No. 16-461

In the Supreme Court of the United States

TERRY CHRISTENSEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly upheld the district court's dismissal of a juror based on the district court's finding that the juror was unable to apply the law during deliberations and lied to the court.

2. Whether the court of appeals correctly upheld the district court's refusal to suppress recordings made by petitioner's co-defendant on the ground that petitioner failed to carry his burden of proving that the recordings were made "for the purpose of committing any criminal or tortious act." 18 U.S.C. 2511(2)(d).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-138a) is reported at 828 F.3d 763. A second opinion of the court of appeals (Pet. App. 139a-170a) is not published in the Federal Reporter but is reprinted at 624 Fed. Appx. 466.

JURISDICTION

The amended judgment of the court of appeals was entered on July 8, 2016. The petition for a writ of certiorari was filed on October 5, 2016. 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 Central District of California, petitioner was convicted of conspiracy to intercept and use wire communications, in violation of 18 U.S.C. 371, and interception of wire communications, in violation of 18

U.S.C. 2511(1)(a) and (d). Petitioner was sentenced to 36 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-170a.

1. Petitioner, an attorney, hired Anthony Pellicano to wiretap Lisa Bonder, who was seeking child-support payments from one of petitioner's clients. Pellicano held himself out as a legitimate private investigator, but in fact routinely relied on wiretaps, bribes, and other illegal tactics. After arranging the wiretap on Bonder, Pellicano regularly updated petitioner on her phone calls, including her discussions with her attorneys—information that petitioner actively sought out. Unbeknownst to petitioner, Pellicano recorded the phone conversations in which he provided these updates. Pet. App. 15a-18a; Gov't C.A. Br. 44-51.

2. After Pellicano's criminal activity came to light, a federal grand jury indicted Pellicano, petitioner, and several other defendants on a variety of criminal charges. Petitioner and Pellicano were charged with two counts relating to the Bonder wiretap: conspiracy to intercept and use wire communications, in violation of 18 U.S.C. 371, and interception of wire communications, in violation of 18 U.S.C. 2511(1)(a) and (d). Those two counts were tried separately from the other charges against Pellicano and the remaining defendants. Pet. App. 19a-21a; Gov't C.A. Br. 8-9.

a. Petitioner moved to suppress Pellicano's recordings of their conversations, contending that the recordings violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* Pet. App. 190a-191a. Title III does not prohibit a private citizen from recording his own phone calls unless the recordings are made "for the purpose of

committing any criminal or tortious act." 18 U.S.C. 2511(2)(d). The district court denied petitioner's motion, finding that he had failed to show that Pellicano recorded their conversations for an unlawful purpose. Pet. App. 190a-199a.[1]

b. Following a two-month trial, the district court submitted the case to a jury. Gov't C.A. Br. 44. After 75 minutes of deliberations, Juror 9 sent a note to the court stating that Juror 7 "do[es]n't agree with the law, about wire tapping." Pet. App. 90a. The note quoted Juror 7 as stating that he "[u]nderstands what the law is but do[es]n't agree"; that "witness[es] never tell the truth"; and that, "if its ok [for] the government to wire tap + not get caught, then its ok for him." *Ibid.* At the bottom of the note, the foreperson (Juror 1) added a request for help: "We are unable to move forward; we need assistance." *Ibid.* (brackets omitted). Juror 3 also sent a separate note, which similarly quoted Juror 7's declaration that, "[i]f its OK for the government to do it and not get caught," then it "should be OK for him." *Ibid.* The prosecutor suggested that the court ask Juror 7 about the quoted statements, but the court demurred. Gov't C.A. E.R. 13,673-13,674. Instead, it re-instructed the jurors about their duty to apply the law whether or not they agreed with it. Pet. App. 90a-91a.

Shortly thereafter, Juror 9 sent another note to the court. Pet. App. 91a. Among other things, the note

[1] The district court initially denied the motion "without prejudice to an evidentiary hearing" at which petitioner could "attempt to meet his burden of proof." Pet. App. 199a. But the court later concluded that a hearing was unnecessary because petitioner's offer of proof showed that he lacked "adequate relevant and admissible evidence." *Id.* at 179a; see *id.* at 178a-189a.

stated that when asked whether he believed wiretapping was illegal, Juror 7 responded: "In the law we don't have to pay federal taxes, just state taxes." *Ibid.* In the same note, the foreperson asked that an alternate be seated because Juror 7 "will not talk about evidence or the law"; "will not participate in deliberations"; and is "ANTI-government." *Ibid.* The court later received an unsigned note quoting Juror 7 as stating that the case was "a joke" because "no one died," and also stating that he "d[id]n't treat this case seriously." *Ibid.*

After receiving briefing from the parties, the district court separately questioned Juror 7 and five other jurors. Pet. App. 91a-94a. The court explained that the focus of the questioning would be "whether [Juror 7] is willing to follow the law and whether he is willing to deliberate," and it instructed each juror "not to volunteer information beyond what the court asked and not to discuss the content of deliberations or any juror's views on the merits." *Id.* at 92a n.22, 95a-96a.

