NO. 14- 9997

IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL GONZALEZ,
Petitioner,
v.

STATE OF CONNECTICUT,
Respondent.

On Petition for a Writ of Certiorari to the Connecticut Supreme Court

BRIEF OF CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Elisa L. Villa, Esq.
President
Connecticut Criminal Defense Lawyers Association
P.O. Box 1766
Waterbury, CT 07621

Proloy K. Das, Esq.*
Thomas A. Plotkin, Esq.
Rome McGuigan, P.C.
One State Street
Hartford, CT 06103
(860) 549-1000
pdas@rms-law.com
Counsel for *Amici Curiae*

Jeffrey T. Green, Esq.
Co-Chair, *Amicus* Committee
National Association of Criminal Defense Lawyers
1660 L Street, N.W.
Washington, DC 20036
(202) 872-8600

John T. Philipsborn, Esq.
Amicus Committee Chair
California Attorneys for Criminal Justice
507 Polk Street, Suite 350
San Francisco, CA 94102
(415) 771-3801

*Counsel of Record

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QUESTION PRESENTED BY PETITIONER FOR REVIEW

This case squarely presents an opportunity for this Court to resolve a division of authority on a question that three justices characterized as "troublesome" at oral argument in *Johnson v. Williams*, __ U.S. __, 133 S. Ct. 1088, 185 L.Ed.2d 105 (2013).

Consistent with a criminal defendant's Sixth Amendment right to an impartial jury, may a trial judge discharge and replace a juror during deliberations, based upon other jurors' allegations that she refuses to deliberate or is engaging in other misconduct, where it is reasonably possible that the real reason for the discharge is the juror's views regarding the sufficiency of the State's evidence?

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Connecticut Criminal Defense Lawyers Association ("CCDLA") is a not-for-profit organization of approximately three hundred lawyers who are dedicated to defending persons accused of criminal offenses. Founded in 1988, CCDLA is the only statewide criminal defense lawyers' organization in Connecticut. CCDLA works to improve the criminal justice system by insuring that the individual rights guaranteed by the Connecticut and United States Constitutions are applied fairly and equally and that those rights are not diminished.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 direct members in 28 countries, and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys. NACDL's members include private

[1] Pursuant to Supreme Court Rule 37.2, emails indicating the CCDLA's intent to file this *amicus* curiae brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. Counsel for the petitioner and counsel for the respondent have provided their written consent to the filing of this *amicus* brief. Pursuant to Supreme Court Rule 37.6, the undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici* parties, their members, or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous *amicus* briefs each year in the Supreme Court and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has frequently appeared as *amicus curiae* before this Court in furtherance of its mission to safeguard fundamental constitutional rights.

The California Attorneys for Criminal Justice ("CACJ") is a non-profit corporation founded in 1972. It has over 1,700 dues-paying members, primarily criminal defense lawyers. A principal purpose of CACJ, as set forth in its bylaws, is to defend the rights of individuals guaranteed by the United States Constitution. CACJ has appeared in this Court as *amicus curiae* on several occasions.

The CCDLA, NACDL, and CACJ have come together to submit this *amici curiae* brief because the Connecticut Supreme Court's decision in this case threatens the sanctity of the American jury trial. The question of law presented by the Petitioner is one of great pubic importance, implicating two foundations of our jury system – (1) the right to a unanimous verdict in a criminal trial; and (2) the secrecy of jury deliberations. The Court's decision invades both of these fundamental principles and diminishes the significance of a criminal defendant's right to have an impartial jury consider the evidence against him. The *amici* share an interest in ensuring that criminal defendants continue to enjoy the well-

established right to a jury of twelve peers and in protecting against diminution of that right through excusal of jurors whose expressions of honestly held views are treated as so-called "refusals to deliberate."

STATEMENT OF THE CASE

Petitioner Miguel Gonzalez was charged with the murder of Miguel Vazquez, which had occurred during a party in the early morning of October 7, 2007. The charges, filed more than a year after the murder, were based on inconclusive evidence that Gonzalez was one of six persons who left traces of DNA on a hat found at the scene. There were no eyewitnesses to the murder. Petition for Cert. at 2. The first two trials ended in deadlocked juries that resulted in mistrials. Jury selection in the third trial commenced on September 7, 2011; evidence began on September 26, 2011; and the jury began its deliberations on October 6, 2011, almost exactly four years to the day of the anniversary of the charged offence. Pet. at 2- 3.

