

In the Supreme Court of the United States

JAMES CURTIS KERN,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL, THIRD APPELLATE DISTRICT

BRIEF IN OPPOSITION

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October 13, 2026

QUESTION PRESENTED

Whether the petitioner's rights under the Sixth and Fourteenth Amendments were violated when the trial judge in his criminal trial replaced a juror who had twice disregarded the judge's explicit instructions and who lied to the court.

DIRECTLY RELATED PROCEEDINGS

U.S. District Court for the Eastern District of California:

Kern v. Superior Court, No. 24cv2432 (Apr. 10, 2026) (dismissing petition for habeas corpus).

California Supreme Court:

People v. Kern, No. S295087 (Mar. 11, 2026) (denying petition for review on direct appeal) (this case below).

In re Kern, No. S289547 (May 28, 2025) (denying petition for habeas corpus).

In re Kern, No. S290466 (May 28, 2025) (denying petition for habeas corpus).

California Court of Appeal, Third District

People v. Kern, No. C100646 (Dec. 22, 2025) (affirming judgment on direct appeal) (this case below).

Superior Court of Sacramento County:

People v. Kern, No. 22FE016826 (Mar. 8, 2024) (entering judgment of conviction and sentence) (this case below).

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STATEMENT

1. a. Petitioner James Kern was convicted of committing crimes against three workers at massage establishments. The first worker, M.D., testified that in September 2022, petitioner had entered her establishment and paid \$40 for a half-hour massage. Pet. App. A 2. When petitioner was brought back to a room, he asked if M.D. “provided sexual services.” *Id.* She said no, returned petitioner’s \$40, and walked him toward the front door. *Id.* Petitioner left—but on his way out he said that he actually wanted a full-hour massage and that he was leaving to get more money. *Id.*

When petitioner returned and was being walked back to a room, he put one hand on M.D.’s neck, used the other to hold her arm behind her back, and pushed her against the wall. Pet. App. A 2. M.D. pleaded for him not to hurt her and offered him money. *Id.* Petitioner moved M.D. into a breakroom at the end of the hallway. *Id.* He ordered her to give him her handbag. *Id.* at 3. When she did so, he took the money out, complained that it was not enough, and ordered her to find more. *Id.* When she said she did not have more, he pushed her against the wall and started to touch her “all over,” kissing her neck, grabbing her breast, touching her vagina, and rubbing his body against hers. *Id.* Petitioner asked for a condom. *Id.* After telling him she did not have one, M.D. grabbed a knife and held it to her neck, telling petitioner he “would

have to kill her if he wanted sex.” *Id.* Petitioner grabbed the knife and ran out the front door with her keys and cash. *Id.*¹

The second worker, Q.Z., testified that in August 2022, petitioner had entered her massage business and was brought to a room to wait. Pet. App. A 5. After a while, Q.Z. noticed him leaving, and when she asked him why, he “dashed out.” *Id.* Q.Z. went to the breakroom and noticed that \$150 in cash had been taken from the desk. *Id.*

The third worker, L.D., testified that in September 2022, she was working in a massage business and brought petitioner back to a room. Pet. App. A 5. He left the room, however, and asked for his money back. *Id.* Although L.D. gave petitioner the money, he also took her cell phone. *Id.* After they struggled, petitioner hit her in the face, threw the phone at her, and left. *Id.*

The jury also heard evidence about an uncharged incident from July 2022. Pet. App. A 5. In that incident, a massage worker named G.T. left petitioner waiting in a room while she finished with another client. *Id.* Petitioner left the room and went to the restroom. *Id.* When he left the restroom, he told G.T. he had an emergency and needed to leave. *Id.* But when G.T. reviewed surveillance video, it showed petitioner going into a breakroom and taking approximately \$1,100. *Id.*

¹ The massage business was equipped with a surveillance system, whose recording was entered into evidence. Pet. App. A 3. Although much of the interaction between petitioner and M.D. occurred off-camera, the recording’s audio corroborated M.D.’s testimony about petitioner’s demands. *Id.* at 3-4.

