No. 15-59

In the Supreme Court of the United States

RONALD MARQUET CHEADLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court violated the Fifth and Sixth Amendments by dismissing a juror because she stated that her mind was made up before deliberations commenced and she subsequently refused to deliberate.

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OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1a-47a) is reported at 109 A.3d 594. The order of the Superior Court of the District of Columbia denying petitioner's post-trial motion (Pet. App. 56a-86a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2014. A petition for rehearing was denied on April 14, 2015 (Pet. App. 48a-49a). The petition for a writ of certiorari was filed on July 13, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

Following a seven-week jury trial in the Superior Court of the District of Columbia, petitioner was convicted of first-degree murder, armed robbery, at-

tempted robbery, conspiracy to obstruct justice, obstruction of justice, possession of a firearm during a crime of violence, and carrying a pistol without a license, all in violation of D.C. law. Pet. App. 2a & n.1, 50a-51a, 53a-54a, 56a-57a. Petitioner was sentenced to a total of 1260 months of imprisonment. *Id.* at 51a, 54a. The court of appeals affirmed. *Id.* at 1a-47a.

1. On September 14, 2002, petitioner and two accomplices committed an armed robbery of a group of individuals and an attempted armed robbery of another group on Kenyon Street in Washington, D.C. Pet. App. 3a. When one of the victims attempted to defend himself, a gun battle ensued. *Ibid.* Six people were shot and one victim, Asheile George, eventually died of his wounds. *Ibid.*

Petitioner became concerned that one of his accomplices, Elias Atkins, might inform authorities about the Kenyon Street robbery and shootings. Pet. App. 4a. On March 11, 2003, petitioner and a friend, Michael Matthews, went to an apartment where Atkins was staying. *Ibid.* Petitioner shot Atkins to death and ran out of the apartment. *Ibid.* Three days later, petitioner was arrested for Atkins's murder. *Ibid.*

While in jail after his arrest, petitioner confessed to a childhood friend, Pierre Johnson, that he had killed Atkins. Pet. App. 4a. Johnson began telling others about petitioner's involvement in the murder. *Id.* at 5a. Petitioner told a friend, Azariah Israel, that Johnson was cooperating with the government. Gov't D.C. C.A. Br. 10. Israel thereafter shot Johnson to death. Pet. App. 4a-5a.

After Atkins was murdered, Matthews began cooperating with the government. Pet. App. 5a. Matthews

gave a videotaped statement describing the shooting and testified before a grand jury. *Ibid.* Before he could testify at petitioner's trial, however, Matthews disappeared. *Ibid.* Petitioner's trial was delayed until Matthews was located. *Ibid.* When Matthews finally testified at trial, he claimed to have no memory of Atkins's murder. *Id.* at 5a-6a.

2. Petitioner was charged with the murders of George, Atkins, and Johnson, along with armed robbery, attempted armed robbery, conspiracy, obstruction of justice, and various firearms offenses. Pet. App. 2a-3a & n.1.

On February 9, 2009, petitioner's trial began. Pet. App. 58a. On March 17, 2009, partway through the trial, the government moved to dismiss Juror 13 based on her behavior during the proceedings. *Ibid.* Specifically, the government stated that Juror 13 had appeared to be sleeping during portions of the proceedings; had rolled her eyes while counsel was speaking or questioning witnesses; had commented to another juror that the amount of security in the courtroom was "ridiculous" and unnecessary; and had declined to rely on transcripts provided to aid the jury while they listened to dozens of recorded telephone calls, some of which were barely audible. *Id.* at 23a-24a, 58a-59a, 106a.

The trial court denied the motion to dismiss because it had not personally observed all of Juror 13's behavior. Pet. App. 59a, 106a. In response to the government's motion, however, the court instructed the jury on the importance of entering deliberations "with a completely open mind." *Id.* at 60a (citation omitted). The next day, the court reiterated to the jurors that it was "very important that when [they] go

into the deliberations, [they] haven't made up [their] own minds firmly about any aspect of the case, until [they] have a chance to talk to each other about it." *Ibid.* (citation omitted). And the day after that, the court once again instructed jurors that they "should keep a completely open mind until" deliberations commenced. *Id.* at 61a (citation omitted).

