for three days but no more than that we would request that the court --

THE COURT: All right. You're absolutely right, that it does provide for that. Says I can separate the alternates or instruct them not to discuss the case with any persons. They made replace a regular juror which I did do when they were discharged. I did advise them they should not discuss it. I haven't read over whether or not I think that's

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an option not required. Let me look. I had just read the notes behind 3(b) rather and 23(b) which indicated references not to have substitutions but I did not go to 24.

MR. GRABER: I read those notes, too. I'm not sure -- I haven't been able to discern which came first in terms of which rule was adopted when and the relationship between the two. Mr. Kirschner and I discussed this before Your Honor came in the courtroom today whether there's any case law discussing this sort of situation. But it is our request and my understanding is Mr. Kirschner does not oppose it that to bring in an alternate and instruct the jury to begin anew.

THE COURT: That's a 1999 amendment, so it came in after the 23 Rule obviously brought in to make up after they had begun to allow a juror to be stricken. They then amended the rule to bring that in and have the alternate after some experience with the Rule 23. I'll hear from the government again to do that we'll have to wait discharge and have them come back whenever you find an alternate and find what alternate have not been compromised and have them begin deliberations over again. They'll not be back until next Monday. Tomorrow is a religious holiday.

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They had asked for that and have that off as well as Friday because of the religious holiday and that off as well.

MR. GRABER: If we were deeper into the deliberations it might be more of a concern but --

THE COURT: Well there's some truth to that. It's been three days there could be you can bring someone in and get them up to speed without being overcome with the discussions that's gone on.

MR. KIRSCHNER: Your Honor, given that the rule provides for it we don't oppose the defense request.

THE COURT: I'll allow that. It's going to cause some complications. I think what we'll have to do is I'm going to have to call Juror 0552 in and excuse her over objection of Mr. Wilkerson and his counsel of record, advise her she's excused. Bring the rest of the 11 in and tell them that we've excused the jury, not to worry about the rationale for that, not to reflect upon it or talk about it. And we'll be having an alternate juror come in to deliberate. Because of the time frame I doubt we'll get one this afternoon and it will have to be next Monday to come in.

I have a problem starting next week and it's

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going to be a serious problem for a while. Monday, Tuesday and Wednesday are judicial conference dates. I'm on the executive board. I'm presenting several things to the entire conference, to the Chief Justice. I have to be there and there's no way I can miss that. I don't know if I can get down -- I'll look at the schedule and see. I know Monday morning at 9:30 I cannot be here. I've already talked to Judge Lamberth about coming in when I was going to be gone to do that. I'm suppose to go on vacation. I have a nonrefundable ticket. I had talked to him about taking over Thursday. I would be here through Wednesday I'll have to see what we'll do about that. And Judge Lamberth preside while I'm gone. I don't want to have to bring in a new juror and I not be here.

We'll make an inquiry. I'll ask the jury to go to lunch and see if we can find the next two alternates in line to see if they can get here this afternoon, so I can talk to them this afternoon. I have a matter I have to go to. If you all stay available I'll see if we can locate the next two alternates on the list to see if we can get the next two in line. We're trying to get the first one if they're available. If they aren't we'll going to the

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second. First alternate that is available will come back for deliberations that has not been tainted by anything. We'll have to question them when they get them.

But I'll grant the motion under Rule 24 to substitute an alternate. I'll tell the jurors to go to lunch and after lunch the next two will be seated. Would you bring 0552 in, please.

THE MARSHAL: Yes, Your Honor.

THE COURT: Ma'am, based upon your statement you cannot follow the law and the instructions and you felt so strongly about this and it would affect your decisions, you make a bias decision I'm going to excuse you from further service and deliberations. It's unusual during deliberations to do this, but that I respect your judgment that you made and this is your decision on this. All right.

THE JUROR: Okay.

THE COURT: You don't talk to anyone about this. The case is ongoing. There will still be deliberations. We'll try to get an alternate in. So you can't talk to anyone about your situation and why you're excused or what your feelings are about the case one way or the other until the case is completed. All right?

