No. 18-763

In the Supreme Court of the United States

CHAKA FATTAH, SR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
KIRBY A. HELLER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly upheld the district court's dismissal of a juror based on the district court's finding that the juror stated that he had made up his mind shortly after deliberations began and had refused to deliberate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and rules:

Statutes and rules—Continued: Page

In the Supreme Court of the United States

No. 18-763

CHAKA FATTAH, SR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-146a) is reported at 902 F.3d 197.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2018. A petition for rehearing was denied on September 13, 2018 (Pet. App. 252a-253a). The petition for a writ of certiorari was filed on December 12, 2018. 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 Eastern District of Pennsylvania, petitioner was found guilty of racketeering conspiracy, in violation of 18 U.S.C. 1962(d); conspiracy to commit wire fraud and honest services wire fraud, in violation

of 18 U.S.C. 1343, 1346, and 1349; conspiracy to commit mail fraud, in violation of 18 U.S.C. 1341 and 1349; mail fraud, in violation of 18 U.S.C. 1341; falsification of records, in violation of 18 U.S.C. 1519 and 2; conspiracy to commit bribery and honest services fraud, in violation of 18 U.S.C. 371; bribery, in violation of 18 U.S.C. 201; bank fraud, in violation of 18 U.S.C. 1344 and 2; making a false statement to a financial institution, in violation of 18 U.S.C. 1014 and 2; and money laundering and money laundering conspiracy, in violation of 18 U.S.C. 1956 (2012), 1957, and 2. Gov't C.A. Br. 6-7. The district court granted petitioner's post-trial motion for judgment of acquittal on the charges of bank fraud and making a false statement to a financial institution, one count of mail fraud, and one count of falsification of records. *Id.* at 8. He was sentenced to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals vacated the convictions on the bribery-related counts and the money laundering counts, reversed the district court's judgment of acquittal on the bank fraud and false statement counts, and affirmed the remaining counts of conviction. Pet. App. 1a-146a.

1. In 2006, while petitioner was a United States Congressman representing Pennsylvania's Second Congressional District, he sought the Democratic Party's nomination for mayor of Philadelphia. Pet. App. 8a. As a result of newly enacted municipal limits on campaign contributions, petitioner's campaign experienced financial difficulties; to make up for funding shortfalls, petitioner sought—and his campaign received—an illegal loan of $1 million. *Id.* at 8a-11a.

After petitioner lost the mayoral primary, petitioner and others misappropriated $600,000 in charitable and

federal grant funds from a nonprofit organization in order to repay the illegal loan. Pet. App. 11a-23a. Petitioner also engaged in several other schemes in which he defrauded his own campaign and its creditors to pay his son's college tuition, and he accepted financial benefits in exchange for a series of official acts on behalf of a friend and businessman who provided assistance to petitioner's campaign. *Id.* at 23a-24a, 29a-35a.

2. Following a month-long trial, the jury began deliberations on June 15, 2016. Pet. App. 36a. The next day, after deliberating for approximately four hours, the jury foreperson sent the district court a note informing the court that Juror 12 "refuses to vote by the letter of the law," "will not, after proof, still change his vote," "will not listen or reason with anybody," and "has an agenda or ax to grind w/govt." *Id.* at 36a-37a (citation omitted). Shortly thereafter, the court received a second note, signed by nine jurors, stating that Juror 12 "is argumentative, incapable of making decision," and "constantly scream[s] * * * at all of us." *Id.* at 37a (citation omitted). Based on those notes, the court decided to interview the foreperson and Juror 12 to determine whether Juror 12 was "deliberating as required under his oath," but emphasized that it would "stay away from the merits of the case." *Id.* at 255a. Defense counsel objected to the court's proposed questioning, as well as to the court's subsequent decision to interview three additional jurors. *Id.* at 37a-38a.

