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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The petition presents two important questions warranting review.

First, this case presents troubling and recurring Sixth Amendment issues that have divided courts: how should judges address juror misconduct allegations that may relate to a juror's view of the merits of the case. As the dissent explained: "A couple of vocal and insistent jurors were obviously unhappy with the concerns that Juror 7 expressed concerning the government's case, and set about the effort of getting him removed from the jury so that their desire to quickly convict the defendants could be accomplished." Pet. App. 137a (Christensen, J., dissenting). Indeed, these vocal and insistent jurors successfully prompted Juror 7's investigation and removal, notwithstanding his concerns "about the inadequacy of circumstantial evidence" supporting the government's case. Pet. App. 98a.

The government argues that Juror 7 would have faced the same investigation and removal in any circuit. Not so: unlike the D.C. and Second Circuits, the Ninth Circuit encourages trial courts to undertake an "independent assessment" into juror misconduct—even when (as here) those allegations relate to the merits. And the Ninth Circuit expressly adopted its own standard to make juror dismissal more "attainable." By contrast, the D.C. and Second Circuits prohibit

both investigation and removal if there is "any possibility" that the dismissal request stems from the juror's view of the merits. In those circuits, district courts must order continued deliberations or declare a mistrial. This is not just a semantic distinction—had that standard applied here, the outcome would have been different.

Contrary to the government's assertion, there is no "independent" ground for dismissal. Juror 7's candor became an issue only after the district court violated Christensen's Sixth Amendment rights by intruding into the jury's deliberations. The supposed falsehoods are not "separate" from the constitutional violation: they depend on resolving—after a one-sided inquiry—conflicting statements about whether the jurors' discord related to the merits.

Second, the Court should review whether Title III requires suppression of recordings made "for the purpose of committing any criminal or tortious act"—as the text of the statute requires. The Ninth Circuit does not suppress in those circumstances; instead, it requires that the recordings *also* be essential to the actual execution of such acts. The government offers no textual justification for this essentiality requirement, which places the Ninth Circuit in square conflict with other circuits. And no plausible argument can be made that the recordings here would be admissible without the Ninth Circuit's atextual requirement. After all, Pellicano made the recordings to share them with billionaire Bing (Pellicano's true, undisclosed client) in

breach of the fiduciary duty Pellicano owed Christensen. Tellingly, the government ignores this point and instead responds to a different issue regarding record-keeping.

The petition should be granted.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CONFLICTS OVER INVESTIGATION AND DISMISSAL OF HOLDOUT JURORS

A. The "Any Possibility" Courts Would Have Reversed

1. Faced with six circuits and the D.C. Court of Appeals applying divergent approaches to juror dismissals, the government argues the differences do not matter. The government is wrong.

a. Unlike the decision below, the D.C. and Second Circuits have adopted a bright-line rule: jurors may not be dismissed if there is "*any* possibility" that the request for dismissal relates to the juror's view of the merits. *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987) (emphasis added); *United States v. Thomas*, 116 F.3d 606, 622 (2d Cir. 1997). As these courts explain, any lesser standard would permit the government to convict presumptively innocent persons when the originally empaneled jury would not have unanimously convicted. *Brown*, 823 F.2d at 596; *see United States v. McIntosh*, 380 F.3d 548, 556 (1st Cir. 2004) (affirming mistrial given absence of unambiguous evidence that juror was impeding deliberations).

Yet the Ninth Circuit and three other courts permit just that. To make dismissal of holdout jurors more "attainable," the Ninth Circuit permits dissenting jurors to be dismissed even when a possibility remains that the other jurors were motivated by a disagreement about the merits. Pet. App. 96a; *see* Pet. 22-25 (discussing cases).

The government suggests that any difference is just linguistic, noting that the Ninth Circuit and other courts have cited *Brown* and *Thomas*. Opp. 12. But the actual decisions demonstrate that the substantive standards are not the same. The Ninth Circuit analyzed the "any possibility" test and expressly departed from it, "emphasiz[ing] that the standard is any *reasonable* possibility, not any possibility whatever." *United States v. Symington*, 195 F.3d 1080, 1087 n.5 (9th Cir. 1999).