On March 23, 2009, the case was submitted to the jury in the late afternoon, and deliberations began the following morning. Pet. App. 61a. Approximately two and a half hours after deliberations commenced, the foreperson sent the trial court a note stating that "[o]ne of the jurors has said that her mind is closed as to the case" and that "deliberations are unproductive already." *Id.* at 23a. The court consulted with counsel about the note. *Id.* at 105a-107a. The court observed that it would be inappropriate to "intrude into the thought processes of the deliberating jurors" or to "single out a juror who simply disagrees with the others about what the evidence shows or what it doesn't show." *Id.* at 107a. But the court stated that the timing suggested "a closed mind," rather than "a dissenting mind" because the juror had expressed an "unwillingness to deliberate further at such an early stage of the deliberations in such a complex case." *Id.* at 108a; see *ibid.* (reiterating that the note suggested the juror had "a closed mind and a refusal to even listen to the point of view of others" because jurors had not yet had time "to get far enough to know whether there's a dissent or disagreement about the merits of the case"); *id.* at 112a (observing that the issue with the juror had arisen "before the jury could have deliberated substantively on any of the charges in a meaningful way").

The trial court also expressed concern that the note might refer to Juror 13. Pet. App. 105a. If that were the case, the court said it would be necessary to consider the allegations "in the context of the entire trial," during which Juror 13 had engaged in "inappropriate behavior." *Id.* at 106a. The court noted that it had already instructed the jury three times about "how important it was to go into deliberations with an open mind," and that it had emphasized the point "thinking of [Juror 13]" based on the concern that "her mind was not open." *Id.* at 111a. Under those circumstances, the court observed, "a fourth instruction to keep an open mind" was "not likely to have a salutary effect." *Id.* at 111a-112a.

The trial court decided to question the foreperson about the note, emphasizing at the outset that the foreperson should not "say anything about positions anybody's taken in the jury room, about the case, [or] what [the jury has] discussed in [its] deliberations." Pet. App. 114a. The foreperson confirmed that the juror who stated her mind was closed was Juror 13. *Ibid.* The foreperson further noted that Juror 13 had announced the prior night, "[a]propos of nothing" and before deliberations had begun, that "there would be disagreement, [the jury was] not going to agree." *Id.* at 125a. When deliberations began the following morning, Juror 13 stated that the jury would be deliberating for at least a week, which the foreperson found "remarkable * * * because no one else had spoken." *Id.* at 126a. Juror 13 also repeatedly said that "her mind was made up" and "that nothing anybody said could persuade her one way or the other," and she twice stood up and walked out of the jury room during deliberations. *Ibid.* Although Juror 13

had at times stated she would listen to other jurors, the foreperson noted that "it was the unanimous view of the eleven jurors in the room that those [statements] were not sincere." *Ibid.* The foreperson interpreted Juror 13's comments and actions to signal that she was not open to further deliberations, describing how "[s]he does not listen," "[s]he puts her head down and closes her eyes," and she "is combative, accus[ing] people of having agendas." *Id.* at 132a. The foreperson further noted "that there's a lot of disagreements in the jury room" that were "being handled in" a "thoughtful fashion," but that the difficulties with Juror 13 were "something very different." *Id.* at 127a.

The trial court next proceeded to question each juror individually. Pet. App. 135a-145a. The court stated that it was not inquiring into any juror's "view of the case, or what views have been expressed in the jury room," but instead was asking only whether a juror had "entered into the deliberations with a closed mind from the beginning and [was] unwilling to approach the deliberations with an open mind." *E.g.*, *id.* at 135a-136a. Each juror confirmed that Juror 13 had a closed mind and had expressed unwillingness to participate in deliberations. *Id.* at 135a-145a.

When the trial court questioned Juror 13, she "was highly agitated" and stated that she had not entered deliberations with a closed mind. Pet. App. 145a; see *id.* at 142a-143a, 145a-146a. Juror 13 said that the other jurors could not "force [her] to agree with them" and that she had "told them that [she] made up [her] mind with the decision that [she] made." *Id.* at 142a-143a.