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THE JUROR: All right.
THE COURT: Thank you.
THE JUROR: Thank you.
THE COURT: We'll excuse you at this time. I'll explain to the other jurors nothing about what you have said. I'll just say you'll no longer be with them.
THE JUROR: Okay, thank you.
THE COURT: Okay, thank you.
MR. GRABER: Mr. Wilkerson's request would be that whatever it's convenient to come and instruct the jurors.
THE COURT: Hopefully I can do it this afternoon. We'll start. Yeah, I want to do it.
MR. GRABER: It's our preference also because Your Honor has presided over the trial though it is a little late that if Your Honor is not in the area that if there's a note that you try to handle that by telephone conference call.
THE COURT: I would do that absolutely. I would be in by phone. Wherever I am I will do that.
[Thereupon, Jury enters courtroom at 1:04 p.m.]
THE COURT: Ladies and gentlemen, thank you for coming in and waiting for lunch for a few

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machines. As you see we are short one juror. I do not want you to speculate or question why that juror not going to be available, but she'll not be continuing deliberations. We're going to bring an alternate in here we hope after lunch to renew the deliberations if we can get one here in time. But one juror has been excused for service for her own reasons. Do not talk about that or speculate or get into any discussions among yourselves about that.
We're going to send you to lunch. Hopefully you will not start deliberations until we get the 12th juror here. Whenever we get a 12th juror here I will give very brief instructions to you to and the 12th juror to begin again your deliberations. We can't help that in this circumstance unfortunately. I'm going to ask you to go to lunch. And we'll see if we're ready to proceed this afternoon.
If we get delayed, we'll have to begin Monday because Thursday is a religious holiday. Friday we will not be sitting. Hopefully we will be able to contact the alternate and bring an alternate juror in here. Hopefully he'll be able to do that this afternoon. Do not deliberate until we get to 12 jurors again and do not discuss among yourselves that we have constituted a juror. All right. Thank you.

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[Thereupon, Jury exits courtroom at 1:05 p.m.]
THE COURT: Just wait a minute. They want to send a note out for something. All right. I've got two notes. I'm not going to answer them until after lunch. I have to look at them for a while. One is a very detailed note all about findings they have to make or are not on first degree, felony murders and CCE murders, about all the RICO acts and about vicarious liability and how it's applied. And it's a very detailed note by the foreperson.
The second note is number seven now may I be dismissed? No reason, no nothing. Just a handwritten note. I'm attempted to answer that no. I don't see any need to go into questioning. They want to come back and give me some more details. It says, "Judge Hogan may I be dismissed from deliberation? Juror 7." Which is not the right juror number. I'm going answer that one now no.
MR. KIRSCHNER: We agree the answer is no. Even though it's some inability, it may be some frustration. We've all been here so long, but we would suggest to the court to answer that no.
THE COURT: All right. The second note you can look at. We'll take a luncheon break and have you

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all make sure the next two alternates in line will be called and answer it after lunch.
[Thereupon, recess taken at 1:11 p.m., resuming at 3:25 p.m.]
THE DEPUTY CLERK: Your Honor, returning to the matter Criminal Record 00-157, United States versus Larry Wilkerson. All parties are present at this time, Your Honor.
THE COURT: Okay. Thank you. As I understand we were able to contact one of the two alternates next on their list. One is a man who works at night and was not able to be located. And the second one on our list was a woman who was located. The marshals picked her up and is bringing her here now. She's here now. She's arrived. What's her number juror?
THE DEPUTY CLERK: This is juror 1973, Your Honor. Seat number --
THE COURT: Juror 1973.
THE DEPUTY CLERK: Seat 15.
THE COURT: Secondly, we have as I've indicated a note that remained unanswered that came in at lunch which is a long note by Juror 1748 for looks like the foreman. Her juror instructions and there's three parts of it. And counsel have seen it. First

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issue is do we respond to this note if I have an alternate and telling them to start over their deliberations? Tell them to start deliberations over and if there's still a problem then ask me after they've talked with the other jurors for a while.