In response to the district court's questioning, Juror 7 denied making the quoted statements about the wiretapping and tax laws. Pet. App. 92a-94a & n.24. The other five jurors, however, all confirmed that Juror 7 had made statements substantially similar to those quoted in the notes. *Id.* at 94a. The court "ma[d]e a credibility finding that the five other jurors [we]re credible and that Juror No. 7 [wa]s not." Gov't C.A. E.R. 13,765.

The district court then dismissed Juror 7 under Federal Rule of Criminal Procedure 23(b), relying on two independent grounds. First, the court concluded that Juror 7 was "not willing to follow the law and will not follow the law in this case." Pet. App. 94a-95a.

Second, the court also relied on the "independent ground" that Juror 7 had "lied to the Court." *Id.* at 95a (brackets omitted). The court explained that Juror 7 had "lied over and over again" by denying making the statements reported by the other jurors; by denying knowledge of the other jurors' notes to the court; and by failing to respond to voir dire questions asking prospective jurors to identify themselves if they had views about the charges or the wiretapping laws. Gov't C.A. E.R. 13,762; see *id.* at 13,764-13,765. The court emphasized that Juror 7's false statements were "a very strong" independent reason for the dismissal because "jurors who lie to the Court cannot remain on the jury." *Id.* at 13,773.

c. After excusing Juror 7, the district court seated an alternate and instructed the jury to restart its deliberations. The jury convicted petitioner and Pellicano on both counts. Pet. App. 21a, 84a.[2]

4. The court of appeals affirmed. Pet. App. 1a-170a.

a. As relevant here, the court of appeals first held that "[e]ach of the two independent grounds cited by the district court" justified the dismissal of Juror 7. Pet. App. 85a; see *id.* at 83a-104a.

First, the court of appeals explained that "[a] juror's intentional disregard of the law * * * can constitute good cause for dismissal." Pet. App. 85a. The court emphasized, however, that "it is not permissible

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[2] Petitioner sought a new trial based on the dismissal of Juror 7, relying on post-verdict declarations from Juror 7 and another juror. Pet. App. 172a-173a. The district court denied the motion, holding that the declarations were inadmissible under Federal Rule of Evidence 606(b) and that in any event the declarations did not undermine the court's findings about Juror 7's veracity and inability to follow the law. Pet. App. 173a & n.1.

to discharge a juror based on his views regarding the sufficiency of the evidence." *Id.* at 86a. To guard against that possibility, the court had previously 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." *Id.* at 87a (quoting *United States* v. *Symington*, 195 F.3d 1080, 1085 (9th Cir. 1999)). The court had also emphasized that in inquiring into the possibility that a juror is refusing to follow the law, a district court "may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations." *Id.* at 88a (quoting *Symington*, 195 F.3d at 1086).

In this case, the court of appeals commended the district court's "constrained" inquiry into the issues raised by the jurors' notes. Pet. App. 95a. After a thorough review of the record, the court declined to disturb the district court's factual findings, including its finding that "Juror 7 would not follow the law." *Id.* at 101a; see *id.* at 90a-101a. The court further held that those findings amply "supported [the district court's] conclusion that there was no reasonable possibility that the impetus for dismissal stemmed from Juror 7's views on the merits of the case." *Id.* at 103a.

Second, and in the alternative, the court of appeals upheld the district court's conclusion that "the fact that Juror 7 had lied to the court was an independent ground for excusing him." Pet. App. 100a. The court of appeals explained that dismissing a juror based on his intentional, material falsehoods to the court is "appropriate and permissible." *Id.* at 100a, 103a.

b. In a separate opinion devoted to issues raised by petitioner and his co-defendants that "d[id] not war-

rant discussion in a precedential opinion," Pet. App. 15a, the court of appeals rejected petitioner's claim that Pellicano's recordings should have been suppressed under Title III. *Id.* at 147a-148a. The court agreed with the district court that petitioner had not carried his burden of proving that the recordings were made for an unlawful purpose, explaining that the fact that "the recordings evidenced Pellicano and [petitioner's] crimes and torts did not mean they were essential to actually committing those crimes and torts." *Ibid.*

c. Chief District Judge Christensen, sitting by designation, dissented from the portion of the panel's opinion rejecting petitioner's challenge to the dismissal of Juror 7. Pet. App. 128a-138a.