Before questioning each juror, the district court explained that it would not ask about the merits of the case or how any juror was voting. Pet. App. 38a. In response to the court's questions, the foreperson stated, consistent with the information in his note, that Juror

12 was not willing to follow the law. *Id.* at 263a.[1] The foreperson stated that Juror 12 would express doubts "[w]ith the law and then * * * wants to add his own piece of the law to it which has nothing to do [with] it." *Id.* at 264a. According to the foreperson, Juror 12 "has his own agenda," and he also was "very argumentative," "stand[s] up screaming," and "put his hand on another juror." *Id.* at 265a-266a. The result, the foreperson explained, was that Juror 12 had caused "mayhem" and left "everybody in that room a wreck." *Id.* at 264a-265a.

When questioned, Juror 12 admitted to the district court that he had "yelled back" at the other jurors but claimed that he had done so only if they "yelled at [him]," and he also claimed that he was "the only one deliberating." Pet. App. 273a. Juror 12 asserted that he had explained to the other jurors why his vote "was different" and that, when he brought up evidence, the other jurors said it "doesn't mean anything" and "pointed to the indictment." *Id.* at 274a. In response to the court's question whether he had touched other jurors, Juror 12 stated that he had not "[h]urt" anyone, but he said he could not remember whether he had unintentionally placed his hand on any of the jurors. *Id.* at 278a-279a.

Juror 3 told the district court that "[o]n the very first day there was kind of a screaming match between a couple of the jurors" but that "amends" had been made the following day. Pet. App. 280a. Juror 3 also stated that, in his opinion, the other jurors "pounced" on the juror with the dissenting view and "were very impatient with

---

[1] The transcripts at times misidentify the foreperson as Juror 12 (instead of as Juror 2) and misidentify Juror 12 as Juror 2. Pet. App. 237a n.2.

him," as a result of which that juror "got very defensive." *Id.* at 280a-281a.

Juror 6 described Juror 12 as "obstinate" and stated that Juror 12 "doesn't give valid reasons as to why he may disagree with the charge." Pet. App. 284a. Juror 12 was the first to raise his voice, Juror 6 told the district court, and he may have touched Juror 6 and another juror. *Id.* at 284a-285a. According to Juror 6, while the other jurors "can review the evidence" and "come to a conclusion," Juror 12 "put[s] his own emotions into it instead of just looking at what it says, what the facts are" and "just continues to read past that into his own mind of what he feels it should be." *Id.* at 287a-288a. Juror 6 also stated that Juror 12's "justification[s] for some of his responses don't seem to relate to what the matter is before us." *Id.* at 288a.

Finally, Juror 1 told the district court that the jury had not "been able to even start the deliberation process" because Juror 12 came "into the process with his view already established, refusing to even listen to any of the evidence." Pet. App. 289a-290a. When asked whether Juror 12 was deliberating, Juror 1 responded, "Not with us. Like he will not listen to anything we're saying" and instead "has his own path." *Id.* at 291a. Juror 1 also reported that Juror 12 "gets louder and louder and points and puts his hand on your shoulder" in his attempt to "force everyone else to get to his point of view." *Id.* at 292a.

After hearing argument from counsel, the district court adjourned for the afternoon. Pet. App. 42a-43a. The following morning, the court informed counsel that "additional significant evidence" had come to light, and it placed the courtroom deputy under oath to testify about her exchanges with Juror 12 the previous day. *Id.*

at 43a (citation omitted). The deputy testified that, as she was escorting Juror 12 back to the jury room, "he just looked [the deputy] straight in the eye, and he said, I'm going to hang this jury." *Id.* at 303a. Following the questioning of the other jurors, the deputy said, Juror 12 "came out of the jury room" and told the deputy that "I really need to talk to you." *Ibid.* He then told her "it's going to be 11 to 1 no matter what." *Id.* at 304a.