I think we have to wait before I explain that to them. I'm telling them to start over one hundred percent. And they may still have the same problems to answer maybe they should talk to the other new juror for a while and then I'll get a sense. And I'll explain that to them. In the meantime you should look at this and see if it's fair questions.

Secondly, the government supplied, I haven't had a chance to show defendants this, a copy of the instructions given by Judge Lamberth when he had a somewhat similar I think sort of different situation, but had excused a juror during deliberations. And as I have anticipated he instructed to began anew, setting aside the past deliberations, disregard any notes, if any. In other words, aiding the jury created during the deliberations and use them. Not talking about the evidence or anything in your own vote records, et cetera.

He also told them the destroy their verdict form. They all have verdict forms. They just had the

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one and the original copy made. I don't think that's necessary. He explained that's the only way to do it. Explaining to the new juror who needs to be replaced. The other juror is being replaced and they're starting all over. And they'll continue on at this time. And that all the other instructions still apply. And I'm send them back to deliberate. That means they just start for an hour and a half or so today and then come back on Monday. I can also advise them of that. I can also advise them I may be in and out next week. I'll do the best I can to be here to answer further notes.

Is there any other suggestions on how we should answer these suggestions?

MR. KIRSCHNER: We agree with all the court's proposals. The only thought I have is that you might want to ask them in the event you have already marked up your verdict form, please give that to the court and we'll give you a clean copy.

THE COURT: I don't want them to give it to the court. I'd ask them to destroy it themselves, throw it away.

MR. KIRSCHNER: That makes sense.

THE COURT: All right. Then you all should think about answering the one note because I think it

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has a couple of good questions. There's one note I'd like input on. All right. Would you bring this alternate in and we'll explain to her make sure she's here and available to start this afternoon and come back next Monday for her schedule effect.

THE MARSHAL: Juror 1973, Your Honor.

THE COURT: Good afternoon.

THE JUROR: Good afternoon.

THE COURT: Ma'am, you're known as 1973. We've had an occasion as I said at the time we released the alternates that we've asked you to keep in the same state of knowledge that you have, not to discuss this case with anyone or let anyone discuss it with you in the event there was an emergency and we needed to call you all back and one of you had to serve. We were able to locate you when we had a deliberating juror became unavailable. It just happened. So I've got a couple of questions for you for the record. And one is: Are you in the same state of knowledge as when you left? That is, you haven't discussed the case or read about it or had any contact with anybody connected with the case?

THE JUROR: No, I haven't. I'm in the same state.

THE COURT: Same state of knowledge. Are

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you available because the court needs you this afternoon for an hour or so? And after that we would not be sitting again until next Monday so you could make some arrangements on your schedules. The reason is tomorrow is a religious holiday, Rosh Hashanah for some people and you've not been sitting on Fridays.

THE JUROR: Yes, I am available.

THE COURT: You're confident you could go back into your mode that you were in here earlier as a sitting juror and deliberate fairly and impartially on this case and the evidence that you've heard in this court?

THE JUROR: Yes, Your Honor.

THE COURT: What I will be doing is instructing the jury to start over again. They can't decide on there. You would have to start all over again. They would have to start just like the first time they walked in the jury room, so you'd be in the same position as the others so you would have an opportunity to deliberate and to participate fully in the deliberations starting anew. And wouldn't feel they've already reached certain verdicts. I don't know what they've done. You'd be free to exercise your own judgment on the instructions as I've given them to you. All right?

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THE JUROR: Yes.
THE COURT: Thank you for your willingness to help out in this situation. That's why we have alternates. What I'm going to do is have the other jurors come back. You would be sitting -- let the other jurors come in and I'll place you in the right seat you'll become known as that juror number whatever the number is. Thank you.
[Brief pause.]
[Thereupon, Jury enters courtroom.]
THE COURT: All right. Ladies and gentlemen, good afternoon. After our break you understand what happened earlier. And I explained to our alternate juror, the number juror nine has been excused by the court and she's now going take the seat of number nine and become a deliberating juror.
Now once again the reasons for the excusal are not relevant to your deliberations. You're not to speculate about the reasons for the excusal of the other juror. This alternate juror will become a member of the deliberating jury. And she was an alternate and has been away, but has informed us she's had no discussions about the case or talked to anyone about the case, hadn't heard anything about it during her absence. She'll be now seated as juror number

