

No. 17-41

In the Supreme Court of the United States

JOSE ISMAEL VENTURA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
*Acting Solicitor General
Counsel of Record*

KENNETH A. BLANCO
*Acting Assistant Attorney
General*

KIRBY A. HELLER
*Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

QUESTION PRESENTED

Whether the court of appeals erred in holding that the district court did not abuse its discretion in dismissing a deliberating juror because the juror had previously failed to reveal relevant information during voir dire.

TABLE OF CONTENTS

	Page
Opinion below.....	1
Jurisdiction.....	1
Statement	1
Argument.....	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

<i>United States v. Abbell</i> , 271 F.3d 1286 (11th Cir. 2001), cert. denied, 537 U.S. 813 (2002).....	8
<i>United States v. Brown</i> , 823 F.2d 591 (D.C. Cir. 1987)	7
<i>United States v. Carson</i> , 455 F.3d 336 (D.C. Cir. 2006), cert. denied, 549 U.S. 1246 (2007)	7, 10, 12
<i>United States v. Christensen</i> , 828 F.3d 763 (9th Cir. 2016), cert. denied, 137 S. Ct. 628 (2017)	7
<i>United States v. Ebron</i> , 683 F.3d 105 (5th Cir. 2012), cert. denied, 134 S. Ct. 512 (2013)	6, 7, 9
<i>United States v. Edwards</i> , 303 F.3d 606 (5th Cir. 2002), cert. denied, 537 U.S. 1192, and 537 U.S. 1240 (2003)	8
<i>United States v. Gibson</i> , 135 F.3d 257 (2d Cir. 1998)	7
<i>United States v. Ginyard</i> , 444 F.3d 648 (D.C. Cir. 2006)	8, 9, 10
<i>United States v. Kemp</i> , 500 F.3d 257 (3d Cir. 2007), cert. denied, 552 U.S. 1223 (2008)	8
<i>United States v. McGill</i> , 815 F.3d 846 (D.C. Cir. 2016), petition for cert. pending, No. 16-8051 (filed Feb. 24, 2017)	6, 7, 8, 9, 12
<i>United States v. Spruill</i> , 808 F.3d 585 (2d Cir. 2015), cert. denied, 137 S. Ct. 407 (2016)	9

IV

Cases—Continued:	Page
<i>United States v. Symington</i> , 195 F.3d 1080 (9th Cir. 1999)	8
<i>United States v. Thomas</i> , 116 F.3d 606 (2d Cir. 1997)	7, 8
<i>United States v. Vartanian</i> , 476 F.3d 1095 (9th Cir. 2007)	8, 9
<i>United States v. Warner</i> , 498 F.3d 666 (7th Cir. 2007), cert. denied, 553 U.S. 1064 (2008)	6, 12
Statutes and rule:	
18 U.S.C. 2	3
18 U.S.C. 1958	2, 3
21 U.S.C. 848(e)(1)(A)	2, 3
Fed. R. Crim. P. 23(b)(3)	6, 10

In the Supreme Court of the United States

No. 17-41

JOSE ISMAEL VENTURA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is reprinted at 673 Fed. Appx. 81.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2016. A petition for rehearing was denied on February 3, 2017 (Pet. App. 8a). On April 24, 2017, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including July 3, 2017, and the petition was filed on that date. 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 New York, petitioner was convicted of murder for hire and conspiring to commit

murder for hire, in violation of 18 U.S.C. 1958, and procuring the intentional killing of an individual in connection with a conspiracy to distribute 1000 kilograms or more of marijuana, in violation of 21 U.S.C. 848(e)(1)(A). He was sentenced to life imprisonment. The court of appeals affirmed. Pet. App. 1a-7a.

1. Petitioner operated a highly profitable marijuana distribution business in northern Manhattan. Pet. App. 2a; Gov't C.A. Br. 4, 6. Petitioner oversaw the operation, but let others—including his girlfriend Teresa Cruz, his son Kevin Ventura, and his son's friend, Edwin Torrado—take care of the details. Gov't C.A. Br. 5, 7.