Petitioner was convicted of kidnapping to commit robbery, assault with intent to commit rape, and robbery for his crimes against M.D. Pet. App. B; see Pet. App. A 2-4. He was convicted of misdemeanor theft for stealing money from Q.Z. Pet. App. A 5. And he was convicted of attempted robbery for trying to take L.D.’s phone. *Id.*

b. The petition for certiorari concerns the removal of a juror—Juror No. 11—during deliberations. A few hours into deliberations, the jury sent a note stating that it had come to an agreement on two counts but was unable to agree on the other three. Pet. App. A 11. The trial judge called the jury in and began to question Juror No. 11, the foreperson, instructing him “not to provide information about the jury’s deliberation,” and especially not to give “the ‘split’ of the jury’s votes.” *Id.* at 11-12. Juror No. 11 interrupted the judge and said the split was 11 to one, causing the judge to “repeat[] that [he] specifically said not to advise the court of the votes.” *Id.* at 12. The judge listed options for providing the jury with additional information, and the jury returned with questions, which the judge answered. *Id.*

The next day, with the jury still undecided, the court provided additional instructions. Pet. App. A 12. Late in the day, which was a Friday, one juror asked to be removed due to work obligations the next week. *Id.*; 11 RT 740-742.² The parties did not object. Pet. App. A 12. That juror was removed, and

² RT refers to the Reporter’s Transcript filed in the court of appeal, and CT refers to the Clerk’s Transcript.

on Monday morning an alternate juror was seated. *Id.* With the parties' agreement, *see* 11 RT 742, the court delivered a standard instruction, known as CALCRIM No. 3575, *see* Pet. App. A 12. The instruction informed the jury that "[t]he alternate juror must participate fully in the deliberations that lead to any verdict," and the parties had a "right to a verdict reached only after full participation of the jurors whose votes determine that verdict." 12 RT 750. "Therefore," the instruction continued, the jurors had to "begin [their] deliberations all over again." *Id.* "Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place." *Id.* at 750-751. "Now, please return to the jury room and start your deliberations from the beginning." *Id.* at 751.

The jury returned to the jury room at 9:19 a.m. Pet. App. A 12. At 10:30 a.m., Juror No. 11 sent a note asking to be excused from the jury. *Id.* He did not, however, respond to the judge's return note, which asked him to "[p]lease be more specific as to your request" and asked if there was a "medical or financial or other reason." 2 CT 414; *see* 12 RT 767. Shortly after noon, the jury sent a note stating that it had selected a new foreperson, Juror No. 4. Pet. App. A 12. At 3:15 p.m., the jury sent two notes. One was a request for additional argument on one charge. *Id.* The other was a note from Juror No. 4, the new foreperson, stating that "I'm concerned I'm not hearing all the deliberating due to a juror having difficulty re-setting. He refuses to explain his opinions, because he already did so last week.'" *Id.* at 12-13.

When questioned in court, Juror No. 4 identified Juror No. 11 as the juror referenced in his note. Pet. App. A 13. The judge asked him whether Juror No. 11 was “not following” the instruction that the court had read about jurors having “to start all over, essentially,” and “begin your deliberations all over again, and . . . disregard the earlier deliberations and decide the case as if those earlier deliberations had not taken place.” 12 RT 754. Juror No. 4 answered “yes.” *Id.* The court then brought in five additional jurors selected at “random[,]” *id.* at 757, and asked them similar questions about whether Juror No. 11 had not followed that instruction, *id.* at 755-758 (Juror Nos. 2, 5, 9, 10, and 12). Each responded in the affirmative. *Id.*

The court then questioned Juror No. 11. Pet. App. A 13. Juror No. 11 said, “I’ve had to explain my position repeatedly to [the other jurors], and they get up and scream at me when they don’t like it.” *Id.* The court asked him: “Did you inform the other jurors that you did not need to explain your opinion because you did so last week?” 12 RT 760. Juror No. 11 replied, “No, sir, I did not.” *Id.*; see Pet. App. A 13.

The court then brought in three more jurors. *See generally* Pet. App. A 13. In questioning each juror, the court recounted the instruction, given upon the seating of the alternate juror, that required the jury to disregard earlier deliberations and begin their deliberations again. 12 RT 762-764. When asked if Juror No. 11 had refused to follow that instruction, two of those jurors answered “Yes.” *Id.* at 762-764 (Juror Nos. 3 and 6). The third, Juror No. 8,

responded that “that juror kind of refuses to do a lot of things. I don’t know if he necessarily refused to follow those instructions. I think it seems as if he’s confused about the instructions, if that makes sense to you.” *Id.* at 764. The court then asked Juror No. 8 specifically, “Did you hear him make the comment that he didn’t want to explain his opinions because he had already did so last week?” *Id.* at 764-765. Juror No. 8 answered “Yes.” *Id.* at 765. After excusing Juror No. 8, the court asked counsel whether an additional juror should be examined, and both counsel said no. *Id.*; *see infra* p. 12 n.4.