The trial court found the testimony of the eleven other jurors credible and concluded that Juror 13 should be removed pursuant to District of Columbia Superior Court Rule of Criminal Procedure 24(c) based on her unwillingness to deliberate. Pet. App. 145a-147a; see *id.* at 69a. The court emphasized that it would be improper to remove Juror 13 if the jurors "were in the fifth day of deliberations, and they had thoroughly discussed the case with her participating, and she had a view that was different from all the others and said they just don't agree with [her] and they can't force [her] to change [her] mind." *Id.* at 147a. But the court determined that Juror 13 had instead entered "the jury room with a closed mind," which she had expressed "before they even began talking about the case," and had confirmed within the first hours of deliberations by saying she would listen but that her "mind [wa]s made up." *Ibid.* The court also observed that Juror 13 was not being "single[d] * * * out as a dissenting juror on the merits" because the foreperson had mentioned that there was considerable disagreement among the jurors. *Id.* at 133a. "[B]ased on this record," the court found it "as clear as it could possibly be" that, "whatever any of [the jurors'] views [were] about the merits of the case," Juror 13 was unwilling to perform her duty to deliberate. *Id.* at 146a.

After replacing Juror 13 with an alternate juror, the trial court instructed the jury to begin its deliberations anew. Pet. App. 72a-73a. The jury deliberated for three days before returning a verdict finding petitioner guilty of murder, armed robbery, attempted armed robbery, conspiracy to obstruct justice, ob-

struction of justice, and various firearms offenses. *Id.* at 2a n.1, 30a, 50a-51a, 53a-54a, 56a-57a.

3. Petitioner moved for a new trial on the ground that the removal of Juror 13 was improper. Pet. App. 30a. The trial court denied the motion, holding that Juror 13 was properly "excused for cause very early in the deliberations when it became patently obvious this juror was * * * adamantly refusing to deliberate." *Id.* at 75a. The court emphasized that it "did *not* remove Juror 13 because she disagreed with other jurors about how the case should be decided," noting that "at the time she was excused, neither the court nor the parties had been informed how she or any other juror would decide" the case. *Id.* at 78a-79a. Instead, "Juror 13 was excused because she refused to deliberate from the outset of deliberations, despite *three* instructions from the court stressing the importance of entering deliberations with an open mind." *Id.* at 79a. Juror 13's statement that she was participating in deliberations was "not credible," and the court "was convinced beyond any doubt that she was not deliberating and was not willing to deliberate, in violation of her oath as a juror." *Ibid.* "[O]n this record," the court concluded, "there [is] no possibility —much less a reasonable one—that [Juror 13] was removed because she disagreed with the other jurors about the evidence, * * * rather than because of her absolute refusal to deliberate." *Id.* at 85a.

4. The District of Columbia Court of Appeals affirmed. Pet. App. 1a-47a.[1] The court observed that

[1] The court of appeals initially remanded for the trial court to "make additional findings of fact regarding whether during jury selection, [Juror 13] failed to disclose disqualifying information out of a desire to serve on [the] jury for some improper purposes."

cause existed to remove Juror 13 because she "entered deliberations with a closed mind and an intent to cause the jury's work to be protracted and unproductive" and because she engaged in "seriously disruptive behavior" during deliberations, including "walk[ing] out of the jury room while other jurors were expressing their views," "put[ting] her head down and clos[ing] her eyes rather than engag[ing] with her fellow jurors," and "express[ing] to them that her mind was made up and that while she would listen, nothing they could say could change her mind." *Id.* at 33a-35a (citation omitted). Thus, the court concluded, Juror 13 was properly removed because she "was not

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Pet. App. 30a-31a (citation and internal quotation marks omitted; second set of brackets in original). That order stemmed from evidence obtained after the verdict demonstrating that Juror 13 was a Maryland resident and therefore was not eligible to serve as a juror in the Superior Court of the District of Columbia. *Id.* at 30a. After conducting an evidentiary hearing on remand, the trial court concluded that Juror 13 had "intentionally lied about her [non-District of Columbia] residence" and had failed to disclose relevant background information during voir dire, including that she had been convicted of a misdemeanor in 2007 and had a close relationship with a convicted felon. *Id.* at 31a (brackets in original). The court found insufficient evidence, however, to conclude that Juror 13 sought to serve on the jury for an improper purpose. See *ibid.* The court reiterated instead that Juror 13 was properly removed from the jury because her "refusal to deliberate violated her oath as a juror and the court's repeated instructions." Super. Ct. Findings of Fact & Conclusions of Law on Remand 14 (Nov. 12, 2013). When the case returned to the court of appeals, the court focused only on the record that existed at the time of Juror 13's removal and did "not consider the impact of the post-verdict information about Juror 13's lack of eligibility" to sit on the jury. Pet. App. 40a n.36.