On October 14, 2011, the fourth day of deliberations, the trial court first became aware of the potential for a third mistrial when it received a note signed by the foreperson that stated "We are struggling to come to a consensus. Can the judge please review one, reasonable doubt; two, inferring." Tr. 10/14/11 at 1; The court proceeded to call the jury in and provide them with the requested instructions. Id. at 2-5. Two days later, on October 17, 2011, it was reported to the court that a juror had privately approached the clerk that morning, and said: "Is there any way we can get rid of our foreperson," and receiving no response, advised "I'm asking a

legitimate question." Tr. 10/17/2011 at 1. The next day, October 18, 2011, the court received a note signed by the jury foreperson stating "we are not able to come to one decision." Tr. 10/18/2011 at 1. The court called the panel in and instructed the jury to continue their deliberations. Id. at 2-4. The next day, the seventh day of deliberations, the court suspended deliberations because the jury foreperson had lost her voice and was unable to speak. Pet. at 3.

On the eighth day of deliberations, October 20, 2011, the court received a signed note from juror AN that stated: "Judge, it is the opinion of several jurors that one juror is not deliberating in good faith. We appear to be at an impasse." Tr. 10/20/2011 at 1-2. The court interviewed AN at first without inquiring as to the juror's identity, the content of the deliberations, or the existence of a voting bloc. Tr. 10/20/2011 at 3-6. AN advised the court that the juror in question was arguing suppositions that never came into evidence at trial. AN added that "she" would not explain her reasoning when confronted, and that she constantly changed her argument, for example by no longer finding something credible that she had hitherto believed. Id. at 5-6.

After AN left the courtroom, the prosecutor immediately requested that the court make further inquiry, on the grounds that if the problem juror was not basing deliberations solely on the evidence, then she should be dismissed. The court determined that it needed to interview AN further to ascertain whether the problem juror was not following the court's orders, or was instead making permissible inferences or interpretations from the evidence. Tr.

10/20/2011 at 7-9. This time the court had AN identify the juror who was the subject of his note by having him write down her name. The court then asked AN to state the basis for his allegation. AN responded that the juror had stated that witnesses had been bribed, or were being bribed, or that some sort of monetary influence was being exerted over witnesses. Tr. 10/20/2011 at 13-15.

After AN returned to the jury room, the court announced its intent "to further investigate this claim of misconduct," and to call out all of the jurors except for QA, the foreperson, who the court now revealed was the name disclosed by AN. Id. at 16. The court proceeded to interview every juror except for the previously-interviewed AN and the foreperson QA, who was to be interviewed last. Not a single one of these ten jurors repeated or referred to AN's allegation that QA was injecting matters not in evidence into the deliberations such as speculations concerning bribed witnesses, nor did the court question these ten jurors about AN's claim. Id. at pp. 16-58. The court explained its refusal to pose such a question to counsel, stating that without being suggestive to the jurors, he was trying to draw out of them whether they would make the same allegation. Id. at 28-29.

The next day, October 21, the court interviewed QA. At the outset of the interview, the court advised QA that he did not wish to know the content of the deliberations, only the process, the mood in the jury room, and the willingness of jurors to participate. Tr. 10/21/2011 at 2. QA characterized the deliberations as "intense." Asked by the court to define the "intensity," QA began to speak in terms of

blocs, the possibility that one juror might sway several on the majority, and the court then cut off her answer. Id. at 3. QA disagreed that any juror was shutting down and refusing to deliberate further, or that deliberations were breaking down because of one juror's refusal to talk, and when the court stated that she had been identified as the problem juror, she denied it. *Id.* at 4-5. She stated that "we're at the point where one is not listening to the other because one is not giving the answer the others want to accept." *Id.* at 3. She elaborated that answers were being given but not accepted because of perception. Tr. 10/21/2011 at 4. QA agreed with the court's characterization of her responses that she was in fact talking in the juror room, but the others were not accepting of her answers. *Id.* 5. QA denied that she had stated in deliberations that a witness had been bribed. *Id.* She explained that a question had been asked of her, and she answered it, and claimed that she clearly remembered the exchange: "A question was asked of me what would an individual have gotten out of being a witness? And my response was, I don't know, I can't tell you." QA recalled that she was asked if bribery was involved, and recalled that her response was, "no, but I don't know what someone would get out of being a witness" *Id.* at 5-8.