In 1995, Kevin Ventura and Torrado were arrested after they shot and killed the clerk in a store that was selling marijuana on petitioner's turf and then set fire to the store. Gov't C.A. Br. 8-10. In their absence, petitioner turned to his nephew, Eugene Garrido, to take on the day-to-day management of his drug spot and serve as enforcer. *Id.* at 10. When Kevin Ventura was released from prison, however, Garrido refused to cede his position and threatened to take over the drug spot completely. *Id.* at 11. As a result, petitioner ordered his son to arrange for Garrido to be killed. *Ibid.* Kevin Ventura recruited two brothers for the job, and, on August 19, 1996, the hitmen shot and killed Garrido and another man, Carlos Penzo, who attempted to intervene. *Id.* at 13-14. Cruz paid the first cash installment for the murder on behalf of petitioner; Kevin Ventura paid the rest. *Id.* at 14.

2. A federal grand jury charged petitioner with one count of conspiring to commit murder for hire, which resulted in the shooting deaths of Garrido and Penzo, in violation of 18 U.S.C. 1958; one count of murder for hire, resulting in the shooting deaths of Garrido and Penzo,

in violation of 18 U.S.C. 1958 and 2; and one count of procuring the intentional killing of Garrido in connection with a conspiracy to distribute 1000 kilograms or more of marijuana, in violation of 21 U.S.C. 848(e)(1)(A), and 18 U.S.C. 2. Gov't C.A. Br. 2.

During jury selection, the district court asked the prospective jurors a series of questions about their experiences with law enforcement and the criminal justice system. Specifically, the court inquired whether any prospective juror (or relative or close friend) had ever been involved in an investigation or prosecution, been charged or convicted of a crime, or been a victim of a crime, and, if so, whether anything about those experiences would prevent the prospective juror from being fair and impartial. Gov't C.A. Br. 39-40. The individual eventually seated as Juror 2 answered "no" to each of those questions as well as to the court's "catch-all" question asking whether there was anything else that might suggest bias or prejudice. *Ibid.*

Following a two-week trial, the jury began to deliberate. Gov't C.A. Br. 40. On the first day of deliberations, the other jurors sent a note to the district court expressing "concerns" about Juror 2: the note explained that Juror 2 had once stated that he had "a problem with anyone who has an agreement with the government," and the other jurors were concerned that "he will not be fair and open minded," "will not apply the instructions as to the law to the evidence," and "is not open to discussion." Pet. C.A. App. 446. The court instructed the jurors to listen to one another and to follow the court's instructions on the law. *Id.* at 453. When the jurors were brought back into the jury box at the end of the day, the foreperson attempted to ask the court a question, to which Juror No. 2 responded loudly that it was

“not a question,” and other jurors weighed in. Gov’t C.A. Br. 41. The court instructed the jurors to ask any questions in jury notes and dismissed the jury for the day. *Ibid.*

In light of the “unusual specificity” of the jury note referencing Juror 2’s potential refusal to follow the district court’s instruction and deliberate in good faith and the “unusual nature of the interaction that everyone observed between Juror No. 2 and a number of other jurors,” the government made inquiries overnight into Juror 2’s background to assess whether Juror 2 had an undisclosed connection to the case. Pet. C.A. App. 520-521, 535. That inquiry revealed, among other things, that Juror 2 had two arrests, including a recent arrest for criminal possession of marijuana, had received several summonses, was accused by his daughter of a domestic violence incident, and had been the victim of several crimes. *Id.* at 535-536.

The government presented the information to the district court the next day, and, with the consent of both parties, the court interviewed Juror 2 on the record and in the presence of counsel. Pet. C.A. App. 456, 458-481. Before asking any questions, the court cautioned Juror 2 not to reveal anything about his views of the case or the jury’s deliberations. *Id.* at 461. Juror 2 then admitted that he had been arrested, blaming the arrests on the police officers simply “making their quota.” *Id.* at 463; see *id.* at 461-463, 471-472. He also attempted to justify his failure to reveal that he had been accused of assault or the victim of a crime. *Id.* at 466-470. In response to a specific question by the court, petitioner belatedly acknowledged that he also had pleaded guilty in connection with charges of unauthorized use of a motor vehicle. *Id.* at 473-477.