deliberating and was disrupting her fellow jurors' efforts to deliberate." *Id.* at 34a.

In reaching that conclusion, the court of appeals recognized that a juror may not be excused "for the purpose of breaking a deadlock or because of her views of the merits." Pet. App. 32a (quoting *Shotikare* v. *United States*, 779 A.2d 335, 344 (D.C. 2001)). The court stated that reversal is required "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." *Id.* at 33a (quoting *Shotikare*, 779 A.2d at 345) (citation omitted). But the court perceived no reasonable possibility that Juror 13 was excused because of her view of the merits. *Id.* at 36a. The court reasoned that "the issue of Juror 13 came to light early after the case had gone to the jury, when there were still what the foreperson described as 'lots' of disagreements among the jurors, meaning that no juror could be identified as a dissenter." *Id.* at 36a-37a. And after Juror 13 was excused, the court explained, "deliberations continued for a further three days before the jury reached its verdicts, suggesting that there remained much room for discussion." *Id.* at 37a. The court also emphasized that other jurors had focused on Juror 13's refusal to deliberate, rather than expressing frustration with her views of the case or her potential to create a hung jury. *Id.* at 37a n.33, 38a. And the trial court had "scrupulously avoided any indication of the jurors' views on the merits of the case and explicitly and repeatedly admonished each juror" to "reveal nothing to him about the content of their deliberations." *Id.* at 38a. Based on the record, the court of appeals held that there was no "reasonable possibility that Juror 13 was removed because she

was a dissenting voice or because of her views on the evidence." *Id.* at 36a.

ARGUMENT

Petitioner argues (Pet. 21-24) that the removal of Juror 13 violated the Fifth and Sixth Amendments because, in his view, there was a reasonable possibility that her removal stemmed from her views of the merits. Petitioner further contends (Pet. 11-21) that lower courts have articulated divergent standards for assessing the propriety of the removal of a juror during deliberations. Those arguments lack merit. The lower courts apply essentially the same standard to determine whether a deliberating juror was properly excused, and the court below correctly applied that standard to the facts of this case. This Court recently denied petitions for writs of certiorari in two cases involving the question that petitioner presents, and there is no reason for a different result here. See *Patterson* v. *United States*, No. 14-8995, 2015 WL 1307894 (Oct. 5, 2015); *Gonzalez* v. *Connecticut*, No. 14-9997, 2015 WL 2473126 (Oct. 5, 2015).

1. a. District of Columbia Superior Court Rule of Criminal Procedure 24(c) provides that an alternate juror may replace a juror who "is found to be unable or disqualified to perform juror duties," including "after deliberations have begun." As the court of appeals recognized, a juror's refusal to deliberate and her disruptive behavior preventing others from deliberating can warrant the juror's dismissal under Rule 24(c). See Pet. App. 32a-36a. This Court observed more than a century ago that "[i]t cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his

ears to the arguments of men who are equally honest and intelligent as himself." *Allen* v. *United States*, 164 U.S. 492, 501-502 (1896); see *Lowenfield* v. *Phelps*, 484 U.S. 231, 235, 241 (1988) (approving jury instruction that stated that jurors had a "duty to consult with one another[,] to consider each other's views[,] and to discuss the evidence with the objective of reaching a just verdict") (citation omitted). Because "[i]t is well-settled that jurors have a duty to deliberate," a court may permissibly remove a juror if she has "made up her mind prior to the beginning of deliberations and refused to engage in deliberations with the other jurors." *United States* v. *Baker*, 262 F.3d 124, 130 (2d Cir. 2001); see, *e.g.*, *United States* v. *Boone*, 458 F.3d 321, 329 (3d Cir. 2006) (observing that it is "manifest * * * that a juror who refuses to deliberate * * * violates the sworn jury oath and prevents the jury from fulfilling its constitutional role," which provides grounds for the juror's dismissal), cert. denied, 551 U.S. 1147 (2007).