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nine for the remaining of the deliberations. So her state of knowledge is the same as it was as you had at the end of the closing arguments and the final instructions so she's a fully qualified juror.
However that means to be fair you must begin your deliberations all over. You must begin anew as if you haven't deliberated yet, just like the first time. That means I recognize that causes some delay but cannot be avoided, a fair and impartial decision made in this case. You should set aside and disregard your past deliberations, discussions and votes, if any. Disregard notes and aids you've made created during the deliberations not the other ones you made during the trial. In other words, if you've got a couple of verdict forms and recorded something in the verdict forms I want those torn up and we'll give you new verdict forms.
You'll begin your deliberations afresh as if you'd just never discussed the case among yourselves at all because it's the only fair way when we have a new alternate that enters the case like this. New member of the Jury that has the benefit of all the discussions as if she's been a deliberating juror for the first time and you begin your deliberations anew, so she's not faced with you all having some, arrived

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at some decision, being cold and not having a chance to deliberate. So the jury has the full chance to participate and deliberate all over again.
Number nine you're replacing the deliberating juror has been excused. The reasons again are not relevant. You yourself are not to speculate as to why you joined the deliberating jury and what happened to the other jurors. The eleven jurors you're now joining have been instructed to deliberate anew as if they're deliberating for the first time. You're instructed to enter the deliberations as if the jury were just beginning to deliberate for the first time in the case as it is for you.
Now the only other instructions I've got for you really is that if you would tear up those verdict forms I'll give you a couple of new ones if you need them and tear, shred them very carefully, please. We don't want anyone to look at those. Now the other instruction again is we don't go out and talk about this case with anyone or let anybody talk to you about or read about it or carried in the press. It would cause us difficulties. It's especially important now that you follow the instructions. Set the newspaper aside if it covers this case or look at the TV if

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there's any media reports of it.
The court schedule is such we have already planned to have a religious holiday tomorrow, so you'll not be sitting on tomorrow and on Fridays you'll not be sitting. You'll not be sitting after today. Next Monday is the Judicial Conference of the United States. I'm on the Executive Committee of that conference. I give reports to the Chief Justice and other members of the conference. And it's our budget for the next year. And I'm very much involved in our budget which is very poor. We're having a real hard time. And we'll be rifting people, so I have to be there.
I'll be in and out as I may be available if have you other notes and other matters to discuss. It may be a time when I ask another judge to take my place if you desire to work out the questions with the lawyers and still handle the case. It's not that I'm not interested or concerned about you. There are some commitments on my time and I can't avoid it.
You also have another note pending with several questions. Because we're adapting, starting over again, I'd like you first to go back and begin your review of the evidence again and discussions again. And then if this note still needs answering

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after you've started your deliberations and gone through it we'll keep the note and let us know and we'll address the note. It's in fairness to the new sitting juror we need to have you start over again.

If it becomes a problem you're welcome to ask this original note the foreperson sent out or write a different note or just indicate you want this note still needs to be responded to. But I told counsel since you're starting over I'll hold the note for now. We will answer if it becomes later. You have to start your deliberations and get to a point where this note may be necessary.

All right. Let me ask counsel if you'll like to cover anything else before you send them back. Anything else?

MR. KIRSCHNER: No, Your Honor.

MR. GRABER: No, Your Honor.

THE COURT: Ladies and gentlemen, again I thank you for your services so far. I'll ask you to go back and resume anew your deliberations at this time with the new juror. And if it's about anything I've just said -- if it's about a scheduling policy I can talk to you.

THE JUROR: It's about something you said just now about a procedure.

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THE COURT: You can write a note if you need to. It's better for counsel to hear and talk to me about it. But if it's scheduling I can tell you right now. In any event, we'll sit for the rest of the day and we'll be back at the ordinary time. Thank yo very much. You're excused.

[Thereupon, Jury exits courtroom at 3:35 p.m.]

