No. 01-1618

In the Supreme Court of the United States

MICHAEL ABBELL AND WILLIAM MORAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court complied with Rule 23(b) of the Federal Rules of Criminal Procedure, and the Sixth Amendment, when it dismissed a juror on the ground that she refused to follow the law and the court's instructions during jury deliberations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rules:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 271 F.3d 1286.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 2001. A petition for rehearing was denied on February 5, 2002 (Pet. App. 60a-62a). The petition for a writ of certiorari was filed on May 1, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of a racketeering conspiracy, in viola-

tion of 18 U.S.C. 1962(d); and money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). After trial, the district court denied petitioners' motion for a new trial, but granted their motion for a judgment of acquittal on the racketeering conspiracy count. Pet. App. 30a-59a. Petitioner Abbell was sentenced to 87 months' imprisonment; petitioner Moran was sentenced to 60 months' imprisonment. *Id.* at 3a. The court of appeals affirmed petitioners' money laundering convictions and the district court's denial of their new trial motion, reversed the judgment of acquittal on the racketeering conspiracy count, and remanded for resentencing. *Id.* at 1a-2a.

1. During the 1980s and 1990s, Miguel Rodriguez-Orejuela was a leader of the Cali Cartel, a criminal enterprise that smuggled large quantities of cocaine into the United States. Pet. App. 4a. Rodriguez and the other Cartel leaders enforced a strict code of silence among their employees to protect the Cartel's ongoing operations. *Ibid.* The Cartel paid the attorney's fees for employees and expenses for their families. *Ibid.* It threatened arrested employees and their families with injury or death if they cooperated with the authorities. *Ibid.* And it obtained affidavits or depositions from arrested employees stating that they did not know or were not involved with Rodriguez. *Ibid.*

Petitioners Abbell and Moran were attorneys who worked for Rodriguez. Abbell directed the false deposition scheme, targeting those employees likely to provide false exculpatory evidence and warning against deposing employees who might inculpate the Cartel's leaders. Pet. App. 21a-22a. Abbell knew that the employees he targeted would have to lie to answer the questions in a manner that would benefit Rodriguez. *Id.* at 22a. Petitioner Moran was also involved in obtaining false affidavits from members of the Cartel who

were arrested importing drugs. *Id.* at 20a. Both Abbell and Moran received large sums of money from Rodriguez. *Id.* at 18a. They also both provided a large quantity of that money to Cartel employees and their wives. *Ibid.*

2. After a five-month trial, the jury acquitted petitioners on a substantive racketeering count, but hung on the remaining counts. Pet. App. 37a. Petitioners were then tried again. *Ibid.* On Monday, July 6, 1998, jury deliberations began. *Ibid.* On Thursday morning, July 9, the court received a note presented by Juror Gooden and signed by Foreperson Sebastian that alleged that a juror—later identified as Juror Alfonso—had formed an opinion about the case "prior to, in spite of and irregardless [sic] of the evidence," and was not reviewing, reading, or viewing the exhibits. *Id.* at 67a. In chambers and in the presence of petitioners and their counsel, the court interrogated Sebastian about the note after telling her not to disclose the substance of the jury's deliberations. *Ibid.* Sebastian said that Alfonso had not deliberated at all, *id.* at 69a, that she said that "I made up my mind the minute I walked out of the box," and that earlier that morning she had said that the racketeering conspiracy count was "a stupid law, and we don't have to regard it," *id.* at 69a, 72a. The court directed Sebastian not to discuss the meeting with the other jurors. *Id.* at 72a. The district court summoned the jury to the courtroom and gave a supplemental instruction that it had a duty to apply the law and that jury nullification was illegal. *Id.* at 73a-77a.

On July 13, Alfonso sent a note to the court stating that the jury was deadlocked. Pet. App. 77a. Ten jurors sent a note stating that they disagreed with Alfonso's note. *Id.* at 79a. The court interrogated

Sebastian, who said that Alfonso had not deliberated in the case. *Id.* at 80a-81a. Sebastian also stated that, since the court's supplemental instruction, Alfonso had not expressly stated that she would not follow the law. *Id.* at 82a-83a.