Following the courtroom deputy's testimony, the district court recalled Juror 12 to describe his recollection of the conversation. Pet. App. 306a. Juror 12 stated that he told the deputy that the other jurors had engaged in name calling and made offensive comments about his military service. *Id.* at 307a-309a. At defense counsel's request, the court asked Juror 12 whether he had told the clerk that he would hang the jury, and he responded that "I said I would." *Id.* at 310a. He then added that "I said, we don't agree; I'm not just going to say guilty because everybody wants me to, and if that hangs this jury, so be it." *Ibid.* He told the court that he had not remembered that statement during the previous questioning because he was "more concerned about people spitting on my military record." *Id.* at 311a. The court asked him again whether he told the deputy that he "would hang the jury no matter what," and he responded that he could not "recall that exactly." *Ibid.*

Defense counsel continued to oppose Juror 12's removal from the jury, interpreting his comment to the courtroom deputy as meaning that he would not agree to a verdict merely because others wanted him to do so. Pet. App. 311a-314a. The government asked for his disqualification based on his "hostility * * * to the other jurors and to the court" and his refusal to deliberate. *Id.* at 314a.

The district court dismissed Juror 12. Pet. App. 315a. Crediting the testimony of the courtroom deputy, and finding Juror 12 "not to be credible," the court found that Juror 12 told the deputy that "he was going to hang this jury no matter what." *Id.* at 314a. The court explained that, after only a few hours of deliberation, "[t]here's no way in the world he could have reviewed and considered all of the evidence in the case and [the court's] instructions on the law." *Id.* at 315a. The court also concluded, based on the juror's testimony and demeanor, that Juror 12 "has delayed, disrupted, impeded, and obstructed the deliberative process and had the intent to do so" in the future; that he "has preconceived notions about the case"; and that he "has violated his oath as a juror." *Ibid.* The court also stated that it had instructed the jury "to be willing to discuss the evidence and participate in the discussion with other jurors," and it did not believe that "any further instructions or admonitions would do any good" because Juror 12 was "intent on, as he said, hanging this jury no matter what the law is, no matter what the evidence is." *Ibid.*

Defense counsel moved for a mistrial, which the district court denied. Pet. App. 47a. After seating an alternate juror, the court instructed the reconstituted jury to restart its deliberations. *Ibid.* It also reminded the jury of its obligation to participate in deliberations and reiterated that the indictment and verdict form were not evidence and that the jury was required to follow the court's instructions. *Id.* at 47a-48a; see Gov't C.A. Br. 53-54. After deliberating for approximately 16 hours, the jury returned a verdict finding petitioner guilty on the charges in the indictment. Gov't C.A. Br. 54.

The district court further addressed the dismissal of Juror 12 in two post-verdict decisions. Pet. App. 236a-

240a, 242a-250a. In ordering the unsealing of records pertaining to the juror's dismissal at the request of the media, the court quoted its previous findings and stated that "there [wa]s no doubt that Juror 12 intentionally refused to deliberate when he declared *so early in the process* that he would hang the jury no matter what." *Id.* at 239a-240a. The court further explained that its finding "was predicated on the admission of Juror 12 as reported by the court's deputy clerk"; that "[t]he facts became clear to the court after hearing the credible testimony of the deputy clerk and the less than credible testimony of Juror 12"; and that "[t]he demeanor of Juror 12 before the court confirmed the court's findings." *Id.* at 240a. The court repeated those findings in denying the motions of petitioner's two co-defendants for bail pending appeal. *Id.* at 248a-249a.

3. The court of appeals affirmed in part, vacated in part, and reversed in part. Pet. App. 1a-146a.

As relevant here, the court of appeals first determined that the district court had not abused its discretion in questioning the jurors after it received the two jury notes alleging Juror 12's refusal to deliberate and describing his behavior towards the other jurors. Pet. App. 51a-57a. Although petitioner contended that the questioning was "'intrusive and pointed,'" the court of appeals observed that petitioner failed to identify any question or topic that was inappropriate or "elaborate on how * * * the questions posed by [the district court] specifically intruded into deliberative secrecy." *Id.* at 55a-56a (citation omitted). The court of appeals also noted that the "very able and experienced district judge * * * was in the best position to determine what type of inquiry was warranted under the circumstances." *Id.* at 57a.