MR. KIRSCHNER: There was another juror who was indicating to the marshal she was about to write you another note besides the --

THE COURT: I'll just step out for a one second. I'm just going to get a new verdict form. We'll be right back.

[Thereupon, proceedings recessed at 3:35 p.m.]

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CERTIFICATE

I, Cathryn J. Jones, an Official Court Reporter for the United States District Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, the proceedings had and testimony adduced in the above case.

I further certify that the foregoing 58 pages constitute the official transcript of said proceedings as transcribed from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name, this the 17th day of September, 2004.

OFFICIAL COURT REPORTER

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TABLE IDENTIFYING WILKERSON'S REQUESTS FOR LIMITED *VOIR DIRE*

Juror Hearing Excerpt	**Transcript Page (9/15/04am) Appendix Page**
("... at minimum the court should voir dire the juror to find out whether or not this is an evidentiary at all based concern."	9/15/04am: 7 App. 27
(noting that during jury selection, after Juror 0552 made remarks evidencing concerns about instances where people had been wrongly convicted, the AUSA asked her questions and the juror indicated she could follow the evidence and the law and be fair to both sides (citing Tr. 7/16/04am:106-07).	9/15/04am: 9 App. 28
GRABER noting, that, in [U.S. v. *Brown* , 823 F.2d 591 (D.C.Cir.1987)]"as the Court was talking to the jury it came out that there was an evidentiary basis for [Spriggs's concerns] which, I think is why the court should inquire of the juror"	9/15/04am: 9 App. 28
GRABER: "in light of that ... the court should voir dire the juror and determine if her problem is based on the facts as the law applies to those facts..."	9/15/04am: 11; App. 28
GRABER: "So I think the court should 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."	9/15/04am: 14 App. 29

Juror Hearing Excerpt	**Transcript Page (9/15/04am)** **Addendum Page**
AFTER JUROR INDICATES HER EMOTIONAL DISTRESS IS BASED NOT "JUST BECAUSE OF DELIBERATIONS" BUT BECAUSE OF "THE WHOLE CASE"	*See* 9/15/04am: 25-27; App. 32
Graber: "In light of the Second Circuit decision [in [*U.S. v. Thomas*, 116 F.3d 606, 621 (2d Cir.1997)] 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.	9/15/04am: 25 App. 32
"She also said she had the problem with the whole case. And our view is that 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 part of the problem is having to do with whether the evidence in the case ... the whole point [in *Thomas,* at 621] is if it's at all a fact based sort of concern than Mr. Wilkerson has a right to that juror. [*U.S. v. Thomas*, 116 F.3d 606, 621 (2d Cir.1997)] And ... even if it's total law based, he still under the Sixth Amendment has a right to that juror." (Graber further notes that this Circuit has left open the question of dismissal solely on nullification grounds).	9/15/04am: 29; App. 33

Juror Hearing Excerpt	**Transcript Page (9/15/04am)** **Addendum Page**
GRABER: "But 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." "But in addition to that, what the *Thomas* case is saying [is] that 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 to get that out from the juror. She did say she had a problem with the whole case."	9/15/04am: 30; App. 33 9/15/04am: 30; App. 33
GRABER ((indicating "sensitivity" to concern about probing into deliberative process): "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."	9/15/04am: 31; App. 33
GRABER (after again reading a quote from *Thomas* [116 F.3d at 621]: "it seems like 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?"	9/15/04am: 32-33; App. 33-34

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA .
Plaintiff, .
. Docket No. CR-00-157-15
.
LARRY WILKERSON, . Washington, D.C.
. July 16, 2004
.
Defendant. .
. . . . . .

Day 5 - AM SESSION
TRANSCRIPT OF VOIR DIRE
BEFORE THE HONORABLE CHIEF JUDGE THOMAS HOGAN
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by machine shorthand, transcript produced by computer-aided transcription.

never came up with a person or whoever did it.

MS. CARLSON-LIEBER: Okay. The reason we asks questions like this is to try to get a sense of people's views of law enforcement in other matters pertaining to this case so we can get folks who are fair to both sides.

THE JUROR: I understand.