The district court then interviewed Juror Gooden, who confirmed that, before deliberations began, Alfonso had indicated that she had made up her mind. Pet. App. 86a. Gooden also stated that, before the court's supplemental instruction, Alfonso had referred to the court's instructions as a "guide," not the law. *Ibid.* The court once again interrogated Sebastian, who said that Alfonso had not deliberated for the past four or five days, and was either sitting or doing her nails. *Id.* at 90a.

The district court then interviewed the remaining jurors. Juror McSwiggan said that Alfonso had initially refused to deliberate, Pet. App. 92a, that, before the supplemental instruction, she had said that she "doesn't care what the law is," *ibid*, and that after the supplemental instruction, she had deliberated "somewhat," *ibid.*, but had not engaged in "meaningful" deliberation, *id.* at 93a. Juror Blanton said that Alfonso had not been deliberating, *id.* at 94a, that she had repeatedly said that "we didn't have to follow the instructions," *id.* at 95a, and that after the supplemental instruction, she had "pretended" to deliberate "a few times," *id.* at 96a. Juror Doll said Alfonso had not been involved in "meaningful deliberation," *id.* at 99a, and that she had said that she did not have to follow the court's instructions, *id.* at 98a. Doll also stated that Alfonso had discussed the evidence somewhat, but had not followed the rules. *Id.* at 99a. That morning, Doll stated, Alfonso had listened, but had not participated in discussions. *Ibid.*

The court interviewed Juror Alfonso, who said that a juror had attempted to pressure her regarding her vote, and that other jurors had accused her of disregarding the court's instructions. Pet. App. 102a. Asked whether she had said that she did not have to follow the law, Alfonso replied, "[m]aybe not exactly." but "Like this is not everything. This is not everything that we have to take into consideration." *Id.* at 103a. Alfonso denied having made up her mind before entering the jury room, and she stated that she had been deliberating. *Id.* at 104a-105a. But Alfonso admitted that, "[m]aybe I have a problem with the federal law." *Id.* at 105a. Alfonso explained that "[m]aybe I have problems due to the fact that I been so many years with the criminal law, and I say this doesn't make sense this, you know, but also on the other hand it is not only like you say." *Ibid.* When asked again whether she had told other jurors that she did not have to follow the law, she stated that she had said "I don't have to follow only the law. I have to use my common sense." *Id.* at 108a.

Juror Grant said that all of the jurors had been deliberating, Pet. App. 117a, and no juror had said that you do not have to follow the law in that manner, *id.* at 118a. Juror Mandell said that Alfonso stated that she "couldn't go by the way this law was written," *id.* at 121a, that after she was told she had to follow the law, she was giving the law "lip service," *ibid.* Juror Rosso said that Alfonso had said that the instructions were from the judge but "[t]his is not the law." *Id.* at 126a-128a. In Rosso's opinion, Alfonso had not been deliberating. *Id.* at 128a-129a. Juror Peralta said that Alfonso had deliberated some days, but not others, *id.* at 131a, that Alfonso had said that jury instructions were like travel instructions, *id.* at 132a, and that after the supplemental instructions, Alfonso had become

pretty nonverbal, *id.* at 133a. Juror Cortes said that Alfonso had participated in deliberations "once or twice," *id.* at 137a, that she had said that the court's instructions were like travel instructions, *id.* at 140a, and that she had not discussed the evidence in the past few days, *id.* at 141a. Juror Butler said that Alfonso said that she did not need to follow the law to come to a reasonable verdict, *id.* at 143a, and that she had worked in law enforcement and certain laws do not apply. *Ibid.* Butler also stated that, following the supplemental instructions, Alfonso said that she would follow the law, *id.* at 145a, and that she was currently deliberating, *id.* at 146a.

After concluding its interviews with the jurors, the district court concluded that Alfonso "simply was not answering my questions about her ability to follow the law or her willingness to do so." Pet. App. 154a. The court described her responses as "evasive," and noted that "she really does not contradict in substance the statements of at least 10 or maybe 11 of the other jurors that she has indicated to them that she is not simply required to follow the law." *Ibid.* The court emphasized that Alfonso "has apparently made up her mind that she can do pretty much what she feels like doing regardless of what the law is." *Id.* at 155a. The court also found that Alfonso had done nothing to indicate that she had changed her approach following the court's supplemental instructions. *Id.* at 155a-156a.