The court of appeals next considered whether the district court had erred by dismissing Juror 12 under Fed. R. Crim. P. 23(b), which permits a court "to excuse a juror" if it "finds good cause." The court of appeals explained that good cause for dismissal exists "where a juror refuses to apply the law, refuses to follow the court's instructions, refuses to deliberate with his or her fellow jurors, or demonstrates bias." Pet. App. 57a-58a. The court emphasized, however, that "trial courts 'may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the government's evidence.'" *Id.* at 58a (quoting *United States* v. *Kemp*, 500 F.3d 257, 303 (3d Cir. 2007), cert. denied, 552 U.S. 1223 (2008)). Instead, dismissal under Rule 23(b) is appropriate only "when there *is no reasonable possibility that the allegations of misconduct stem from the juror's view of the evidence*." *Ibid.* (quoting *Kemp*, 500 F.3d at 304).

Applying the "high standard for juror dismissal" established in *Kemp*, the court of appeals found that Juror 12's "unequivocal[]" statements to the courtroom deputy "that he was 'going to hang' the jury, and that it would be '11 to 1 *no matter what*'"—combined with the district court's credibility findings—"provided a sufficient basis for Juror 12's dismissal." Pet. App. 58a-59a (citation omitted). As to credibility, the court of appeals determined that the district court's "specific finding that Juror 12 was not credible" was "amply supported by the record." *Id.* at 59a. Among other things, Juror 12 stated that he "could not recall" touching another juror, as the other jurors had testified; failed "to recall his troubling statements to the courtroom deputy despite having made those statements only the previous afternoon"; and, when questioned a second time about the

incident, continued to claim that he could not recall making statements attributed to him by the deputy. *Id.* at 60a. The court of appeals determined that Juror 12's "spotty recollection" of relevant events, along with the district court's assessment of his "demeanor," supported the credibility finding. *Ibid.*

The court of appeals also found that Juror 12's refusal to deliberate, as supported by the district court's factual findings, provided "a legitimate reason" for removing him. Pet. App. 61a. Although petitioner asserted "a reasonable possibility that the complaints about his conduct stemmed from Juror 12's own view of the Government's case," the court of appeals observed that the district court had found "no reasonable possibility that Juror 12's intransigence was based on his view of the evidence," which "'is a finding of fact to which appropriate deference is due.'" *Id.* at 60a-61a (citation omitted). The court of appeals also rejected petitioner's argument that the record contradicted the district court's finding that Juror 12 said "he was going to hang this jury no matter what." *Id.* at 61a (citation omitted). The court of appeals explained that whether both statements were made in the same sentence or in two separate sentences "is a distinction without a difference." *Ibid.* The court likewise rejected petitioner's challenge to the district court's finding that Juror 12 was determined to hang the jury "no matter what the law is" and "no matter what the evidence is." *Id.* at 61a-62a. (citation omitted). The court of appeals explained that the district court accurately described the "import" of the juror's statements and found that the district court's determination was not "error." *Id.* at 62a.

ARGUMENT

Petitioner contends (Pet. 19-32) that the district court erred in dismissing Juror 12 because a possibility existed that his removal stemmed from his views of the merits of the government's case. Petitioner further contends (Pet. 13-19) that the courts of appeals have articulated divergent standards for assessing the propriety of the removal of a juror during deliberations. Those arguments lack merit. The courts of appeals 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 has repeatedly denied petitions for writs of certiorari asserting the purported conflict petitioner identifies.[2] The same result is warranted here, particularly because this case would be an unsuitable vehicle for addressing the question presented.