The district court determined that it would dismiss Juror 2 and seat an alternate in his place. Pet. C.A. App. 491. The court found it “plain that the juror deliberately gave false answers to questions by not producing information in response to the questions that should have been produced.” *Ibid.* The court further determined that the juror’s “false answers in the course of voir dire * * * could not reasonably be inadvertent” and that the juror deliberately concealed information because he wanted to serve on the jury. *Id.* at 493. Finally, the court stated that the juror’s answers reflected a bias against the police, which he also had not disclosed during voir dire. *Ibid.* For “all of those reasons,” the court excused Juror 2. *Ibid.* Petitioner did not object to the dismissal.

On the next trial day, petitioner moved to dismiss the indictment, claiming that “the government acted in bad faith [in investigating Juror 2’s background] to remove a juror they [did] not like.” Pet. C.A. App. 517; see *id.* at 520. The district court denied the motion. *Id.* at 525. It noted that defense counsel had agreed that the court should question Juror 2 once the government’s information came to light and that, given the juror’s responses, the court “had no choice but to excuse the juror.” *Id.* at 523. The court also found that the government’s investigation of Juror 2’s background was not improper under the circumstances. *Id.* at 523-525.

3. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-7a. First, the court rejected petitioner’s argument that the government initiated its investigation of Juror 2 “due to that juror’s views of the sufficiency of the government’s evidence.” *Id.* at 6a. The court of appeals stated that the district court “did not find that the government had specifically

targeted Juror No. 2 for an investigation because of his perceived views on the evidence or had otherwise acted in bad faith.” *Id.* at 6a. The court then concluded that “the district court did not abuse its discretion by removing Juror No. 2 for his untruthfulness in voir dire unearthed by that investigation.” *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-22) that the court of appeals erred in upholding the district court’s dismissal of Juror 2 based on information uncovered by the government during deliberations that Juror 2 had failed to disclose relevant information during voir dire. The court of appeals’ unpublished order is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.*

1. Federal Rule of Criminal Procedure 23(b)(3) authorizes a district court to dismiss a juror for “good cause” after the jury has retired to deliberate. A juror’s lack of candor or misconduct in failing to disclose relevant background information during voir dire can constitute good cause warranting the juror’s dismissal. See, e.g., *United States v. Ebron*, 683 F.3d 105, 127 (5th Cir. 2012) (observing that “a lack of candor can * * * serve as the basis for dismissing a juror” after deliberations have begun), cert. denied, 134 S. Ct. 512 (2013); *United States v. Warner*, 498 F.3d 666, 676-677, 684-687 (7th Cir. 2007) (upholding for-cause dismissal of deliberating jurors because they had misrepresented their criminal histories during jury selection), cert. denied,

* The pending petitions for writs of certiorari arising from *United States v. McGill*, 815 F.3d 846 (D.C. Cir. 2016) (per curiam), petition for cert. pending, No. 16-8051 (filed Feb. 24, 2017), present a similar question.

553 U.S. 1064 (2008); *United States v. Carson*, 455 F.3d 336, 352 (D.C. Cir. 2006) (per curiam) (holding that a juror was properly dismissed for cause when the district court became aware only after deliberations commenced that the juror had provided “deceptive answers to *voir dire* questions”) (citation omitted), cert. denied, 549 U.S. 1246 (2007). Because the district court “is in a far superior position than [a court of appeals] to appropriately consider allegations of juror misconduct,” a decision to dismiss a juror for good cause is reviewed for abuse of discretion. *United States v. McGill*, 815 F.3d 846, 867 (D.C. Cir. 2016) (per curiam) (brackets in original; citation omitted), petition for cert. pending, No. 16-8051 (filed Feb. 24, 2017); see also, e.g., *United States v. Christensen*, 828 F.3d 763, 806 (9th Cir. 2016), cert. denied, 137 S. Ct. 628 (2017); *Ebron*, 683 F.3d at 125-126; *United States v. Gibson*, 135 F.3d 257, 259 (2d Cir. 1998) (per curiam).