Meanwhile, Juror Grant sent the court a note stating, "I quit." Pet. App. 151a. In response to the court's questioning, Grant said that she wrote the note because she had been "mistreated" by some of the other jurors. *Ibid.* Grant agreed to "go home and get a good night's rest." *Ibid.* The court asked Sebastian about Grant's distress. Sebastian explained that no one had mis-

treated Grant, but that some jurors were "zealous" in trying to explain the deliberation process. *Id.* at 152a. The next day, Juror Grant told the court that she wanted to continue to serve as a juror. *Id.* at 157a. The court then dismissed Alfonso for cause and informed the jury of its decision. *Id.* at 156a, 161a-162a.

After their convictions, petitioners moved for a new trial on the ground that the court had erred in excusing Alfonso for cause. The district court denied the motion. Pet. App. 36a-59a. The court stated that Alfonso's dismissal was appropriate for three reasons: (1) she had said that the racketeering statute was a "stupid law," (2) she had said that she did not intend to follow the court's instructions, and (3) she had attempted to use her position as a corrections officer to influence the jury. *Id.* at 54a. The court found that there was not a "'substantial possibility' that Juror Alfonso's position was due to her belief that the evidence was insufficient to support a conviction as to RICO conspiracy." *Id.* at 55a.

3. The court of appeals affirmed. Pet. App. 1a-29a. The court rejected petitioners' argument that the district court had erred in excusing Alfonso from further jury service. *Id.* at 24a-28a. The court stated that because of the danger that a dissenting juror might be mistakenly accused of jury nullification, a juror should be excused "only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence." *Id.* at 25a (citation omitted). The court equated that standard with the "reasonable doubt" standard. *Ibid.* The court also ruled that the question whether a juror was purposefully not following the law is a question of fact that is reviewed for clear error. *Ibid.*

Applying those principles, the court noted that all of the jurors had agreed that early in deliberations, Alfonso had made comments that she did not have to follow the law and that the district court's instructions were advisory only. Pet. App. 27a. The court further observed that while Alfonso made no more direct statements on the issue following the court's supplemental instructions, the majority of the jurors agreed that she did not deliberate, would not consider evidence, and did not discuss the law. *Ibid.* The court also concluded that the district court acted within its discretion in finding, based on Alfonso's own testimony, that she did not intend to follow the law. *Id.* at 28a. Based on those considerations, the court of appeals concluded that "[t]his record shows that the district court's determination that Juror Alfonso was not basing her decision on the sufficiency of the evidence was not clearly erroneous, even in the light of a beyond a reasonable doubt standard." *Ibid.*

The court of appeals also rejected petitioners' contention that the district court's inquiry tainted the jury pool. Pet. App. 27a-28a n.20. The court explained that the district court had acted with "extreme caution" to protect the integrity of the jury process, and had instructed the jury after Alfonso's dismissal that her dismissal should not affect their deliberations. *Ibid.* The court of appeals cautioned district courts to err "on the side of too little inquiry as opposed to too much." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 14-30) that the court of appeals' decision upholding the district court's dismissal of Juror Alfonso for just cause under Federal Rule of Criminal Procedure 23(b) conflicts with the decisions of

other courts of appeals. Petitioners are incorrect. The court of appeals adopted the same substantive standard endorsed by those courts and, like those courts, cautioned district courts not to conduct an intrusive inquiry into allegations of jury misconduct during deliberations. The court of appeals' application of those standards to this case is a fact-bound ruling that merits no further review.

1. Federal Rule of Criminal Procedure 23(b) authorizes a district court to excuse a juror "for any just cause" after the jury has retired to consider its verdict, and to accept a verdict returned by the remaining 11 jurors. As the court of appeals in this case held (Pet. App. 24a), a juror's unwillingness to follow the law or the court's instructions constitutes "just cause" for dismissal. *United States* v. *Thomas*, 116 F.3d 606, 617 (2d Cir. 1997); *United States* v. *Geffrard*, 87 F.3d 448, 450-452 (11th Cir.), cert. denied, 519 U.S. 985 (1996). On the other hand, a juror may not be dismissed based on the juror's doubts about the sufficiency of the evidence. A discharge for that reason would not only fail to satisfy the "just cause" standard; it would also subvert a defendant's right to a unanimous verdict. To protect against dismissals based on a juror's view of the evidence and to safeguard jury deliberations, some courts of appeals have adopted a heightened standard for a dismissal based on a juror's alleged misconduct during deliberations. *United States* v. *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999); *Thomas*, 116 F.3d at 621-622; *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987).