After recounting the ways in which Juror No. 11’s statements conflicted with those of the other jurors, the court explained, “when I weigh these out, I find that these other jurors seemed credible to me, and Juror No. 11 seems incredible.” 12 RT 766. “Juror No. 11, in his statement, I think he’s lying to the Court.” *Id.* The court noted that Juror No. 11 had asked to be excused from the jury about an hour and a half after the alternate juror was seated—and had given no response when asked if there were financial, medical or other reasons behind the request. *Id.* at 766-767. And well before that, the court noted, it seemed like Juror No. 11 had “deliberately refused to follow my instructions right here in court.” *Id.* at 767. The judge recounted that when the jury first reported an impasse, the judge had “specifically told him I do not want to know how the jury was split,” and was clear that “I do not want to know in terms of the numerical number,” yet Juror No. 11 “just immediately blurted out that they were 11 to 1.” *Id.* Based on all that, the court continued:

“I am going to make a finding that he is not credible, that he has lied to the Court, and that he is failing to follow the instructions to begin their deliberations again, which is, essentially, a refusal and failure to deliberate as directed by the Court.” *Id.* at 767-768. The court removed Juror No. 11 and seated an alternate. *Id.* at 768. Once again, the court delivered an instruction that the addition of a new juror required jurors to begin their deliberations anew, 13 RT 780, and later that morning the jury delivered its verdict, 2 CT 422.

2. The court of appeal reversed the kidnapping to commit robbery conviction, on the ground that petitioner’s moving M.D. down the hallway was insufficient to support kidnapping under California law. Pet. App. A 6-11. All other convictions, however, were affirmed. *Id.* at 2.

With respect to the removal of Juror No. 11, petitioner’s counsel argued that the removal was improper under California Supreme Court precedent, because the evidence did not show by a “demonstrable reality” that Juror No. 11 had refused to deliberate. C.A. Opening Br. 15 (quoting *People v. Barnwell*, 41 Cal. 4th 1038, 1053 (2007)); *see also* C.A. Reply Br. 13. The court of appeal agreed that dismissals are appropriate only for jurors whose “inability to perform” their duty “appear[s] in the record as a demonstrable reality” under California’s test. Pet. App. A 15 (internal quotation marks omitted). But the court determined that this standard was met. The court noted that the trial judge had not relied on other jurors’ “opinions” about Juror No. 11. *Id.* at 17.

Instead, the other jurors’ statements about whether Juror No. 11 had said he would not repeat his comments from the week prior were “statement[s] of fact—either he said it or he did not.” *Id.* The trial judge had made an express finding that other jurors were credible in recounting Juror No. 11’s statements—and that Juror No. 11 was not credible in denying them. *Id.* at 17-18. And the judge had also relied on his “own observations regarding Juror No. 11’s prior failure to follow instructions and his request . . . to be excused from the jury, at which time the lack of deliberation issue arose.” *Id.* at 17. In short, the trial court’s reasons for dismissing Juror No. 11 were “supported by the record and show[ed] to a demonstrable reality that the discharged juror was unable to fulfill his duties as a juror because he failed to follow instructions.” *Id.* at 18.

Petitioner sought review by the California Supreme Court, which that court denied. Pet. App. C.³

ARGUMENT

The record reflects, and the trial court found, that Juror No. 11 had not only violated the court’s express instructions but also lied to the court.

³ Petitioner also filed a federal habeas corpus petition, which was dismissed without prejudice. *See Kern v. Superior Court*, No. 24cv2432 (E.D. Cal.). Petitioner appears to have additionally filed two habeas corpus petitions with the California Supreme Court, which were not served on the State but may relate to this conviction. Both were denied. *See In re Kern*, No. S289547; *In re Kern*, No. S290466.

Dismissing him was proper under any conceivable standard. The petition should be denied.