Some courts, including both the D.C. Circuit and the court of appeals here, have applied a heightened evidentiary standard in cases in which a juror refuses to deliberate, because of the risk that the requested dismissal is actually based on the juror’s view of the sufficiency of the evidence. Under that approach, a district court must deny a discharge motion 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.” *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987); see *United States v. Thomas*, 116 F.3d 606, 622, 624 (2d Cir. 1997) (following *Brown* and reversing dismissal of juror where it was not “beyond doubt”). The Third, Ninth, and Eleventh Circuits similarly apply a heightened standard, framed as “any reasonable possibility” or a “substantial possibility,” akin

to beyond a reasonable doubt. *United States v. Kemp*, 500 F.3d 257, 303-305 (3d Cir. 2007) (citations and emphasis omitted), cert. denied, 552 U.S. 1223 (2008); *United States v. Symington*, 195 F.3d 1080, 1087 & n.5 (9th Cir. 1999); *United States v. Abbell*, 271 F.3d 1286, 1302 & n.14 (11th Cir. 2001) (per curiam), cert. denied, 537 U.S. 813 (2002). The courts of appeals have also observed that any slight variation in terminology “is one of clarification and not disagreement.” *Kemp*, 500 F.3d at 304; see *Abbell*, 271 F.3d at 1302 n.14 (describing the different articulations as “interchangeable”).

The D.C. Circuit has made clear, however, that the heightened standard does not apply “unless ‘there is some causal link between a juror’s holdout status and the juror’s dismissal.’” *McGill*, 815 F.3d at 869 (quoting *United States v. Ginyard*, 444 F.3d 648, 652 (D.C. Cir. 2006)). Other circuits that have recognized the heightened standard have similarly limited its application. See e.g., *United States v. Vartanian*, 476 F.3d 1095, 1098-1099 (9th Cir. 2007) (distinguishing prior circuit decision on the ground that dismissal based on juror’s lack of candor about her contacts with the defendant’s family was not based on juror’s willingness to deliberate or her views on the case); *United States v. Edwards*, 303 F.3d 606, 633 (5th Cir. 2002) (“[T]he reasoning of [the cases applying a heightened standard] extends only to those dismissals where the juror’s conduct cannot be evaluated without delving into the reasons underlying the jurors’ views of the case.”), cert. denied, 537 U.S. 1192, and 537 U.S. 1240 (2003); *Thomas*, 116 F.3d at 620 (distinguishing cases in which “a presiding judge is able to determine whether there is ‘just cause’ to dismiss a deliberating juror without *any* inquiry into the juror’s thoughts on the merits of the case”). Accordingly, even

where some evidence suggests that the dismissed juror may have been a holdout, the heightened standard does not come into play if dismissal is justified by circumstances that are separate and independent from the juror's views of the merits. See, e.g., *McGill*, 815 F.3d at 869; *United States v. Spruill*, 808 F.3d 585, 595 (2d Cir. 2015), cert. denied, 137 S. Ct. 407 (2016); *Ebron*, 683 F.3d at 127-128; *Vartanian*, 476 F.3d at 1098-1099; *Ginyard*, 444 F.3d at 652.

2. Petitioner contends (Pet. 11-14) that this Court's review is warranted because the courts of appeals that have recognized the heightened standard have nonetheless disagreed on its application. Specifically, he asserts that, although the courts are not divided on the "correctness of this strict standard," they disagree on whether the "reasonable possibility" test applies to the request for dismissal or the dismissal itself. Pet. 11. That assertion lacks merit.

Contrary to petitioner's contention, the courts of appeals agree that the heightened standard does not apply when the reason for the dismissal is unrelated to the juror's views of the evidence. See pp. 8-9, *supra*. Thus, although petitioner argues (Pet. 12) that some circuits "have revised and limited" the standard the D.C. Circuit announced in *Brown*, the D.C. Circuit itself has held, consistent with the other circuits, that "*Brown* would not prevent a district court from excusing [a known holdout juror] under Rule 23(b) for good cause,' * * * if the court forms an independent, good-cause justification for removing the juror that bears no 'causal link' to the juror's holdout status." *McGill*, 815 F.3d at 868-869 (quoting *Ginyard*, 444 F.3d at 652); see *id.* at 868 (declining to consider whether dismissal for the juror's failure to deliberate would be consistent with *Brown* because