In this case, the trial court did not abuse its discretion by removing Juror 13 based on her unwillingness to deliberate. Notably, Juror 13 "announced * * * that there was going to be disagreement" before the jury had even begun deliberations, when no juror had yet "expressed a point of view from which one could disagree." Pet. App. 125a; see *id.* at 126a. In the first hours of deliberations, Juror 13 repeatedly stated that "her mind was made up" and "nothing anybody said could persuade her one way or the other." *Id.* at 126a. All eleven of her fellow jurors confirmed that Juror 13 had "entered into the deliberations with a closed mind and [wa]s unwilling to participate in the deliberations with an open mind." *E.g.*, *id.* at 141a. Juror 13 fur-

ther disrupted deliberations by walking out of the room while other jurors were expressing their views and putting her head down and closing her eyes when she remained in the jury room. *Id.* at 34a. Finally, Juror 13's testimony that she was participating in deliberations was "not credible." *Id.* at 79a (explaining that "the court did not credit Juror 13, based in part on her demeanor"). In short, Juror 13 was properly removed "because she refused to deliberate from the outset of deliberations, despite *three* instructions from the court stressing the importance of entering deliberations with an open mind." *Ibid.*

b. Although petitioner does not directly challenge the lower courts' conclusion that Juror 13 was "unable or disqualified to perform juror duties" under Rule 24(c) based on her refusal to deliberate, petitioner briefly suggests (Pet. 21-22) that Juror 13 was, in fact, participating in deliberations. But the trial court was "convinced beyond any doubt that [Juror 13] was not deliberating and was not willing to deliberate, in violation of her oath as a juror." Pet. App. 79a. A trial court's "finding on the question whether a juror has impermissibly refused to participate in the deliberation process is a finding of fact to which appropriate deference is due." *Baker*, 262 F.3d at 130. Petitioner provides no basis to disturb the trial court's determination that Juror 13 was not deliberating and so was properly excused pursuant to Rule 24(c).

Petitioner nonetheless contends (Pet. 21-24) that Juror 13's removal violated the Constitution because, in petitioner's view, the record discloses a "reasonable possibility that Juror 13's removal stemmed from her views of the merits." But the trial court and the court of appeals found to the contrary. As the trial court

explained, "on this record, there [is] no possibility—much less a reasonable one—that [Juror 13] was removed because she disagreed with the other jurors about the evidence, * * * rather than because of her absolute refusal to deliberate." Pet. App. 85a. The court of appeals likewise concluded that the record did not support the argument that there was "a reasonable possibility that Juror 13 was removed because she was a dissenting voice or because of her views on the evidence." *Id.* at 36a. Petitioner's factbound disagreement with the lower courts' evaluation of the record does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (observing that this Court "do[es] not grant a [writ of] certiorari to review evidence and discuss specific facts").

In any event, the lower courts correctly found no basis in the record to conclude that Juror 13 was dismissed because of her views of the case. During its investigation of Juror 13's refusal to deliberate, the trial court repeatedly admonished jurors not to reveal their views of the merits. See, *e.g.*, Pet. App. 125a, 135a-145a. The court's questioning did not elicit any specific information about Juror 13's evaluation of the evidence, but instead focused only on whether Juror 13 had refused to participate in the deliberative process. See *id.* at 38a n.35 (observing that Juror 13 only "made her views as to the merits known for the first time" in a declaration supporting petitioner's motion for a new trial). Accordingly, "at the time [Juror 13] was excused, neither the court nor the parties had been informed how she or any other juror would decide any count of th[e] multiple count * * * case if she had been willing to deliberate." *Id.* at 78a-79a. In

short, "the court did *not* remove Juror 13 because she disagreed with other jurors about how the case should be decided," but rather excused her only because "she refused to deliberate" at all. *Ibid.*