MS. CARLSON-LIEBER: And finally with respect to that when asked your opinion regarding the effectiveness of the criminal justice system, you said that you don't think it's working well. And when asked you checked that box. And when asked to explain you say a lot of people are doing time for crimes they did not commit.

I just want to, obviously as the prosecutors, we want to find, you know, get into that a little bit more with you and find out why you responded that way.

THE JUROR: Just basically off of a lot of things that you see sometimes on the news about people that have been let go for a crime they didn't commit now based off DNA and things of that nature so, yeah.

MS. CARLSON-LIEBER: These are cases you read about a lot in the media?

THE JUROR: Yeah or seen you know like the

specials, they have like on Court TV and things like that, yeah.

MS. CARLSON-LIEBER: So you're talking about people on death row for 20 years in Missouri and then the DNA test --

THE JUROR: Yeah.

MS. CARLSON-LIEBER: -- and they sort of say sorry, see you later?

THE JUROR: Yeah.

MS. CARLSON-LIEBER: You have a problem with that?

THE JUROR: Yes, that's wrong. They've lost their time. They can't get that time back.

MS. CARLSON-LIEBER: Okay, that's fair. With sort of that view of some what can be characterized as injustice within the criminal justice system where folks are doing time they should not be, as a backdrop this is, you know, a criminal case involving allegations about drug dealing and murders and all sorts of criminal activity that the government alleges Mr. Wilkerson was involved in.

Do you think that you'd feel comfortable putting aside sort of your concerns about that type of problem and fare the evidence in this case, I'm sorry, view the evidence in this case fairly based just on

what you hear and see in this courtroom and not bring in with you your concerns about what's happened to other folks in other places?

THE JUROR: Right. I could view this case fairly based on from what I've seen and concerned about other people's injustice, but it's about what's going to be proved here.

MS. CARLSON-LIEBER: Okay. Thank you. Thanks very much, ma'am.

THE JUROR: No problem.

THE COURT: All right. Mr. Graber.

MR. GRABER: Thank you judge. Good afternoon.

THE JUROR: Good afternoon.

MR. GRABER: I'm Sebastian Graber. I'm one of the defense attorneys representing Mr. Wilkerson. I have a few questions based on the way you answered your questionnaire.

The fact that your uncle was a police officer does he talk about his work with you very often?

THE JUROR: No, we don't discuss his work.

MR. GRABER: Would the fact that he's a police officer tend to make you give more credibility to police officers or FBI agents who will testify in

this case?

THE JUROR: No.

MR. GRABER: You can view their testimony the same way like any other witness as the court will instruct you?

THE JUROR: Yes.

MR. GRABER: Now your friend that was stabbed that was in 1998. Did you say that was near a club?

THE JUROR: He was leaving a club.

MR. GRABER: Was that a club that young people kinda go to?

THE JUROR: Right, uh-huh.

MR. GRABER: Was that at all related to any drug activity?

THE JUROR: Not that I know of.

MR. GRABER: The fact that this case is going to involve lots of evidence about drugs, allegations that Mr. Wilkerson may have been involved in selling drugs in the early 1990s. And one of our defenses might be, what some people might consider a technical defense. Namely, that the government did not charge him in time to prosecute him for that defense.

Would the fact that the, we may be asserting

a technical defense to the drug charges bring you, give you a problem in considering that defense?

THE JUROR: No.

MR. GRABER: You can follow the court's instructions on how to consider that sort of evidence and defense?

THE JUROR: Yes.

MR. GRABER: Now you indicated there was, I assume it was the same uncle, but you said SWAT team. Is that the same uncle?

THE JUROR: Yes.

MR. GRABER: Was that a prior assignment? He's now working on the detail for P.G. County executive?

THE JUROR: That was prior, yes.

MR. GRABER: At that time did he discuss his work?

THE JUROR: No.

MR. GRABER: Thank you. There was some questions, questions 99 to 101 in the questionnaire which dealt generally with your views about the use of informants and wiretaps and that sort of thing. You put no opinion. Is that something you just haven't thought that much about?

THE JUROR: Right.