Immediately following the court's interview of QA, defense counsel requested a mistrial. Tr. 10/21/2011 at 20. The prosecutor asked that QA be removed on the grounds that, *inter alia*, she violated the court's instructions by raising during deliberations matters not in evidence. The prosecutor also claimed that excusing QA and replacing her with an alternate was the only way to avoid

prejudice to the State, because the alternative would be a third mistrial of the case. *Id*. at 11-14.

The court ruled that QA be dismissed, on the grounds that: (1) QA was refusing to participate in deliberations; and (2) she injected into deliberations matters not in evidence. Tr. 10/21/2011 at 23-29. The court wholly accepted AN's account of QA's speculation as to witness bribery, while acknowledging that the allegation was uncorroborated. Id. at 27-29. The court would not credit QA's account of the jurors' conversation regarding witness bribery, finding that her response was "disingenuous," "contrived," "she tried to dance around the point," and that she was not credible. Id. at 29.

Once QA was replaced with an alternate juror (and subsequently one other, due to an original juror's medical condition), the court instructed the jury to begin deliberations again. After four days of deliberations, the reconstituted jury convicted Gonzalez of murder, and he was sentenced to fifty years in prison. Petition at 5. On appeal, the Connecticut Supreme Court upheld the trial court's dismissal of QA for injecting matters not in evidence into the deliberations and, therefore, did not reach the Petitioner's attack on the court's other basis for QA's dismissal, her purported refusal to deliberate. Pet. at 5.

SUMMARY OF ARGUMENT

The jury system is the trademark of our nation's commitment to due process in its search for criminal justice. As this Court eloquently explained

in *Duncan v. Louisiana*, 391 U.S. 145, 151-52, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968):

> [B]y the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta.[ ] Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. In the 18th century Blackstone could write:
>
> "Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of oyer and terminer occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that… the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve

> of his equals and neighbours, indifferently chosen and superior to all suspicion."[ ]

Duncan v. Louisiana, 391 U.S. at 151-52 (Internal quotations and citations omitted.)

The Connecticut Supreme Court's decision in this case threatens the sanctity of the American jury trial. It constitutes an unprecedented intrusion into two hallmarks of the jury system – jury unanimity and secrecy of jury deliberations. This Court should grant the Petition for a Writ of Certiorari and review the Connecticut Supreme Court's decision in order to provide some guidance as to the standards employed when dismissing a juror in order to protect a defendant's right to a unanimous jury verdict and reverence for jury deliberations.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT *CERTIORARI* TO ADDRESS THE SCOPE OF A CRIMINAL DEFENDANT'S "RIGHT TO A UNANIMOUS JURY VERDICT"

As the Petitioner notes, this case implicates the Sixth and Fourteenth Amendment guarantees of an impartial jury in criminal trials. The *Amici* posit that the case also implicates a criminal defendant's right to a unanimous jury verdict. The trial judge in this case, by dismissing the jury foreperson when the jury was deadlocked, and then reconstituting the jury rather than declaring a mistrial, violated this right. This Court should take this case in order to prescribe a heightened standard of proof whereby a presiding judge cannot discharge a juror if there is *any*

evidence that the juror is not persuaded by the government's evidence.

A criminal defendant's right to a unanimous verdict has been established in forty-eight states as well as under the Federal rules.[2] It has been enshrined as a basic principle of justice in Connecticut's jurisprudence:

"It is settled doctrine in Connecticut that a valid jury verdict in a criminal case must be unanimous… Requiring unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict…[E]ach juror's vote must be his [or her] own conclusion and not a mere acquiescence in the conclusions of his [or her] fellows[.]" *State v. Gary*, 273 Conn. 393, 413-414, 869 A.2d 1236 (2005). "The possibility of disagreement by the jury is implicit in the requirement of a unanimous verdict and is part of the constitutional safeguard of trial by jury.... The jury is required to agree on the factual basis of the offense. The rationale underlying the requirement is that a jury cannot be deemed to be unanimous if it applies inconsistent factual conclusions to alternative theories of criminal liability." (Citations omitted; internal quotation marks omitted.) *State v. Martinez*, 278 Conn. 598, 604 n.13, 900 A.2d 485 (2006). Section 42-29 of Connecticut's Superior Court Rules for Criminal Matters provides, "[t]he verdict shall be unanimous."