Petitioner's claim (Pet. 21-24) that other jurors sought Juror 13's dismissal because she "disagreed with them over their views of the evidence" is likewise unfounded. Juror 13 indicated an unwillingness to deliberate before discussions had even begun, when no juror had yet "expressed a point of view from which one could disagree." Pet. App. 125a; see *id.* at 126a. As the trial court recognized, the timing of the complaints about Juror 13 suggested "a closed mind," rather than "a dissenting mind" because the jury had not yet had time to "deliberate[] substantively on any of the charges in a meaningful way." *Id.* at 108a, 112a; see *id.* at 108a (observing that the complaints about Juror 13 had arisen before jurors had sufficient time "to get far enough to know whether there's a dissent or disagreement about the merits of the case").[2]

In bringing Juror 13's conduct to the trial court's attention, moreover, her fellow jurors focused not on her views of the evidence, but on her refusal to engage in the deliberative process. See, *e.g.*, Pet. App. 105a (note to the judge stated that Juror 13 had "an-

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[2] As the court of appeals recognized (Pet. App. 37a n.33), the facts of this case differ significantly from those in "holdout" cases, where the request for removal of a juror came after a much longer period of deliberations. See, *e.g.*, *United States* v. *Symington*, 195 F.3d 1080, 1083-1084 (9th Cir. 1999) (eighth day of deliberations); *United States* v. *Hernandez*, 862 F.2d 17, 20-22 (2d Cir. 1988) (fourth day of deliberations), cert. denied, 489 U.S. 1032 (1989); *United States* v. *Brown*, 823 F.2d 591, 594 (D.C. Cir. 1987) (fifth week of deliberations).

nounced * * * that her mind is closed as to the case"); *id.* at 126a (foreperson's testimony that Juror 13 had "repeatedly" stated that "her mind was made up"); *id.* at 135a-145a (each juror's testimony that Juror 13 "entered into the deliberations with a closed mind from the beginning and [was] unwilling to approach the deliberations with an open mind"). The suggestion that Juror 13 was targeted for removal because she disagreed with other jurors on the merits is therefore unfounded. Indeed, at the time the jury brought Juror 13's refusal to deliberate to the trial court's attention, "there were still what the foreperson described as 'lots' of disagreements among the jurors, meaning that no juror could be identified as a dissenter." *Id.* at 36a-37a. And "following the replacement of Juror 13, deliberations continued for a further three days before the jury reached its verdicts, suggesting that there remained much room for discussion at the time Juror 13 was removed." *Ibid.* For these reasons, the lower courts correctly concluded that no reasonable possibility existed that Juror 13 was removed because of her views of the case.[3]

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[3] Although petitioner does not seek this Court's review of the procedures the trial court followed to investigate Juror 13's refusal to deliberate, see Pet. i, petitioner briefly contends (Pet. 22-24) that the court's "investigation * * * intrude[d] on the province of the jury's deliberative process" and "undermined confidence in the trial process." That allegation lacks merit. Upon receiving the jury note reporting Juror 13's statement that her mind was closed, the court recognized that it could not "intrude into the thought processes of the deliberating jurors." Pet. App. 107a. As the court of appeals summarized, the trial court "scrupulously avoided any indication of the jurors' views on the merits of the case and explicitly and repeatedly admonished each juror" to "reveal nothing to him about the content of their deliberations." *Id.* at 38a. After

2. Petitioner contends (Pet. 11-21) that this Court's review is warranted because the lower courts have articulated divergent standards for determining when a juror may properly be removed during deliberations. But this case is an unsuitable vehicle for resolving any such disagreement because petitioner agrees with the standard that the courts below adopted, and disputes only how that standard applies to the facts of his case. In any event, the standards that courts have actually applied to allegations of impropriety during deliberations do not diverge in any significant way—and certainly reflect no difference of constitutional magnitude. In particular, all courts have recognized that dismissal may not appropriately be based on a

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removing Juror 13, the judge told counsel that he was pleased "to get through that very difficult inquiry without any juror" stating "where she or any other jurors stood." *Id.* at 30a n.22.