ARGUMENT

Petitioner contends (Pet. 19-41) that the district court erred in dismissing Juror 7 and in refusing to suppress Pellicano's recordings of their phone calls. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. Petitioner first contends (Pet. 19-25) that the court of appeals erred and departed from the decisions of other circuits by holding that a juror may not be dismissed for unwillingness to follow the law if a "reasonable possibility" exists that the impetus for the dismissal is the juror's view of the evidence. Petitioner asserts that some circuits apply an even more stringent standard that bars dismissal if "any possibility" exists that the impetus is the juror's view of the evidence. But as the courts of appeals have recognized, that difference in language "is one of clarifica-

tion, not disagreement"—in substance, the circuits apply the same standard. *United States* v. *Kemp*, 500 F.3d 257, 304 (3d Cir. 2007), cert. denied, 552 U.S. 1223 (2008). This Court has thus recently and repeatedly denied petitions for writs of certiorari asserting the purported conflict petitioner identifies.[3] The same result is warranted here. Indeed, this case would be an especially poor vehicle in which to consider the question presented because the district court's dismissal of Juror 7 rested on an independently sufficient ground—his repeated lies to the court.

a. Federal Rule of Criminal Procedure 23(b) authorizes a district court to excuse a juror "for good cause" after the jury has retired to deliberate. As the court of appeals held, a juror's unwillingness to follow the law or the district court's instructions constitutes "good cause" for dismissal. Pet. App. 85a-86a; accord, *e.g.*, *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). As the court of appeals also recognized, however, a juror may not be dismissed based on his doubts about the sufficiency of the evidence. Pet. App. 86a. A discharge for that reason would not only fail to satisfy the "good cause" standard; it would also raise questions under the defendant's Sixth Amendment right to a unanimous verdict. *Ibid.*

When the basis for a juror's removal is an allegation by other jurors that he is refusing to follow the law, courts have been sensitive to the risk that the

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[3] See *Patterson* v. *United States*, 136 S. Ct. 33 (2015) (No. 14-8995); *Kemp* v. *United States*, 552 U.S. 1223 (2008) (No. 07-8897); *Vartanian* v. *United States*, 552 U.S. 891 (2007) (No. 07-195); *Abbell* v. *United States*, 537 U.S. 813 (2002) (No. 01-1618).

other jurors may have mistaken the juror's doubts about the sufficiency of the government's evidence for the juror's refusal to follow the court's instructions on the law. Courts of appeals have accordingly held that a juror may not be dismissed based on allegations of refusal to follow the law if there is a possibility that the impetus for the removal is the juror's view of the merits. See, *e.g.*, *United States* v. *Abbell*, 271 F.3d 1286, 1302-1303 (11th Cir. 2001), cert. denied, 537 U.S. 813 (2002); *United States* v. *Symington*, 195 F.3d 1080, 1087-1088 (9th Cir. 1999); *Thomas*, 116 F.3d at 621-624; *United States* v. *Brown*, 823 F.2d 591, 596-597 (D.C. Cir. 1987); see also *Kemp*, 500 F.3d at 303 (applying same standard to allegations that a juror made biased comments during deliberations).

The Ninth Circuit first adopted that heightened standard in *Symington*, holding 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. The court equated that reasonable-possibility standard with "the standard of 'reasonable doubt' in the criminal law generally," *id.* at 1087 n.5, and it concluded that such a high threshold was appropriate because "'a lower evidentiary standard could lead to the removal of jurors on the basis of their view of the sufficiency of the prosecution's evidence.'" *Id.* at 1087 (quoting *Thomas*, 116 F.3d at 622).

In this case, the court of appeals carefully applied the strict standard it adopted in *Symington*. The court explained that "because the [district] court was able to confirm from five separate jurors that Juror 7 had made statements expressing disagreement with

the wiretapping laws," the district court's inquiry was sufficient "to leave one firmly convinced" that the impetus for the other jurors' substitution request was unrelated to Juror 7's views of the merits. Pet. App. 96a (citation omitted). Indeed, the court of appeals emphasized that the "only reference" in the record to Juror 7's view of the evidence was his *own* claim that, during deliberations, he had told other jurors that he could not base his decision on "circumstantial evidence." *Id.* at 92a-93a n.24, 98a. But, in light of the other jurors' testimony and Juror 7's repeated false statements about other matters, the court determined that the district court had "validly discounted" Juror 7's claim to have expressed concerns about circumstantial evidence. *Id.* at 98a; see *id.* at 96a (holding that the district court's adverse credibility finding "was not clearly erroneous").