1. a. Federal Rule of Criminal Procedure 23(b)(3) authorizes a district court to dismiss a juror for "good cause" after the jury has retired to deliberate. A juror's unwillingness to deliberate, follow the law, or abide by the district court's instructions constitutes good cause for dismissal. Pet. App. 57a-58a; see *United States* v. *Christensen*, 828 F.3d 763, 806-807 (9th Cir. 2016), cert. denied, 137 S. Ct. 628, and 137 S. Ct. 2109 (2017); *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

---

[2] See *Christensen* v. *United States*, 137 S. Ct. 628 (2017) (No. 16-461); *Cheadle* v. *United States*, 136 S. Ct. 501 (2015) (No. 15-59); *Patterson* v. *United States*, 136 S. Ct. 33 (2015) (No. 14-8995); *Vartanian* v. *United States*, 552 U.S. 891 (2007) (No. 07-195); *Abbell* v. *United States*, 537 U.S. 813 (2002) (No. 01-1618).

appeals recognized, however, a juror may not be dismissed based on his doubts about the sufficiency of the evidence. Pet. App. 58a. 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 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) (per curiam), 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 *United States* v. *Kemp*, 500 F.3d 257, 303 (3d Cir. 2007) (applying same standard to allegations that a juror made biased comments during deliberations), cert. denied, 552 U.S. 1223 (2008).

The Third Circuit first adopted that heightened standard in *Kemp*, explaining that district courts may discharge a juror for failure to deliberate or follow the court's instructions only "when there is no reasonable possibility that the allegations of misconduct stem from the juror's view of the evidence." 500 F.3d at 304. The court equated that no-reasonable-possibility standard with "the burden for establishing guilt in a criminal

trial," *ibid.*, and it determined that such a high threshold was necessary to "ensure that jurors are not discharged simply because they are unimpressed by the evidence presented," *ibid.*

b. In this case, the court of appeals carefully applied the strict standard it adopted in *Kemp*. It found that the district court had a "legitimate reason" for removing Juror 12, based on his "unequivocal[]" statement to the courtroom deputy "that he was 'going to hang' the jury, and that it would be '11 to 1 *no matter what*.'" Pet. App. 59a, 61a (quoting *id.* at 303a-304a). As the court of appeals explained, those statements, along with the district court's findings regarding Juror 12's lack of credibility, supported the district court's factual finding that Juror 12 refused to deliberate in good faith, thereby providing "good cause" for his removal. *Ibid.*

Petitioner asserts (Pet. 29) that the record "leaves no serious question that the district court was presented with evidence raising the possibility that Juror 12 simply doubted the sufficiency of the government's case." But the district court and the court of appeals found to the contrary. As the district court explained, Juror 12 was dismissed because he intentionally refused to deliberate, as evidenced by his statements to the courtroom deputy. Pet. App. 314a-315a; see *id.* at 239a-240a ("[T]here is no doubt that Juror 12 intentionally refused to deliberate when he declared *so early in the process* that he would hang the jury no matter what."); *id.* at 248a. And the court of appeals, considering the same record, found no "error" in the district court's interpretation of the relevant events. *Id.* at 62a. Petitioner offers no sound reason for this Court to second-guess the factual determinations of both the district court and the court of appeals. See, *e.g.*, *Rogers* v.

Lodge, 458 U.S. 613, 623 (1982) ("[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts.").

Petitioner challenges (Pet. 24) the lower courts' interpretation of Juror 12's statements to the courtroom deputy, but that factbound disagreement with the lower courts' evaluation of the record does not warrant this Court's review. See Sup. Ct. R. 10; see also *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). In any event, petitioner's challenge is unfounded. At the time that Juror 12 told the deputy that he was "going to hang" the jury, and that the verdict would be "11 to 1," the jury had deliberated for only about four hours; as the district court explained, at that point there was "no way in the world he could have reviewed and considered all of the evidence in the case and [the court's] instructions on the law." Pet. App. 303a, 304a, 315a; see *Christensen*, 828 F.3d at 811 (finding it "highly unlikely that the other jurors were motivated" to raise concerns with the court by the dismissed juror's "disagreement with their views on the merits" when "[t]he first notes appeared * * * very early in the process, especially after a complicated and lengthy trial"). Petitioner's contrary interpretation that Juror 12 was dismissed for being a "lone dissenter" (Pet. 21) or "'holdout juror,'" Pet. 25, is based on Juror 12's own characterization of his interactions with other jurors. But the district court made a factual finding that Juror 12 was "not * * * credible." Pet. App. 314a.