Petitioner also maintains (Pet. 23-24) that the trial court "single[d] out Juror 13" and viewed her "as a 'problem juror.'" But the court reasonably observed that it had to consider Juror 13's refusal to deliberate "in the context of the entire trial," during which Juror 13 had already engaged in "inappropriate behavior," such as commenting publicly on "her skepticism about the need for all the security that she observed in the courtroom." Pet. App. 106a. Indeed, the court had instructed the jury three times that it was necessary to enter deliberations with an open mind because the court was concerned that Juror 13's behavior indicated that "her mind was not open." *Id.* at 111a. Although petitioner suggests (Pet. 23) that the court should have "issu[ed] a renewed instruction on the need to deliberate," Juror 13 had already ignored three prior instructions to that effect and the court committed no error in "concluding that an additional instruction would be very unlikely to be productive." Pet. App. 40a (internal quotation marks omitted).

juror's views of the merits or the sufficiency of the evidence.

a. Petitioner asserts (Pet. 10) that "a three-way split" exists among lower courts concerning the evidentiary standard for determining whether it is proper to remove a deliberating juror. Petitioner describes (Pet. 11-14) the Second and D.C. Circuits and the Ohio Supreme Court as holding that dismissal is improper if there is "any possibility" that removal is based on the juror's evaluation of the evidence. Petitioner contrasts (Pet. 14-16) those decisions with decisions from the Third, Sixth, Ninth, and Eleventh Circuits that employ a "reasonable possibility" standard. Finally, petitioner maintains (Pet. 16-21) that the California and Connecticut Supreme Courts apply what petitioner calls "an 'inverse' reasonable possibility standard." Petitioner ascribes (Pet. 16-18) that same approach to the District of Columbia Court of Appeals, although petitioner acknowledges that the court "purports to apply the reasonable possibility standard."

Petitioner appears to endorse the "reasonable possibility" standard. See Pet. i (framing the question presented as "[w]hether a defendant's right to a unanimous jury verdict under the Fifth and Sixth Amendments precludes a court from removing a juror after the start of deliberations when the record discloses *a reasonable possibility* that the request for removal stems from the juror's views on the merits of the case") (emphasis added); Pet. 21 (asserting that there is a "reasonable possibility that Juror 13's removal stemmed from her views of the merits"). But the standard petitioner advocates is the one the trial court and the court of appeals applied. See Pet. App. 33a

(observing that reversal is warranted "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") (quoting *Shotikare* v. *United States*, 779 A.2d 335, 345 (D.C. 2001)); *id.* at 85a (finding "no possibility—much less a reasonable one—that [Juror 13] was removed because she disagreed with the other jurors about the evidence"). Petitioner's objection to the lower courts' analysis accordingly centers not on the proper evidentiary standard, but on the application of that standard to the facts of his case.[4] Because petitioner has not preserved and does not press an argument that a standard other than a "reasonable possibility" should apply, this case is not an appropriate vehicle to review that issue. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.").

b. In any event, the alleged division among the courts of appeals and the state supreme courts is illusory. Though courts have used somewhat different language when evaluating a claim of juror misconduct

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[4] Petitioner contends (Pet. 18) that the court of appeals' actual analysis reveals that it did not follow the "reasonable possibility" standard because the court purportedly "look[ed] to grounds supporting removal in lieu of scrutinizing whether the removal may be related to the juror's views of the merits." That is incorrect. The court found that the Rule 24(c) standard for removal was satisfied because Juror 13 refused to deliberate, Pet. App. 32a-35a, but it then further reviewed the record to determine whether Juror 13's removal possibly stemmed from her evaluation of the merits, *id.* at 38a-39a. The court could not "agree on this record that there [wa]s a reasonable possibility" that Juror 13 was dismissed due to her views of the case. *Id.* at 36a.

after the start of jury deliberations, they have undertaken essentially the same analysis and applied the same core standard: dismissal is not appropriate when there is a possibility based on the record evidence that the basis for the dismissal rests on the juror's views of the merits of the case or the sufficiency of the evidence, rather than the juror's inability or unwillingness to deliberate in accordance with law. For example, the courts of appeals in *United States* v. *Thomas*, 116 F.3d 606, 621-622 (2d Cir. 1997), and *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987), used the phrase "any possibility," but that meant an actual possibility based on evidence in the record, not a completely speculative possibility. Indeed, the court in *Brown* found that a juror was improperly dismissed because there was a "substantial possibility" based on specific record evidence "that [he] requested to be discharged because he believed that the evidence offered at trial was inadequate to support a conviction." *Ibid.* As the Eleventh Circuit explained in *United States* v. *Abbell*, 271 F.3d 1286 (2001), cert. denied, 537 U.S. 813 (2002), "the term 'any possibility' and the term 'substantial possibility' * * * are interchangeable, both meaning a tangible possibility, not just a speculative hope." *Id.* at 1302 n.14 (citation omitted).