juror was excused for “an alternative and independent” reason that he improperly removed case-related notes from the jury room); *Ginyard*, 444 F.3d at 652 (*Brown* is not implicated where “the record evidence disclose[d] a possibility that [juror at issue] believed that the government [had] failed to present sufficient evidence to support a conviction” but that reason for the dismissal “stemmed entirely from an employment-related need”) (internal quotation marks omitted); see also *Carson*, 455 F.3d at 350, 352 (concluding that *Brown* did not apply because district court dismissed juror based on his “incorrect answers” on voir dire questionnaire and rejecting defendant’s claim that the reason for dismissal was “a pretext to obtain a quicker verdict”).

This case does not trigger a heightened standard because the district court dismissed Juror 2 based on his intentional failure to disclose relevant information during voir dire. Petitioner acknowledges that a finding that a juror lied during voir dire can support dismissal under Rule 23(b)(3), but argues (Pet. 13) that the heightened standard applies in this case because the request for removal can be traced to the government’s investigation of Juror 2’s background after the jury expressed its concern about Juror 2’s failure to deliberate in good faith. Petitioner’s claim is unsupported both factually and legally. Although the government decided to look into petitioner’s background because the juror’s statements and conduct “caused it to believe that juror had ‘some undisclosed connection to this case,’” Pet. App. 6a (quoting Pet. C.A. App. 521), it did not request the juror’s dismissal until the court’s questioning of the juror revealed that he deliberately withheld information during voir dire, Pet. C.A. App. 487. “The district court [in turn] rejected [petitioner’s] argument

that the government had an improper motive for conducting its investigation of Juror No. 2.” Pet. App. 6a. Indeed, petitioner had himself agreed that the court should interview the juror once the results of the government’s investigation were disclosed, and he did not object to dismissing Juror 2 after the juror confirmed that he had not disclosed the material information during voir dire. *Ibid.* In any event, petitioner cites no authority for his claim that the initial impetus for the government’s investigation matters when the substance of the request for the dismissal—and the dismissal itself—was unrelated to the juror’s views of the evidence.

Petitioner’s contention (Pet. 18-22) that the court of appeals erred by considering whether the government conducted its investigation in good faith also lacks merit. Petitioner misconstrues the court of appeals’ opinion as holding that “bad faith” is required for the heightened standard to apply. The court did not so hold. Instead, it responded to (and rejected) petitioner’s argument below that the government had conducted the investigation in bad faith in an attempt to uncover a reason for disqualification that would not trigger the heightened “any possibility” standard. Pet. 19; Pet. App. 6a; see Pet. C.A. Br. 45-46. To the extent petitioner disputes the district court’s underlying factual finding that the government did not have an improper purpose in initiating its investigation, that challenge is factbound, meritless, and implicates no circuit conflict.

Finally, contrary to petitioner’s suggestion, the court of appeals’ unpublished decision below does not suggest that the government can “dig[] for dirt on jurors they have some reason to think may be leaning against them, particularly after deliberations have begun.” Pet. 22. The court expressly distinguished this case from one in

which the government actually targeted a juror for investigation “because of his perceived views on the evidence.” Pet. App. 6a. The court here simply affirmed the district court’s factual finding that, on the record here, the government had not done so. *Ibid.* Cf. *McGill*, 815 F.3d at 869-870 (“[I]f an ostensibly independent basis for a juror’s dismissal in fact amounts to a pretext, and the actual ground for dismissal involves the juror’s views about the adequacy of the government’s evidence, our decision in *Brown* would be directly implicated.”); *Warner*, 498 F.3d at 687 (stating that counsel’s motivations for supporting or opposing the court’s dismissal do not matter “[s]o long as the court was not hoodwinked into believing there was cause where there was none”); *Carson*, 455 F.3d at 352 (considering (and rejecting) defendants’ argument that the district court’s good-cause finding was pretextual).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
 KENNETH A. BLANCO
*Acting Assistant Attorney
 General*
 KIRBY A. HELLER
Attorney

SEPTEMBER 2017