The court of appeals also explained that other features of the record reinforced the district court's conclusion that the jurors' complaints about Juror 7 were not "motivated by Juror 7's disagreement with their views on the merits." Pet. App. 96a. The jurors' first notes were sent "little more than an hour after deliberations began," which is "very early in the process, especially after a complicated and lengthy trial." *Ibid.* That short period was "unlikely to have been enough time" for Juror 7 to emerge as a holdout based on his view of the evidence. *Id.* at 97a. The court of appeals also noted the absence of any indication that other jurors were "looking for a way to get rid of a holdout." *Id.* at 98a. To the contrary, "at least one other juror expressed regret as to what happened." *Ibid.* Under the circumstances, the court correctly held that no

reasonable possibility existed that the impetus for Juror 7's dismissal was his view of the evidence.

b. Petitioner contends (Pet. 25) that the evidence discloses a possibility "that other jurors wanted Juror 7 dismissed because he disagreed with them about the evidence." To support that assertion, however, petitioner relies primarily on "Juror 7's 'statement during questioning about the inadequacy of circumstantial evidence.'" *Ibid.* (quoting Pet. App. 96a, 98a). In so doing, petitioner fails to note the district court's factual finding that the statement on which he relies was "not credible." Pet. App. 96a; see *id.* at 98a. That finding is fatal to his argument.

Petitioner also highlights (Pet. 25) the different view of the record reflected in Judge Christensen's dissent. As the court of appeals explained, however, Judge Christensen "d[id] not apply" the proper clear-error standard of review to the district court's credibility determinations and other factual findings. Pet. App. 100a. Petitioner's disagreement with the court of appeals likewise reduces to an attempt to relitigate the district court's factual findings—a record-intensive claim that not only lacks merit but also does not warrant this Court's review. See Sup. Ct. R. 10.

c. Seeking to frame this case as implicating a broader legal question, petitioner asserts (Pet. 20-25) that the "reasonable possibility" standard applied by the court of appeals and by several other courts conflicts with an even more stringent "any possibility" standard purportedly applied by the First, Second, and D.C. Circuits. Petitioner is mistaken. Although courts have used somewhat different language, they have undertaken the same analysis and applied the same substantive standard: dismissal of a juror is not

appropriate where there is a non-speculative possibility based on record evidence that the impetus for dismissal is the juror's view of the evidence.

As petitioner observes, the D.C. Circuit has held that "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, the court must deny the request." *Brown*, 823 F.2d at 596. The Second Circuit has "adopt[ed] the *Brown* rule as an appropriate limitation on a juror's dismissal" based on an alleged refusal to follow the law. *Thomas*, 116 F.3d at 622.[4]

No conflict exists because the courts on the other side of petitioner's purported circuit split have applied the same rule. In *Symington*, for example, the Ninth Circuit relied on *Brown* and *Thomas* and repeatedly endorsed their approach. 195 F.3d at 1086-1087. The Ninth Circuit emphasized that its no-reasonable-possibility standard was stringent, akin to a requirement of proof beyond a "reasonable doubt." *Id.* at 1087 n.5. And it explained that it articulated the standard as a "*reasonable* possibility, not any possibility whatever" simply to exclude speculative or unreasonable possibilities. *Ibid.*; see *ibid.* ("It may be that 'anything is possible in a world of quantum mechanics.'") (brackets and citation omitted).

The other decisions petitioner cites as evidence of a circuit conflict (Pet. 22-25) are to the same effect. In *Abell*, the Eleventh Circuit held that "a juror should be excused only when no 'substantial possibility' exists

[4] Although the First Circuit does not appear to have addressed the issue in a case involving a challenge to the removal of a juror, it has cited *Brown* with approval. See *United States* v. *McIntosh*, 380 F.3d 548, 556 (2004)

that she is basing her decision on the sufficiency of the evidence." 271 F.3d at 1302 (quoting *Thomas*, 116 F.3d at 621-622). The court derived that rule from *Thomas* and *Brown*, and it explained that it regarded the terms "any possibility" and "substantial possibility" as "interchangeable, both meaning a tangible possibility, not just a speculative hope." *Id.* at 1302 n.14. In *Kemp*, the Third Circuit endorsed the approach followed by the Ninth and Eleventh Circuits, but it emphasized that the "slight difference in the standards as expressed by the D.C. and Second Circuits as compared to the Ninth and Eleventh Circuits * * * is one of clarification and not disagreement." 500 F.3d at 304. And the D.C. Court of Appeals likewise relied on *Thomas* and articulated a "reasonable possibility" standard simply to exclude "fanciful or wholly speculative possibilit[ies]." *Brown* v. *United States*, 818 A.2d 179, 186 n.3 (2003); see *id.* at 185-186.