While the Third Circuit in *United States v. Kemp* cited *Brown* and *Thomas*, it too adopted a more lenient approach. 500 F.3d 257, 301-03 (3d Cir. 2007). The government portrays *Kemp* as concluding that any difference among the various tests " 'is one of clarification, not disagreement.' " Opp. 7-8 (quoting *Kemp*, 500 F.3d at 304). But this "clarification" alters outcomes, so the Third Circuit deepened the divide, holding that "the articulation of the Ninth and Eleventh Circuits is superior" to that of the D.C. and Second Circuits. *Kemp*, 500 F.3d at 304.

b. A comparison of *Thomas*, *Kemp*, and this case disproves the government's assertion (Opp. 14) that

the "any possibility" test would make no difference here. In each case:

- The district court dismissed a holdout juror.
- Several jurors complained about the holdout before or shortly after deliberations began. *Thomas*, 116 F.3d at 609-10 (before); *Kemp*, 500 F.3d at 271-72 (third day); Pet. App. 90a (first day).
- The court acknowledged evidence that the holdout doubted the government's case. *Kemp*, 500 F.3d at 276 (dismissed juror allegedly stated that "[t]he government didn't present the evidence to prove anything"); *Thomas*, 116 F.3d at 623-24 (dismissed juror assured court "his vote was based on his view of the evidence"); Pet. App. 96a (acknowledging "Juror 7's statement during questioning that he disagreed with the other jurors because he 'cannot agree to judge his decision on circumstantial evidence' " (brackets omitted)).

Yet the different standards yielded different outcomes. In *Thomas*, the Second Circuit reversed because the conflicting testimony showed "a possibility that the juror was simply unpersuaded by the Government's case." 116 F.3d at 624. In *Kemp* and here, the same kind of conflicting testimony produced the opposite result. *Kemp*, 500 F.3d at 305; Pet. App. 98a.

c. The government argues the D.C. and Second Circuits' recent decisions temper the conflict. Opp. 13-14. But it cites no decision departing from, or even addressing, the "any possibility" standard. *United States*

v. McGill, 815 F.3d 846, 868 (D.C. Cir. 2016) (unnecessary to address whether dismissal "would have run afoul" of *Brown*); *United States v. Spruill*, 808 F.3d 585, 595-96 (2d Cir. 2015) (dismissal did not trigger "any possibility" test). Indeed, the government acknowledges the D.C. Circuit's recent recognition that circuits are "applying *Brown*'s approach (*or a variant thereof*)." Opp. 13-14 (quoting *McGill*, 815 F.3d at 867 (emphasis added)). That proves the petition's point: lower courts are applying conflicting variations.

2. The government tries to minimize the separate conflict over a trial court's power to investigate allegations of juror misconduct. But the circuits "are split on this issue." *United States v. Patterson*, 587 F. App'x 878, 895 (6th Cir. 2014) (Cole, C.J., concurring in part and dissenting in part).

The government acknowledges that the D.C. and Second Circuits have "stated that a judge 'faced with anything but unambiguous evidence that a juror refuses to apply the law as instructed need go no further in his investigation of the alleged nullification.' " Opp. 17 (quoting *Thomas*, 116 F.3d at 622). Thus, *before* questioning jurors, district courts in those circuits must determine whether there is "any possibility" that the dismissal request relates to the merits. Anything less "would encourage the court faced with ambiguous evidence of such impropriety to investigate further, eliciting testimony from jurors until enough evidence surfaced to affirm or reject allegations of juror nullification." *Thomas*, 116 F.3d at 622.

The government contends the Ninth Circuit uses this test too. Opp. 17. This case disproves that. Even *after* recognizing that the complaints about Juror 7 "could be construed as matters relating to the merits," the district court still questioned half the jury. C.A. ER4390-91. Instead of reversing, the Ninth Circuit declined to place "a limitation on the district court's freedom to question jurors." Pet. App. 99a. It held district courts should conduct an "independent assessment," even when the misconduct allegations may relate to the merits. Pet. App. 100a.[1]

The Third Circuit likewise provides "more leeway to investigate juror misconduct than in other circuits." *Kemp*, 500 F.3d at 304. Contrary to the government's assertion (Opp. 18 n.6), *Kemp* expressly addressed the argument "that the District Court should not have questioned the jurors about Juror 11's alleged misconduct." 500 F.3d at 301. Applying its permissive standard, the Third Circuit approved the district court's "more-expansive mode of investigation," which involved questioning *every* juror on three separate occasions. *Id.* at 301-02.[2]

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[1] This is not a quarrel with "the lower courts' view of the facts." *Contra* Opp. 18. Based on the district court's own assessment of the jury notes, other circuits would have precluded inquiry and dismissal.