2. Petitioner seeks to frame this case as implicating a broader legal question, asserting (Pet. 13-19) that the no-reasonable-possibility standard applied by the court of appeals and by several other courts conflicts with an

even more stringent no-possibility standard 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, under which dismissal of a juror is not appropriate if the record discloses a non-speculative possibility that the impetus for dismissal stems from the juror's view of the evidence.

As petitioner observes (Pet. 13), 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. 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).

No conflict exists, however, because the courts on the other side of petitioner's purported circuit conflict 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 further 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 chose to articulate the standard as a "reasonable possibility, not any possibility whatever," simply to exclude speculative or unreasonable possibilities. *Ibid.* (emphasis omitted); see *ibid.* ("It may be that 'anything is possible in a world of quantum mechanics.'") (brackets and citation omitted);

see also *Kemp*, 500 F.3d at 304 (explaining that a standard of "no reasonable possibility" avoids "abstract 'anything is possible' arguments," while also "adequately ensur[ing] that jurors are not discharged simply because they are unimpressed by the evidence presented").

The other decisions petitioner cites as evidence of a circuit conflict (Pet. 17-19) are to the same effect. In *Abbell*, the Eleventh Circuit held that "a juror should be excused only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence." 271 F.3d at 1302 (citing *Thomas*, 116 F.3d at 621-622). The court derived that rule from *Thomas* and *Brown* and 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, and it described the "slight difference in the standards as expressed by the D.C. and Second Circuits as compared to the Ninth and Eleventh Circuits" merely as "one of clarification and not disagreement." 500 F.3d at 304.

Those decisions are entirely consistent with the decisions of the Second and D.C. Circuits in *Thomas* and *Brown*, neither of which suggested that a "speculative" possibility would preclude dismissal. To the contrary, both courts focused only on possibilities grounded in "record evidence." *Thomas*, 116 F.3d at 621 (emphasis omitted); see *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 described 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) (per curiam) (grouping *Symington*, *Kemp*, *Abbell*, and *Thomas* as decisions "applying *Brown*'s approach (or a variant thereof)"), cert. denied, 138 S. Ct. 57, and 138 S. Ct. 58 (2017); *United States* v. *Spruill*, 808 F.3d 585, 595 (2d Cir. 2015) (characterizing *Symington* and *Kemp* as applying "the *Thomas* rule"), cert. denied, 137 S. Ct. 407 (2016).

Petitioner's claim that the no-reasonable-possibility standard "invades the secrecy of jury deliberations" has no basis in the decisions that articulate the standard that way. Pet. 26 (capitalization altered). Courts on both sides of the purported conflict have emphasized the importance of jury secrecy and warned about the dangers of intrusive questioning. See, *e.g.*, *United States* v. *Boone*, 458 F.3d 321, 329 (3d Cir. 2006), cert. denied, 551 U.S. 1147 (2007); *Symington*, 195 F.3d at 1086; *Thomas*, 116 F.3d at 619; *Brown*, 823 F.2d at 596. Conversely, the circuits that articulate a no-possibility standard have recognized "the [district] court's inherent authority to conduct inquiries in response to reports of improper juror conduct and to determine whether a juror is unwilling to carry out his duties faithfully and impartially." *Thomas*, 116 F.3d at 617; see *United States* v. *Baker*, 262 F.3d 124, 129 (2d Cir. 2001) ("[T]he questions [w]hether and to what extent a juror should be questioned regarding the circumstances of a need to be excused [are] also within the trial judge's sound discretion.") (citation and internal quotation marks omitted; second and third set of brackets in original); *McGill*, 815 F.3d at 867 ("[A] district court, based on its unique perspective at the scene, is in a far superior position

than [a court of appeals] to appropriately consider allegations of juror misconduct.") (quoting *Boone*, 458 F.3d at 329) (brackets in original).[3]

3. Even if the question presented otherwise warranted this Court's review, this case would be a poor vehicle in which to consider it.