Those decisions are entirely consistent with the decisions of the Second and D.C. Circuits in *Thomas* and *Brown*, which did not suggest that a "speculative" or "fanciful" possibility would preclude dismissal. To the contrary, both courts referred to a possibility grounded in "record evidence." *Thomas*, 116 F.3d at 621; *Brown*, 823 F.2d at 596. As the Eleventh Circuit observed, moreover, *Brown* itself used the phrases "any possibility" and "substantial possibility" interchangeably. 823 F.2d at 596; see *Abbell*, 271 F.3d at 1302 & n.14. And both the Second and D.C. Circuits have recently characterized the standards adopted by other circuits as consistent with *Thomas* and *Brown*. See *United States* v. *McGill*, 815 F.3d 846, 867 (D.C. Cir. 2016) (grouping *Symington*, *Kemp*, *Abbell*, and *Thomas* as decisions "applying *Brown*'s approach (or

a variant thereof)"); *United States* v. *Spruill*, 808 F.3d 585, 595 (2d Cir. 2015) (characterizing *Symington* and *Kemp* as applying "the *Thomas* rule"), cert. denied, No. 16-401 (Oct. 31, 2016).

d. Even if the question presented otherwise warranted this Court's review, this case would be a poor vehicle in which to consider it because petitioner would not benefit from a decision resolving that question in his favor. That is true for at least two reasons.

First, the application of a different standard would not alter the conclusion that the district court properly dismissed Juror 7 for refusing to follow the law. The court of appeals sustained that ground for dismissal because "the [district] court was able to confirm from five separate jurors that Juror 7 had made statements expressing disagreement with the wiretap laws," Pet. App. 96a, and because "[t]he only reference to Juror 7's view of the evidence was his own statement during questioning," which the district court permissibly declined to credit, *id.* at 98a.

The decisions finding dismissals inappropriate involved starkly different facts. In *Brown*, a juror sought to be discharged after *five weeks* of deliberations, and he stated without contradiction "that his difficulty was with 'the way [the law is] written *and* the way the evidence has been presented.'" 823 F.2d at 594, 597. Given that statement, the D.C. Circuit concluded that there was a "likelihood" that the juror's "desire to quit deliberations stemmed from his belief that the evidence was inadequate to support a conviction." *Id.* at 597. Similarly, the complaints about a juror's purported refusal to deliberate in *Thomas* arose after more than a day of deliberations, and several jurors indicated "that [the juror in ques-

tion] justified his position during deliberations in terms of the evidence" and stated that "he found the Government's evidence * * * insufficient or unreliable." 116 F.3d at 611, 624. Petitioner cites no decision finding dismissal inappropriate on facts comparable to those present here.

Second, even if Juror 7's refusal to follow the law would not have justified his dismissal, both the district court and the court of appeals emphasized that his repeated falsehoods supplied an "independent ground[]" for excusing him. Pet. App. 84a. Petitioner does not challenge the district court's factual finding that Juror 7 "lied over and over again." Gov't C.A. E.R. 13,762. Nor does he dispute the court of appeals' observation that those lies constituted an "appropriate and permissible" ground for dismissal. Pet. App. 100a. And because that separate and unchallenged ground fully justified the district court's decision to excuse Juror 7, petitioner would not be entitled to relief even if this Court granted review and agreed with his contention that some possibility existed that other jurors' concerns about Juror 7 were based on his doubts about the evidence.[5]

2. Petitioner contends (Pet. 26-30) that apart from its ultimate decision to dismiss Juror 7, the district

[5] "[I]f a court forms an independent, good-cause justification for removing [a] juror that bears no 'causal link' to the juror's 'holdout status,' the court may excuse the juror even if the juror 'independently had doubts about the sufficiency of the evidence.'" *McGill*, 815 F.3d at 869 (citation omitted); see, *e.g.*, *United States* v. *Vartanian*, 476 F.3d 1095, 1098-1099 (9th Cir. 2007) (similar). That remains true even if, as in this case and in *McGill*, the district court also relies on the juror's refusal to follow the law and substantiates both grounds for dismissal through the same juror interviews. 815 F.3d at 862-866, 868-871.

court also erred by questioning jurors in response to their notes about Juror 7. The court of appeals correctly rejected that argument, and its decision neither conflicts with any decision by another court of appeals nor otherwise warrants this Court's review.

a. The court of appeals correctly found no error in the district court's carefully limited questioning of jurors. When, after only 75 minutes of deliberations, jurors first apprised the district court of Juror 7's unwillingness to follow the law, the court declined the government's request to question Juror 7; instead, it re-instructed the jurors about their duty to adhere to the law. See p. 3, *supra*. The court questioned members of the jury only after other jurors—within minutes of the re-instruction—again informed the court that Juror 7 would "not talk about evidence or the law" and would "not participate in deliberations." Pet. App. 91a. And the court made clear that its questions would focus only on "whether [Juror 7] is willing to follow the law and whether he is willing to deliberate." *Id.* at 92a n.22.