The court of appeals in this case adopted such a heightened standard. It held that a juror should be excused "only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the

evidence." Pet. App. 25a (citation omitted). The court defined "substantial possibility," as a "tangible possibility," as opposed to a "speculative hope." *Id.* at 25a n.14. The court also equated its "substantial possibility" standard with a "beyond reasonable doubt" standard. *Id.* at 25a.

Applying that stringent standard, the court of appeals affirmed the district court's dismissal of Juror Alfonso. The court first noted that the district court had applied the correct legal standard. Specifically, the district court expressly found that "the record does not reveal a 'substantial possibility' that Juror Alfonso's position was due to her belief that the evidence was insufficient to support a conviction as to the RICO conspiracy." Pet. App. 26a-27a. The court of appeals further determined that the record supported the district court's determination. *Id.* at 27a-28a. In particular, all jurors agreed that Alfonso had stated that she did not have to follow the law, most jurors agreed that Alfonso would not engage in deliberations even after the district court instructed the jury on its duty to follow the law, and the district court was entitled to find, based on its assessment of Juror Alfonso's testimony, that she did not intend to follow the court's instructions or the law. *Ibid.* Based on those considerations, the court of appeals concluded that the "record shows that the district court's determination that Juror Alfonso was not basing her decision on the sufficiency of the evidence was not clearly erroneous, even in the light of a beyond a reasonable doubt standard." *Id.* at 28a. That fact-bound determination does not warrant review.

2. a. Petitioners contend (Pet. 14-21) that the court of appeals' "substantial possibility" standard is less stringent than the standards adopted by the courts of

appeals in *Symington*, *Thomas*, and *Brown*. In formulating its dismissal standard, however, the court of appeals expressly relied on the decisions in *Thomas* and *Brown*. Pet. App. 25a. That reliance was appropriate. Although the courts in *Thomas*, 116 F.3d at 621-622 and *Brown*, 823 F.2d at 596, used the phrase "any possibility," those courts undoubtedly meant a "substantial" possibility, not a speculative one. Indeed, the court in *Brown* used the term "substantial possibility" interchangeably with the phrase "any possibility." *Ibid.* Any other interpretation of those decisions would suggest that those courts intended to prohibit dismissals in all cases, since it is always possible to speculate that a juror's position is based on the insufficiency of the government's evidence. *Symington*, 195 F.3d at 1087 n.5.

Nor is there any conflict between the decision below and *Symington*. In that case, the Ninth Circuit held that "if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." 195 F.3d at 1087. A "substantial" possibility means the same thing as a "reasonable" possibility, and the court of appeals in this case equated the two. See Pet. App. 25a (equating "substantial possibility" standard with the "reasonable doubt" standard); *id.* at 28a (same). The court of appeals' statement of the governing legal standard is therefore fully consistent with the standard articulated by the other circuits.

b. Petitioners err in contending (Pet. 20) that *Symington*, *Thomas*, and *Brown* preclude a district court from making credibility judgments in deciding whether there is a substantial possibility that a juror's position is based on the sufficiency of the evidence. In those cases, the courts held that the record showed that there

was a substantial possibility that dismissal was sought based on the juror's doubts about the sufficiency of the evidence. *Symington*, 195 F.3d at 1088; *Thomas*, 116 F.3d at 624; *Brown*, 823 F.2d at 596. None of those cases addressed whether a district court may make credibility judgments in applying that standard.

Other court of appeals decisions have made clear that district courts may resolve credibility issues. For example, in *United States* v. *Baker*, 262 F.3d 124, 130-131 (2001), the Second Circuit deferred to a district court's factual finding that a juror refused to participate in deliberations. The court explained that deference is warranted because the district court is in a unique position to hear and observe the testimony of the witnesses. *Ibid.* Similarly, in *United States* v. *Barone*, 114 F.3d 1284, 1307-1309, cert. denied, 522 U.S. 1021 (1997), the First Circuit affirmed a district court's dismissal for cause based on a finding that a juror was influenced by extra-record evidence. The First Circuit specifically upheld the district court's authority to reject the juror's testimony as not worthy of belief. *Id.* at 1307.