[2] The California Supreme Court departs from *Brown* and *Thomas*, permitting "whatever inquiry is reasonably necessary." *People v. Cleveland*, 21 P.3d 1225, 1237 (Cal. 2001). Contrary to the government's contention (Opp. 18 n.6), this decision resolved "a question with federal constitutional dimensions." *Johnson v. Williams*, 133 S. Ct. 1088, 1098 (2013) (discussing *Cleveland*).

Finally, the government asserts that no court has held that "a district court's inquiries into juror misconduct provide[] an independent basis for reversing a conviction." Opp. 18. But extensive inquiries into jury deliberations often lead to dismissal of dissenting jurors. Cal. Attorneys Crim. Justice Amicus Br. 16-22. Thus, in most cases, one constitutional error (investigation) will produce another (dismissal).

B. No Independent Ground Supports Juror 7's Dismissal

The government tries to avoid review by arguing that Juror 7's dismissal could be affirmed on a purportedly "independent" ground—that he lied to the court. Opp. 15. That ground is not independent of the challenged constitutional violations. It is the product of improper questioning and inextricably linked to whether the jurors' discord related to the merits.

Under the government's standard, an independent ground must "bear[] no 'causal link' to the juror's 'holdout status.'" Opp. 15 n.5 (quoting *McGill*, 815 F.3d at 869). That means it must have "no connection to any ideas [the juror] might have formed about the strength of the government's case." *McGill*, 815 F.3d at 869. For example, dismissing a juror to pursue a job opportunity would be an independent ground, as would dismissal for smuggling notes out of the jury room. *Ibid.*; *United States v. Ginyard*, 444 F.3d 648, 651 (D.C. Cir. 2006).

But the purported falsehoods here are not. The district court made credibility findings by resolving

conflicting accounts of Juror 7's statements—most of which concededly related to weaknesses in the government's case. Only by concluding that Juror 7 would not follow the law could the district court surmise that he must have withheld prejudices about wiretapping during voir dire. Pet. App. 95a, 103a. That is also the only way the court could have discredited Juror 7's assurances that he knew wiretapping was unlawful. Pet. App. 102a-103a. Similarly, Juror 7's supposed false denial of having said "we don't have to pay federal taxes" was bound together with the determination that he would not follow the law regarding wiretapping. Pet. App. 101a-102a ("The district court reasonably concluded that Juror 7 made [the taxes] statement to suggest that the Defendants in this case did not have to comply with the wiretapping laws.").[3]

Such "credibility" findings cannot be separated from the constitutional violation. Indeed, if a retroactive finding of dishonesty during voir dire were an independent ground, that basis would exist every time courts later determined that a juror refused to follow the law. The inseparability between these "credibility" findings and Juror 7's holdout status is particularly apparent given the one-sided questioning. Without ever asking whether Juror 7 was willing to deliberate and follow the law, the district court asked whether he had made certain statements and then cut off any

[3] The district court also found that Juror 7 lied in denying knowledge of the court's receipt of a "couple of notes." C.A. ER4429. That finding hardly constitutes good cause for dismissal—and neither court below concluded it could be.

juror who began to answer in any detail. C.A. ER4428-33, ER4436-38, ER4443, ER4447-48. Despite that truncated inquiry—and contrary to the government's suggestion that the "only reference" to Juror 7's view of the evidence was his own responses to questions (Opp. 10)—the jurors confirmed their disputes about the merits. One note recounts Juror 7 emphasizing the absence of a critical witness, and one juror revealed Juror 7's adherence to the presumption of innocence. C.A. JSER591; C.A. ER4436; Pet. 12-15.

II. THIS COURT ALSO SHOULD REVIEW THE NINTH CIRCUIT'S ATEXTUAL READING OF TITLE III, WHICH CONFLICTS WITH OTHER CIRCUITS

A. Although Conspicuously Ignored By The Government, The Decision On The Question Actually Presented Conflicts With Other Courts

1. Title III requires suppression of recordings made "for the purpose of committing any criminal or tortious act." 18 U.S.C. § 2511(2)(d). But the Ninth Circuit refuses to suppress in these circumstances. Instead, it demands a showing that the recording was *essential* to actually executing such acts. *United States v. McTiernan*, 695 F.3d 882, 889-91 (9th Cir. 2012).