Consistent with the district court's limited focus and its understanding that it could not "inquire into * * * the merits of the case," Gov't C.A. E.R. 13,694, the court conducted "constrained" questioning of Juror 7 and five other jurors—those who had sent notes and one additional juror selected at random. Pet. App. 95a. The court scrupulously warned each juror not to reveal anything about deliberations, the evidence, or any juror's view of the case. *Id.* at 95a-96a. The court then focused its questions only on whether Juror 7 had in fact made statements evidencing his refusal to follow the law, and where necessary

it "cut [jurors] off mid-sentence" to prevent them from straying into other topics. *Id.* at 96a.

b. Petitioner asserts (Pet. 26-27) that the court of appeals' approval of that circumspect inquiry places it in conflict with the Second and D.C. Circuits. That is incorrect. The decisions on which petitioner relies warned against "overly intrusive judicial inquiries into the substance of the jury's deliberations" and stated that a judge "faced with anything but unambiguous evidence that a juror refuses to apply the law as instruced need go no further in his investigation of the alleged nullification." *Thomas*, 116 F.3d at 622; accord *Brown*, 823 F.2d at 596. But the Ninth Circuit has echoed the D.C. Circuit's observation that "[a] court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations." *Symington*, 195 F.3d at 1086 (quoting *Brown*, 823 F.2d at 596); see Pet. App. 88a. The Ninth Circuit has therefore adopted the same limitation on a district judge's authority to question jurors, holding 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" or engage in further inquiry. *Symington*, 195 F.3d at 1087. "Under such circumstances, the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial." *Ibid.*

In this case, the court of appeals applied the standard it announced in *Symington* and correctly found no error in the district court's questioning of the jury in response to what the court regarded as unambiguous indications that Juror 7 was refusing to follow the law. Pet. App. 95a-97a. Indeed, the court of appeals em-

phasized that "[a]ll of the concerns expressed by the other jurors related to Juror 7's views on the law, not the evidence." *Id.* at 97a. Petitioner's contention that the district court was not permitted to inquire further rests on a disagreement with the lower courts' view of the facts—not any dispute about the applicable legal standard.[6]

c. The conflict that petitioner asserts does not warrant this Court's review for an additional reason. Although *Brown* and *Thomas* cautioned against expansive inquiries into potential juror misconduct, both of those decisions rested on the conclusion that the ultimate dismissal was inappropriate—not on any holding that the district courts erred in questioning jurors. Indeed, *Thomas* expressly declined to decide "whether the [district] court's inquiries were themselves sufficiently intrusive to constitute reversible error." 116 F.3d at 624. Petitioner thus cites no decision by any court holding that a district court's inquiries into juror misconduct provided an independent basis for reversing a conviction—let alone a decision

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[6] Petitioner also contends (Pet. 28-29) that the Third Circuit and the California Supreme Court have approved questioning of jurors that ran afoul of the guidance in *Brown* and *Thomas*. But the Third Circuit decision on which he relies addressed only the ultimate dismissal of the juror—not the propriety of the district court's questioning. *Kemp*, 500 F.3d at 303-306. And although the California Supreme Court declined to adopt the limits on questioning articulated in *Thomas* and *Brown*, it relied on "California law" and did not address the Sixth Amendment or Rule 23(b)—the authorities on which *Brown* and *Thomas* relied. *People* v. *Cleveland*, 21 P.3d 1225, 1236-1237 (2001).

finding reversible error based on the sort of carefully circumscribed inquiry conducted here.[7]

3. Finally, petitioner contends (Pet. 34-40) that the court of appeals erred and perpetuated a circuit conflict by holding that Title III did not require suppression of Pellicano's recordings of his phone conversations with petitioner. This Court recently denied a petition for a writ of certiorari making the same argument, asserting a similar purported circuit split, and likewise involving Pellicano's recording of his discussion of illegal activities with one of his clients. *McTiernan* v. *United States*, 133 S. Ct. 964 (2013) (No. 12-733). The Court should do the same here.