Petitioners suggest (Pet. 20) that, under *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), a district court does not have authority to make credibility determinations after an investigation into juror misconduct during deliberations. But *Reeves* holds only that, when a district court is evaluating a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50, it must draw all inferences in favor of the nonmoving party and may not make credibility judgments. 530 U.S. at 150. The Court explained that such judgments are entrusted to the jury as the finder of fact. *Ibid.* *Reeves* is inapplicable to a district court's inquiry into jury misconduct during

deliberations, because in that setting, the district court is the ultimate fact-finder. A decision regarding jury misconduct obviously is not entrusted to the jury itself.

c. Petitioners similarly err in contending (Pet. 20) that *Symington*, *Thomas*, and *Brown* preclude the questioning of jurors to decide whether removal is appropriate. None of those cases erects a per se rule against such inquiries. Moreover, in none of those cases did the court of appeals hold that the district court erred in questioning jurors to determine whether dismissal was warranted. Rather, as discussed above, those courts reversed convictions based on their determinations that the evidence compiled as a result of the district court's questioning showed that there was a reasonable possibility that the request for dismissal was based on the juror's view of the evidence. *Symington*, 195 F.3d at 1088; *Thomas*, 116 F.3d at 624; *Brown*, 823 F.2d at 596. Those courts also did not suggest that an error in questioning jurors would itself be grounds for reversal of a conviction, absent evidence of prejudice to the defense.

The courts in *Symington*, *Thomas*, and *Brown* did warn about the dangers of intrusive jury questioning. *Symington*, 195 F.3d at 1086; *Thomas*, 116 F.3d at 619; *Brown*, 823 F.2d at 596. But the court of appeals in this case expressed the same concern. The court of appeals approved the district court's inquiry based on a determination that the district court had "proceeded with extreme caution to protect the integrity of the jury process." Pet. App. 27a-28a & n.20. In addition, the court of appeals cautioned district courts in the future to err on the side of too little inquiry instead of too much. *Ibid.*

Furthermore, the record supports the court of appeals' conclusion that the district court proceeded with

due caution. The district court interviewed *all* jurors only after (1) the court received a report from the jury foreperson that Alfonso had made up her mind about the case and had announced that she did not intend to follow the law, (2) the court instructed the jury that it must follow the law, and (3) the foreperson again informed the court that Alfonso was refusing to participate in deliberations. The district court conducted its interviews in chambers in the presence of petitioners and counsel. Before each interview, the district court told each juror not to divulge his or her views about the merits of the case or the state of deliberations (Pet. App. 67a, 79a, 84a-85a, 90a, 91a, 94a, 97a, 117a, 120a, 126a, 131a, 136a, 142a). Instead, the court's questions focused on whether a juror had stated that she did not intend to follow the law, and whether a juror had refused to participate in deliberations.

Other courts have upheld dismissals under Rule 23(b) after similarly limited questioning. See *Baker*, 262 F.3d at 130-132; *Barone*, 114 F.3d at 1307; see also *United States* v. *Reed*, 167 F.3d 984, 991 (6th Cir.), cert. denied, 528 U.S. 897 (1999). Whatever the outer boundaries of appropriate questioning, they were not exceeded here.

3. Finally, petitioners' reliance (Pet. 21-26) on *Tanner* v. *United States*, 483 U.S. 107 (1987), and *Brasfield* v. *United States*, 272 U.S. 448 (1926), is misplaced. In *Tanner*, the Court held that under Federal Rule of Evidence 606(b), a district court properly rejected a defendant's post-verdict motion for an evidentiary hearing to determine whether jurors had been drinking and using drugs during trial. By its terms, Rule 606(b) applies only to "an inquiry into the validity of a verdict or indictment." It does not apply to a pre-verdict judicial inquiry into juror misconduct during deliberations. In *Brasfield*, the Court held that a trial court erred in

asking a deadlocked jury for its numerical division. The district court in this case specifically advised the jurors not to inform it of the jury's division.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2002