First, petitioner failed to argue below in favor of a no-possibility standard rather than a no-reasonable-possibility standard. In the district court, defense counsel objected to the removal of Juror 12 based on the contention that Juror 12 had not actually refused to deliberate, but had instead merely declared his intention to reach his own assessment of the evidence. Pet. App. 311a-314a. Defense counsel did not advocate application of any particular legal standard, however, nor did counsel suggest that the court was applying an incorrect standard to its removal decision.

In the court of appeals, petitioner similarly did not argue that the no-reasonable-possibility standard was incorrect. To the contrary, petitioner stated that the court had adopted a "strict standard for dismissal of a juror during deliberations, allowing such a dismissal

---

[3] Petitioner suggests (Pet. 30-31) that a court can avoid deadlock by using "less-invasive techniques," such as an *Allen* charge, see *Allen* v. *United States*, 164 U.S. 492, 501-502 (1896), instead of dismissing a juror. The court of appeals did not disagree with that view as a general matter. See Pet. App. 57a n.12 (noting that a trial court should not necessarily resort to interviewing jurors when confronted with allegations of juror misconduct, and stating its preference for "err[ing] on the side of too little inquiry as opposed to too much") (quoting *United States* v. *Oscar*, 877 F.3d 1270, 1287 (11th Cir. 2017)) (brackets in original). An *Allen* charge would have been inappropriate in this case, however, because the jury had deliberated for only four hours, and the district court dismissed Juror 12 in substantial part as a result of his statements to the courtroom deputy.

only where there is no reasonable possibility the dismissal is due to the juror's view of the evidence." Pet. C.A. Br. 21 (emphasis omitted). Petitioner merely argued that the district court had misapplied that standard because "[t]here was much more than a reasonable possibility that the other jurors' complaints about Juror 12 were based on his view of the government's case." *Id.* at 25; see *id.* at 28-29 ("The issue is not whether the trial court can point to a piece of evidence or two that would support dismissal of a juror, but whether the court can conclude that there is *no reasonable possibility* the dismissal stems from the juror's view of the evidence."). That argument illustrates that petitioner's disagreement with the district court is, at bottom, factual rather than legal. And having failed to advance his preferred legal test in the courts below, petitioner should not be permitted to do so for the first time in this Court. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

Second, the application of a different standard would not alter the conclusion that the district court properly dismissed Juror 12 for refusing to follow the law. The court of appeals sustained that ground for dismissal because of Juror 12's statements to the courtroom deputy about his intention to hang the jury "'no matter what,'" "coupled with the District Court's finding that Juror 12 lacked credibility." Pet. App. 59a (citation and emphasis omitted). Petitioner asserts (Pet. 28) that the decision below "squarely presents the question in a way that demonstrates the difference between the 'no possibility' and '[no] reasonable possibility' standards." Yet petitioner does not explain how a court could view the circumstances of Juror 12's dismissal as satisfying the latter standard but not the former. Nor does petitioner

point to any unreasonable or speculative possibility that would justify divergent outcomes under those two standards. To the contrary, petitioner states that "[t]he thorough record *requires no speculation* about what was in the minds of the majority of jurors, Juror 12, or the district court." Pet. 29 (emphasis added).

Petitioner also has failed to identify any decision from another court of appeals that reached a different result under materially similar circumstances. The decisions on which petitioner relies found dismissal to be inappropriate based on starkly different facts. In *Brown*, for instance, 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 question] 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. Indeed, *Thomas* recognized that the district court's finding that the juror in question "was unlikely to convict the defendants 'no matter what the evidence' was a proper basis for the exercise of the court's dismissal authority, provided that the court had a sufficient evidentiary basis for this finding." *Id.* at 618.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL*
Acting Solicitor General
BRIAN A. BENCZKOWSKI
Assistant Attorney General
KIRBY A. HELLER
Attorney

FEBRUARY 2019

* The Solicitor General is recused in this case.