a. Under 18 U.S.C. 2515, an intercepted oral or wire communication may not be introduced in court if "the disclosure of that information would be in violation" of Title III. Section 2511(2)(d), in turn, generally permits private parties to record their own communications, but provides an exception for recordings made "for the purpose of committing any criminal or

[7] Contrary to petitioner's implication (Pet. 32-33), the limited questioning at issue here differed markedly from the questioning in the state-court trial underlying this Court's decision in *Johnson* v. *Williams*, 133 S. Ct. 1088 (2013). In that case, the trial judge *and counsel* engaged in an extended colloquy with all twelve jurors, delving into matters such as the jurors' understanding of the reasonable doubt standard and generalized inquiries into whether various topics had been raised during the deliberations. *Williams* v. *Cavazos*, 646 F.3d 626, 631-634 (9th Cir. 2011). The questioning elicited repeated statements about the dismissed juror's views of the evidence, including six jurors who stated that he "did not believe that the evidence was sufficient." *Id.* at 634. And in any event, this Court's decision in *Johnson* addressed only the procedural question whether the state courts had resolved a Sixth Amendment claim on the merits; the Court did not itself address that claim.

tortious act." Congress added that exception to prohibit one-party consent recordings made for illegal purposes such as "blackmailing the other party, threatening him, or publicly embarrassing him." *United States* v. *Phillips*, 540 F.2d 319, 325 (8th Cir.) (quoting 114 Cong. Rec. 14,694 (1968) (Sen. Hart)), cert. denied, 429 U.S. 1000 (1976).

In *United States* v. *McTiernan*, 695 F.3d 882 (2012), cert. denied, 133 S. Ct. 964 (2013), the Ninth Circuit rejected a contention that Section 2511(2)(d) barred the admission of Pellicano's recording of a phone conversation with a different purchaser of his illegal services. *Id.* at 884-887. Like petitioner, the defendant in *McTiernan* argued that Pellicano's recording was inadmissible under Section 2511(2)(d) because it was made "as part of a recordkeeping process in support of Pellicano's 'far-reaching criminal enterprise.'" *Id.* at 888. Specifically, the defendant contended that the recording was "a reminder of the illegal acts that Pellicano intended to commit." *Ibid.*

The Ninth Circuit rejected the defendant's contention that Section 2511(2)(d) requires the exclusion of any recording that a participant in a criminal enterprise makes for "recordkeeping purposes," agreeing with the district court that such a sweeping interpretation "would include virtually any recording related to a criminal act made by one of the criminal participants." *McTiernan*, 695 F.3d at 888-889 (citation omitted). The court emphasized that Section 2511(2)(d) requires a court to "look to the purpose and not to the subject matter of the recording," and it concluded that "the purpose of recording a conversation to create a reminder list (even a list of illegal acts that are agreed to be done) is not a criminal or tor-

tious purpose." *Id.* at 890. The court explained that "[s]uch a recording is not essential to the actual execution of [the contemplated illegal activity], unlike a recording of a conversation made for the purpose of blackmailing another person." *Ibid.*

b. The court of appeals' unpublished opinion in this case correctly rejected petitioner's challenge to the admission of Pellicano's recordings of their conversations. Pet. App. 147a-148a. Echoing *McTiernan*, the court explained that the fact that "the recordings evidenced Pellicano and [petitioner's] crimes and torts did not mean they were essential to actually committing those crimes and torts." *Ibid.*

Petitioner contends (Pet. 39-40) that the court of appeals departed from the text of the statute by holding that Section 2511(2)(d) does not require the suppression of a recording made to serve as a to-do list of criminal acts.[8] That is incorrect. Section 2511(2)(d) prohibits recordings made "for the purpose of committing any criminal or tortious act." *McTiernan* correctly held that this language should not be read to encompass every recording that is related to a criminal scheme, or that could be said to advance such a scheme in some way. Instead, a recording is made "for the purpose of committing any criminal or tortious act" when the recording itself is intended to be

[8] The court of appeals correctly held that the recordings would be admissible even if Pellicano had made them for this purpose. In fact, however, the district court correctly held that petitioner failed to introduce sufficient evidence to establish that Pellicano made the recordings for that or any other purpose. To the contrary, Pellicano often recorded his personal and professional calls, including calls involving mundane matters for which no apparent purpose was served by the recordings. Gov't C.A. E.R. 239-241.