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[2] The two outlier states that create statutory exceptions to jury unanimity in criminal cases are Louisiana, under La. Code of Criminal Procedure, Art. 782, and Oregon, under Oregon Rev. Stat. §136.450.

The origins of the unanimity requirement are obscure, but its roots certainly lie in Anglo-Saxon law centuries before the foundation of our Republic. *See Apodaca v. Oregon*, 406 U.S. 404, 407 n.2, 92 S.Ct. 1628, 32 L.Ed. 2d 184 (1972)(dating the unanimity requirement as becoming settled in the latter half of the fourteenth century); and James Kachmar, Silencing the Majority: Permitting Nonunanimous Jury Verdicts in Criminal Trials, 28 Pac. L. J. 273, 277 (1996)(noting that in 1367, an English court refused to accept an 11-1 verdict). Over the course of the eighteenth century, as Americans became more familiar with the doctrines of English common law, and adopted them into their own legal systems, the unanimity rule took root in the United States. *Apodaca*, *supra*, at 408, n.3. Subsequently, despite the fact that this Court has held that the Sixth Amendment provides no Constitutional mandate for jury unanimity at the state level, *see Apodaca*, *supra*, at 406, the right remains robust in forty-eight states[3] and at federal law. See Fed. R. Criminal Procedure 31(a) ("the verdict shall be unanimous").

As then-Judge Kennedy opined, at the time speaking for the Ninth Circuit Court of Appeals,

> The dynamics of the jury process are such that often only one or two members express doubt as to view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view

[3] See footnote 2.

> to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict, and we are unwilling to surrender the values of that mode of fact-finding, or to examine the constitutional implications of an attempt to do so, absent a clear mandate in the Rules or a controlling statute.

United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978).

In the instant case, the Petitioner's right to a unanimous jury verdict was violated by the trial court's removal of the dissenting juror and reconstitution of the jury panel. The decisions cited by the Petitioner, which stand for the principle that a holdout juror should be insulated from allegations of misconduct if there is *any* evidence that the holdout finds the government's evidence insufficient, also stand for the principle that removal of the juror in such circumstances violates the broadly recognized right to a unanimous jury verdict.

Because forty-eight states and the federal system recognize the right to a unanimous verdict, this issue has implications beyond Connecticut. Indeed, there has been a lack of clarity nationally as to how a trial court should consider dismissing a

juror without compromising a defendant's right to a unanimous jury verdict. In *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987), one day after the jury sent a note to the court indicating difficulty reaching a unanimous verdict, a juror asked to be excused from service after five weeks of deliberation on the grounds that he could not "go along" with the RICO statute under which the defendants were charged, and that if he had known the content of the RICO statute at the outset of trial, he would have informed the court that he could not be impartial. In a colloquy with the trial judge, the juror also stated that he had issues with "the way it's written and the way the evidence has been presented... if the evidence was presented in a fashion in which the law was written, then maybe I would be able to discharge my duties." *Id.* at 594. The trial court dismissed the juror under Fed. R. Crim. Pro. 23(b), which permits dismissal "for just cause," on the grounds that he would not follow the law and, therefore, could not discharge his duty as a juror. After three further weeks of deliberation, the jury returned guilty verdicts. *Id.* at 595.

The defendants appealed on the grounds that the trial court's dismissal of the juror violated their right to a unanimous verdict, and the D.C. Circuit agreed:

> We agree with the appellants that the court 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… If a court could discharge a juror on the basis of such a request, then the right to a unanimous

> verdict would be illusory. A discharge of this kind would enable the government to obtain a conviction even though a member of the jury that began deliberations thought that the government had failed to prove its case. Such a result is unacceptable under the Constitution… Any other holding would fail to protect adequately a defendant's right to be convicted only by a unanimous jury.

Brown, *supra*, 823 F.2d at 596.

Variants of this rule have been adopted in other jurisdictions, reflecting in part the *Brown C*ourt's concern for a criminal defendant's right to a unanimous jury verdict. *See United States v. Thomas*, 116 F.3d 606, 621 (2d Cir. 1997)(to remove a juror where there is evidence that he was not satisfied with the government's case "is to deny the defendant his right to a unanimous verdict"); *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999) (invoking *Brown* and *Thomas* and 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 cannot dismiss, but can only either compel continued deliberations or declare a mistrial; "this rule is attentive to the …[imperative of]…safeguarding the defendant's right to a unanimous verdict[.]").