The government tries to side-step this indefensible reading by ignoring the issue the petition actually raised. The government argues that Section 2511(2)(d) does not cover "a recording made to serve as a to-do list of criminal acts." Opp. 21. But Christensen seeks

suppression because Pellicano made the recordings for a tortious purpose: to prove to Bing that Pellicano was, in breach of his fiduciary duty to Christensen and Kerkorian, diverting focus away from Bing—the true biological father. Pet. 18, 37.

Although the Ninth Circuit ruled on this issue (Pet. App. 147a-148a), the government's opposition tellingly says nothing of Bing or his role. Instead, having reframed the petition as being about record-keeping, the government argues there is no conflict. Opp. 24. But that is no answer to the issue actually presented: five circuits hold that Title III requires suppression of recordings made for the purpose of committing criminal or tortious acts. Pet. 34-35. The Ninth and Seventh Circuits require more. Pet. 36-37.[4]

2. This different standard altered the outcome. The Ninth Circuit refused to suppress because Pellicano's recordings were not *essential* to breach of his fiduciary duty. Pet. App. 147a-148a. But under a plain-language interpretation, Section 2511(2)(d) required suppression because Pellicano made the recordings "'for the purpose of committing' the tortious act of breaching this [fiduciary] duty." *Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz*, 31

[4] Contrary to the government's assertion (Opp. 23), the Second Circuit's *Jiau* decision does not disprove this conflict. *Jiau* agreed with the Ninth Circuit on a different principle: "that an illegal enterprise was discussed in the recorded conversation is not determinative of a violation under § 2511(2)(d)." *United States v. Jiau*, 734 F.3d 147, 152 (2d Cir. 2013).

F. Supp. 3d 237, 260 (D.D.C. 2014); *see* Pet. 34-35 (discussing circuits adhering to Title III's text).

Perhaps recognizing this, the government contends (Opp. 21 n.8) that Christensen failed to proffer sufficient evidence of tortious purpose. But the Ninth Circuit did not so conclude, nor could it have. As the petition demonstrated, the record shows that Pellicano was double-dealing to protect Bing. Bing paid Pellicano over $300,000 in the same paternity matter, Pellicano repeatedly diverted attention away from, or gathered evidence favorable to, Bing, and (as Pellicano subsequently admitted) he began recording Bonder before he met Christensen. Pet. 8-9, 18-19. Pellicano's recordings were proof to Bing that he was trying to mislead Christensen. On this record, the recordings could not be admitted, especially without even an evidentiary hearing.[5]

B. The Government Cannot Defend The Ninth Circuit's Atextual Interpretation

1. The government's defense of the Ninth Circuit's reading of Title III fares no better than its attempt to dismiss the circuit conflict. Other than baldly asserting that the essentiality requirement is "faithful

[5] Likewise unavailing is the suggestion (Opp. 21 n.8) that the recorded calls involved only mundane subjects and that Pellicano routinely recorded his calls. Christensen is the only lawyer Pellicano recorded out of the many who retained him; these recordings were kept in a separate folder marked "SAFETY"; and there were no recordings of conversations with Bing—even though Pellicano repeatedly referenced just getting off the phone with Bing. C.A. JSER24, GEX2964, GEX3014-3374.

both to the text and to Congress's purpose" (Opp. 22), the government nowhere explains how that could be so.

As the petition explained (Pet. 39-40), this Court has held that the similarly-phrased mail fraud statute requires no demonstration of essentiality. *Schmuck v. United States*, 489 U.S. 705, 710 (1989) (mailings "need not be an essential element of the scheme" to be made "for the purpose of executing" a scheme to defraud). The government does not confront how Title III's phrase "for the purpose of committing" incorporates an essentiality requirement when "for the purpose of executing" does not. *Compare* 18 U.S.C. § 2511(2)(d), *with id.* § 1341.

2. Nor can Title III's purpose justify the essentiality requirement. *Contra* Opp. 22. Congress adopted Section 2511(2)(d) to prohibit the "many other abuses of the right of privacy" it foresaw from technological advances. 114 Cong. Rec. S14694 (1968). But the Ninth Circuit's interpretation provides scant protection beyond blackmail. *McTiernan*, 695 F.3d at 890. That narrow reading leaves "wide open the problem of * * * many other abuses of the right of privacy," contrary to Congress's stated intent. 114 Cong. Rec. S14694.

The government incorrectly claims that Christensen's interpretation would suppress "virtually any recording related to a criminal act made by one of the criminal participants." Opp. 22. Relatedness is not the

inquiry; the text of the statute turns on the *purpose* for making the recordings.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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