"an integral part of the execution of [the crime or tort]." *McTiernan*, 695 F.3d at 890. That interpretation of the statute is faithful both to the text and to Congress's purpose, which—as petitioner acknowledges (Pet. 40)—was to prohibit one-party consent recordings made for the purpose of "blackmailing the other party, threatening him, or publicly embarrassing him." 114 Cong. Rec. at 14,694. As the Ninth Circuit explained, petitioner's contrary view of the statute would compel the suppression of "virtually any recording related to a criminal act made by one of the criminal participants"—an absurd result that Congress cannot have intended. *McTiernan*, 695 F.3d at 889 (citation omitted).

c. Petitioner errs in asserting (Pet. 34-35) that the Ninth Circuit's decisions in *McTiernan* and in this case conflict with decisions by the First, Second, Fourth, Eighth, and D.C. Circuits. None of those decisions held that Section 2511(2)(d) required the suppression of the recordings at issue, and none of them endorsed petitioner's counterintuitive assertion that Congress intended to allow criminal conspirators to compel the suppression of their own recordings of their discussions of joint criminal activity.[9]

[9] To the contrary, two of the decisions on which petitioner relies held that Section 2511(2)(d) does not require suppression of one conspirator's recording of discussions of unlawful activities with his co-conspirators if the recording is made "in order to prevent future distortions by a participant." *United States* v. *Cassiere*, 4 F.3d 1006, 1021 (1st Cir. 1993); see *United States* v. *Dale*, 991 F.2d 819, 840-841 (D.C. Cir.) (same), cert. denied, 510 U.S. 906, and 510 U.S.C. 1030 (1993). Another likewise rejected the suggestion that Section 2511(2)(d) requires suppression simply because the recorded conversations "related to [the co-conspirators' crimes]." *United States* v. *Truglio*, 731 F.2d 1123, 1131 (4th Cir.), cert.

Petitioner's reliance (Pet. 34) on the Second Circuit's decision in *United States* v. *Jiau*, 734 F.3d 147 (2013), cert. denied, 135 S. Ct. 311 (2014), confirms that his assertion of a circuit split is unfounded. In *Jiau*, a hearing-impaired participant in an insider-trading scheme recorded the phone calls in which his source provided inside information in order to ensure that he understood them. *Id.* at 151-152. The defendant argued that the recordings were inadmissible under Section 2511(2)(d) because the tippee "would not have been able to understand the inside information without the recordings." *Id.* at 152. The Second Circuit rejected that argument, explaining that Section 2511(2)(d) "is confined to instances where the recording party intends to use the recording to harm or injure a recorded party, such as to blackmail, threaten, or publicly embarrass the recorded party." *Ibid.* Citing *McTiernan* with approval, the Second Circuit explained that "the fact that an illegal enterprise was discussed in the recorded conversation is not determinative of a violation under § 2511(2)(d) * * * because we look to the 'intended use of the recordings' to determine the purpose of the recording." *Ibid.* (citations omitted).

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denied, 469 U.S. 862 (1984). And the Eighth Circuit's decision in *Phillips* simply remanded for an evidentiary hearing because the district court had failed to allow the defendant any opportunity to introduce evidence about the purpose for which the recordings were made. 540 F.2d at 326-327. Here, in contrast, the district court denied petitioner's request for an evidentiary hearing only after concluding that petitioner's offer of proof was insufficient, Pet. App. 178a-189a, and petitioner has not renewed in this Court his contention that the district court abused its discretion by declining to hold a hearing.

Petitioner thus cites no decision by another court of appeals endorsing the rule that he seeks—let alone a decision holding that Section 2511(2)(d) compels suppression under circumstances like those present here. As in *McTiernan* itself, the question he seeks to raise does not warrant this Court's review.[10]

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[10] Petitioner separately asserts (Pet. 36-37) that the Seventh Circuit has departed from decisions of other courts of appeals by holding that Section 2511(2)(d) applies only if the recording was actually "use[d] * * * with intent to harm." *By-Prod Corp.* v. *Armen-Berry Co.*, 668 F.2d 956, 960 (1982). This case would not implicate any conflict created by the Seventh Circuit's decision because the court of appeals held Section 2511(2)(d) inapplicable without relying on such an actual-use rule. In any event, it is far from clear that the asserted conflict exists. The Seventh Circuit's discussion was dicta. See *By-Prod*, 668 F.2d at 960 (stating, after finding Section 2511(2)(d) inapplicable on other grounds, that "[w]e doubt anyway that a tape recording which was never used could form the basis for liability under [S]ection 2511(2)(d)"). *By-Prod* also arose in a very different context. It involved a private civil suit for damages for an alleged violation of Section 2511(2)(d), and the Seventh Circuit suggested that the statute may require an actual use of the recording because it sought to prevent a party from recovering damages for a recording that was made in violation of the statute but then immediately erased. See *ibid.* ("A statute that provides for minimum damages of $1000 per violation must have more substantial objects in view than punishing evil purposes so divorced from any possibility of actual harm.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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