The courts that petitioner describes as applying an "inverse reasonable possibility standard" follow the same approach of reviewing the record evidence to determine whether it discloses an actual possibility that a juror was removed because of her views of the merits. The California Supreme Court has held that a juror may properly be dismissed "if it appears as a demonstrable reality that the juror is unable or un-

willing to deliberate," but the court has not found that standard satisfied when the record reveals that the juror was removed because he "viewed the evidence differently from the way the rest of the jury viewed it." *People* v. *Cleveland*, 21 P.3d 1225, 1237-1238 (2001) (citations and internal quotation marks omitted). Thus, "in application, the California standard" has "not produce[d] different results" as compared to the evidentiary standard used by other courts. *State* v. *Elmore*, 123 P.3d 72, 81 n.8 (Wash. 2005) (en banc). Petitioner is further wrong to assert (Pet. 19) that courts in the District of Columbia and Connecticut apply "a less stringent approach to reviewing juror removals." As previously noted, the District of Columbia Court of Appeals has adopted the "any reasonable possibility" standard. *Shotikare*, 779 A.2d at 345 (citation and emphasis omitted). And the Connecticut Supreme Court has reserved judgment on what evidentiary standard applies to allegations that a juror refused to deliberate in good faith, finding it "not necessary" to consider that issue in a case in which a juror was removed for misconduct unrelated to her alleged refusal to deliberate. *State* v. *Gonzalez*, 109 A.3d 453, 464, cert. denied, No. 14-9997, 2015 WL 2473126 (Oct. 5, 2015).

In short, "[w]hile there is a slight difference in the [evidentiary] standards as expressed by" the lower courts, "the difference is one of clarification and not disagreement." *United States* v. *Kemp*, 500 F.3d 257, 304 (3d Cir. 2007), cert. denied, 552 U.S. 1223 (2008); see *United States* v. *Patterson*, 587 Fed. Appx. 878, 896 n.1 (6th Cir. 2014) (Cole, J., concurring in part and dissenting in part) (recognizing that courts are in basic agreement on the evidentiary standard and have

simply "modified slightly the language employed"), cert. denied, No. 14-8995, 2015 WL 1307894 (Oct. 5, 2015). Courts have uniformly agreed that a deliberating juror may not be removed because of her views of the case, and they have reviewed the basis for a juror's removal under an evidentiary standard that is "at once appropriately high and conceivably attainable." *United States* v. *Symington*, 195 F.3d 1080, 1087 n.5 (9th Cir. 1999).[5]

Notably, petitioner does not identify any case whose outcome was affected by the choice between the allegedly different standards. Petitioner does not even suggest that the choice between those standards would affect his case; to the contrary, he contends (Pet. 22) that "[t]he circumstances of Juror 13's removal demonstrate that the court of appeals' decision is incorrect under any standard." As the court of appeals explained, however, the record evidence disclosed no "reasonable possibility that Juror 13 was removed because she was a dissenting voice or because of her views on the evidence." Pet. App. 36a. Petitioner's factbound disagreement with the court's assessment of the record does not warrant further review.

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[5] Petitioner suggests (Pet. 21-24) that the alleged inconsistency between the standards applied by the lower courts implicates his Fifth and Sixth Amendment jury trial rights. But courts applying the "reasonable possibility" standard have emphasized that it is tantamount to the "beyond a reasonable doubt" standard. *Kemp*, 500 F.3d at 305; see *Symington*, 195 F.3d at 1087 n.5; *Abbell*, 271 F.3d at 1302. The application of that stringent standard adequately safeguards a defendant's right to a unanimous jury, raising no concern under the Fifth and Sixth Amendments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2015