No. 25-7562

IN THE SUPREME COURT OF THE UNITED STATES

JAMES CURTIS KERN,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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Petitioner James Curtis Kern respectfully submits this Reply to respondent's Brief in Opposition to his Petition for Writ of Certiorari.

ARGUMENT

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO SETTLE THE STANDARD FOR THE MID-DELIBERATION REMOVAL OF A JUROR.

Although respondent recognizes that the Circuit Courts apply different standards when reviewing the mid-deliberation removal of a juror, *see* Br. Opp. 10, it argues that "their slight divergence does not warrant certiorari and plenary review." Br. Opp. 11. However, at least the Third and Fourth Circuits have expressed disagreement with the Second Circuit's continued adherence to the "any possibility" standard: "We echo the Third Circuit's concerns with the 'any possibility' standard and note that the 'reasonable' or 'substantial' possibility standards are less likely to lead district courts to refuse to remove jurors for illogical or frivolous reasons." *United States v. Lafitte*, 121 F.4th 472, 488-489 (4th Cir. 2024); *see United States v. Kemp*, 500 F.3d 257, 304 (3d Cir. 2007). There is a meaningful split among the Circuits.

Respondent calls California's "demonstrable reality" standard California's "own formulation for the same principle" expressed by the Circuit Courts. Br. Opp. 10. However, in *State v. Elmore*, 155 Wash.2d 758 (2005), Washington's Supreme Court distinguished California's "demonstrable reality" standard from the Ninth Circuit's "reasonable

probability" standard and adopted the Ninth Circuit's approach. *Id.* at 776-78. The *Elmore* court explained, "[T]he California standard seems to flip the [Ninth Circuit's] presumption, allowing dismissal if there is a demonstrable reality that the juror was acting improperly, rather than prohibiting dismissal if there is any reasonable probability that the juror was acting properly." *Id.* at 776. *Elmore*'s rejection of California's "demonstrable reality" standard suggests that it may not adequately protect a criminal defendant's Sixth Amendment right to a unanimous jury. *See Ramos v. Louisiana*, 590 U.S. 83, 92 (2020).

In short, the differences among the standards for the mid-deliberation removal of a juror are not "slight." Moreover, the circumstances of the deliberations in petitioner's case demonstrate that it is an appropriate vehicle for resolving the standards' conflict.

On the first day of deliberations, the jury expressed its inability to reach a verdict in two separate notes to the court and reported an 11-1 split. 2CT 392-93, 396, 398; 9RT 704-706.

On the second day of deliberations, the jury reported continued disagreement and that it had reached an impasse in a note to the court. 2CT 403, 407; 10RT 727.

On the third day of deliberations, the court replaced a juror who was starting a new job and instructed the jury to begin its deliberations anew. 2CT 403, 410; 11RT 740-42; 12RT 749-751. Later that morning, the jury

asked the court whether it could consider the lesser charges without "agree[ment] on guilt or innocence on the primary charges" and requested further argument. 2CT 411, 415, 416, 418; 12RT 752. At the same time, Juror No. 11 asked to be excused from the jury. 2CT 410, 413. That afternoon, the other jurors accused Juror No. 11 of refusing to follow the court's instruction to begin anew with the new juror. 2CT 411, 419; 12RT 752. When the court asked Juror No. 11 whether he agreed with that accusation, he answered, "No, sir. I've had to explain my position repeatedly to them, and they get up and scream at me when they don't like it." 12RT 759-60. He denied telling the other jurors that he did not need to explain his opinion to them because he had done so the previous week. 12RT 760.

Although Juror No. 11's responses conflicted with the other jurors' statements, the record as a whole suggests that the other jurors' real problem with Juror No. 11 was his view of the evidence. The jury's communications with the court show that Juror No. 11 had been the holdout juror in an 11-1 split for three days. This, along with his request to be excused from the jury, suggest that the other jurors had grown frustrated with him and lend credibility to his statement that they "get up and scream at [him] when they don't like" his explanations of his position. Moreover, the jury's question on the third day about whether they could consider the

lesser charges, along with its request for further argument, indicate that Juror No. 11 continued to deliberate that day despite the escalating conflict.

Although petitioner maintains that the trial court violated his Sixth Amendment right to a unanimous jury under California's standard and each of the federal standards when it removed Juror No. 11, he acknowledges that different courts might reach different results when applying the various standards. This court should grant his petition for writ of certiorari to settle the standard the Sixth Amendment requires for the mid-deliberation removal of a juror.

CONCLUSION

Appellant respectfully asks this court to grant his petition for writ of certiorari.

Dated: Oct. 22, 2026

Respectfully submitted,

James Kern

Petitioner James Curtis Kern
Appearing *pro se*