1. Like other jurisdictions, California allows for the mid-deliberation dismissal or replacement of a juror under appropriate circumstances. *See* Cal. Penal Code § 1089; *see also* Fed. R. Crim. P. 23(b)(3) (allowing for the court to “permit a jury of 11 persons to return a verdict . . . if the court finds good cause to excuse a juror”); Fed. R. Crim. P. 24(c) (providing alternate jurors “to replace any jurors who are unable to perform or who are disqualified from performing their duties”). In California, if a juror “dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty,” the juror is “discharged” and replaced by an alternate. Cal. Penal Code § 1089.

But the Sixth Amendment requires unanimity among jurors in order to obtain a valid conviction, whether in federal or state court. *Ramos v. Louisiana*, 590 U.S. 83, 92-93 (2020). And as precedents in California and elsewhere have recognized, the right to a unanimous verdict can be implicated when a trial court replaces a juror after deliberations have begun. *See, e.g., People v. Barnwell*, 41 Cal. 4th 1038, 1052 (2007); *United States v. Brown*, 823 F.2d 591, 595-596 (D.C. Cir. 1987). As all of these jurisdictions make clear, a juror should not be dismissed simply because that juror’s view of the case differs from the other jurors’ views. *See, e.g., People v. Cleveland*, 25 Cal. 4th 466, 485 (2001) (“[T]he circumstance that a juror disagrees with the majority

of the jury as to what the evidence shows, or how the law should be applied to the facts . . . is not a ground for discharge.”).

Federal courts have stated the evidentiary standard for reviewing mid-deliberation juror dismissals in “slight[ly]” varying words—all of which express the same idea. *United States v. Kemp*, 500 F.3d 257, 304 (3d Cir. 2007); *see id.* (“the difference is one of clarification and not disagreement”). The general principle is that while dismissal may be proper for various reasons, courts must protect against the possibility that a request to discharge a juror reflects that juror’s view of the sufficiency of the evidence. *Compare id.* (“courts may discharge a juror for bias, failure to deliberate, failure to follow the district court’s instructions, or jury nullification when there is no reasonable possibility that the allegations of misconduct stem from the juror’s view of the evidence”), *with United States v. Wilkerson*, 966 F.3d 828, 838 (D.C. Cir. 2020) (court should deny dismissal if there is a “‘tangible’ or ‘appreciable’ possibility” that the request to discharge stems from the juror’s view of the sufficiency of the evidence), *and United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001) (per curiam) (juror should be excused “only when no ‘substantial possibility’ exists that she is basing her decision on the sufficiency of the evidence”).

The California Supreme Court has given its own formulation for the same principle: the “demonstrable reality” test that the petitioner here argued for (*see supra* p. 7) and that the court of appeal applied (*id.*). That test is a “heightened standard” which is satisfied only if the reviewing court is

“confident that the trial court’s conclusion” that a juror may be dismissed for a reason unrelated to the juror’s view of the evidence “is manifestly supported by evidence on which the court actually relied.” *Barnwell*, 41 Cal. 4th at 1052.

2. Although the petition notes these varying formulae, *see* Pet. 5-6, their slight divergence does not warrant certiorari and plenary review. Juror No. 11’s dismissal was correct under any conceivable standard for reviewing the mid-deliberation discharge of a juror. No juror ever complained about Juror No. 11 differing from other jurors’ views or not being persuaded by them. Instead, Juror No. 4’s note and subsequent testimony—and the judge’s entire inquiry in response to the note—were about something different and quite specific: Juror No. 11’s refusal to follow the trial court’s instruction, after one of the original jurors was replaced by an alternate, that the jurors should begin their deliberations anew to allow the newly seated juror to participate. *See supra* pp. 4-6.

Petitioner agreed to that instruction when it was given, *see supra* p. 4, and he has not challenged it at any stage of his appeal. *see* Pet. 4-6; C.A. Opening Br.; C.A. Reply Br.; Cal. S. Ct. Pet. for Rev. Nor has he ever argued that the juror was free to ignore the instruction. For good reason: California is not alone in requiring juries to restart deliberations when a juror is replaced. *See, e.g.,* Fed. R. Crim. P. 24(c)(3) (“If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.”). As the California Supreme Court has recognized, such

instructions serve an important interest: “The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them.” *People v. Collins*, 17 Cal. 3d 687, 693 (1976). And once an instruction like this one is given, jurors are obliged to follow it. *See generally Wainwright v. Witt*, 469 U.S. 412, 420 (1985) (noting interest in having jurors “follow their instructions and obey their oaths”).

True, Juror No. 11 denied that he had violated the instruction. *See supra* p. 5. But the trial judge had strong support for his finding that Juror No. 11 was “not credible” and “lied to the court.” 12 RT 767. The court examined nine jurors in addition to Juror No. 11. *See supra* pp. 5-6.⁴ All agreed that Juror No. 11 had failed to follow the instruction to begin deliberations again. And Juror No. 11 specifically denied telling his fellow jurors that he would not state his positions after the new juror arrived because he had already stated them the week before. But the three other jurors who were specifically asked about that remark stated that Juror No. 11 had indeed made it, and the new foreperson had recounted it in his note to the court. *See supra* pp. 4-6.

Moreover, the trial court had seen for itself Juror No. 11’s violation of another instruction. When the jurors first reported an impasse and Juror No.

⁴ Of the two remaining jurors, defense counsel expressly declined an offer to examine one. 12 RT 765. And defense counsel raised no objection to the judge’s statement that it did not make sense to examine the new alternate because she “doesn’t really have the context” for answering questions on the subject. *Id.*

11 (as foreperson at the time) was questioned in open court, the judge warned him that “I’m going to ask you a series of questions, and it’s very important that you not just do a lot of talking.” 9 RT 705. Then the Court gave a specific instruction, which the juror immediately violated:

THE COURT: Okay. So I do not want to know what the number is. I don’t want to know if the split is 11 to 1 or 2 to 10 or 5 to 7 or 6-6.

JUROR NO. 11: It’s 11-1.

Id. at 705-706.

The record thus showed it to be a “demonstrable reality” that Juror No. 11 was intentionally violating the instruction to begin the deliberation process anew, as the court of appeal here determined using California’s terminology. Pet. App. A 18. But it would also establish, under the various federal formulations, that there was no “reasonable possibility,” *Kemp*, 500 F.3d at 304, or “‘tangible’ or ‘appreciable’ possibility,” *Wilkerson*, 966 F.3d at 838, or “‘substantial possibility,’” *Abbell*, 271 F.3d at 1302, that the removal instead reflected mere disagreement with the juror’s view of the evidence.

3. Nor does this case feature the circumstances that led California to recommend—and this Court to order—that certiorari be granted, the judgment vacated, and the case remanded in *Olivarria v. California*, 146 S. Ct. 2708 (2026) (No. 25-6544). In that case, inquiries into the juror’s behavior began when the foreperson sent a note stating that “‘one juror has dissented and has stated nothing will change her mind.’” Br. of Resp. 6, *Olivarria v. California*,

No. 25-6544 (May 6, 2026). When questioned, the *Olivarria* foreperson responded that “[a]fter deliberating, that juror is convinced that nothing will change her mind.” *Id.* at 7. A later note complained that the juror was not open to “accept[ing] the parts of the testimony that do not agree with her conclusion.” *Id.*; *see also id.* at 9 (holdout juror’s explanation that she “believed that the testimony is true from the . . . defendant”). And the trial court’s conclusion that the juror should be dismissed based on a purported failure to meaningfully deliberate was based on other jurors’ answers to inquiries that used vague and undefined terms—such as asking whether the juror at issue was “refusing to participate in deliberations.” *Id.* at 8-9. In *Olivarria*, that record led the State to confess error, because the dismissal appeared to be improper under the California Supreme Court’s “demonstrable reality” test. *Id.* at 20.

But none of the features that led to the confession of error in *Olivarria* are present here. In this case, the complaints about Juror No. 11 had nothing to do with his views of the prosecution’s case; instead, they focused—from Juror No. 4’s original note to each examined juror’s statements—on Juror No. 11’s violation of the trial court’s instruction to begin deliberations anew after the alternate juror was seated. And instead of relying on jurors’ reactions to vague questions with undefined terms, here the trial court asked Juror No. 11, and several of his fellow jurors, a quite specific question: Whether the juror had said that he “did not need to explain [his] opinion because [he] did so last week.”

12 RT 760. As the court of appeal observed, the answer to that question “was not a statement of opinion but rather a statement of fact” with a yes or no answer. Pet. App. 17. Unlike in *Olivarria*, here there is no way that Juror No. 11’s dismissal for refusal to follow the instruction at issue—then lie about it to the court—might have been based on the juror’s views of the evidence. There is accordingly no reason to disturb the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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