The Eleventh Circuit adopted its version of the rule in *Brown* based largely on the court's concern for protecting the right to a unanimous jury in a

scenario much like that described in the in instant case, holding in *United States v. Abell*, 271 F.3d 1286, 1302 (11th Cir. 2001):

> A risk exists,…that ten or eleven members of a jury that have collectively reached agreement on a case's outcome may thereafter collectively agree that one or two hold-outs – instead of honestly disagreeing about the merits – are refusing to apply the law as instructed by the court in an impermissible attempt to nullify the verdict. The jury's majority may very well further agree to request the court's intervention with regard to those one or two dissenting jurors who are, according to the majority, refusing to apply the law. Thus, even in the face of complaints from a majority of the jury, Federal defendants have some right…to a unanimous verdict [.]

See also State v. Elmore, 155 Wash. 2d 758, 771-72, 777-78, 779, 123 P.3d 72 (Wash. 2005)(where members of the jury passed notes to the court that one of their number was disregarding in a blanket fashion the credibility of witnesses and otherwise purportedly refusing to deliberate, and the trial court excused the alleged problem juror based on a finding that a complaining juror was credible when interviewed, and the purported problem juror was not, defendant's right to a unanimous verdict compromised under *United States v. Abell*, *supra*, and *United States v. Brown*); and *People v. Gallano*, 821 N.E. 2d 1214, 1224, 354 Ill. App.3d 941 (Ill. App.

2004)("This rule of law ensures that a defendant's constitutional right to a unanimous jury verdict is protected and guarantees that a juror will not be excused in a manner that appears to facilitate or manipulate the rendering of a guilty verdict.").

The trial court in this case based its decision to dismiss the foreperson on two grounds; the first was fellow-juror AN's uncorroborated assertion that QA had opined in the jury room that witnesses had been bribed, an assertion QA denied. Not a single other juror on the panel (many of whom did not seem favorably disposed towards QA) so much as mentioned AN's allegation. The second ground was QA's purported refusal to participate in deliberations. However, of the eleven jurors interviewed, eight, including QA, indicated that QA was in fact actually deliberating, at the very least by voicing her opinions as to the facts. Tr. 10/20/2011 at 23-24; 26; 31-33; 35-36; 47-50; 52-55; and 57-58. If she was deliberating, and a holdout juror, then these facts cry out for the application of the rule being sought by the Petitioner.

While the trial court found that QA was not a holdout juror, the fact that the court was on notice that such a scenario obtained, and that QA herself was the holdout is inescapable, based on the record: (1) the jury had informed the court that it was unable to reach a verdict as of a few days prior to AN's complaining note; (2) the characterization by AN in his note that QA was putting the jury "at an impasse;" and (3) QA's own testimony that "we're at the point where one is not listening to the other because one is not giving the answer the others want to accept." The trial court's finding that QA was not

a holdout rested upon the dubious logic that had she been deliberating and then stopped when there was no further sense in continuing, then she would have expressly stated as much during the interview. Tr. 10/21/2011 at 26-27. However, the trial judge never asked her such a question; moreover, he made it clear that he did not want to hear the content of deliberations, a caution that likely would have chilled QA from volunteering such information.

The evidence that QA was a holdout, and the court could have so ascertained, creates the inference that QA's conduct, and her fellow-jurors' response, was based on her dissatisfaction with the government's case. By affirming the trial court's actions, the Connecticut Supreme Court created a rule that is at odds with the rule articulated by the D.C. Circuit in *Brown* because it effectively rendered the defendant's "right to a unanimous verdict… illusory. A discharge of this kind …enable[d] the government to obtain a conviction even though a member of the jury that began deliberations thought that the government had failed to prove its case. [The trial court] fail[ed] to protect adequately the defendant's right to be convicted only by a unanimous jury." *United States v. Brown*, *supra*, 823 F.2d at 596.

In order to protect the right to a unanimous jury, this Court should grant *certiorari* in this case.

II. THIS COURT SHOULD GRANT *CERTIORARI* TO EXPLAIN WHAT CIRCUMSTANCES, IF ANY, PERMIT A JUDGE PRESIDING OVER A CRIMINAL TRIAL TO INVADE THE SECRECY OF JURY DELIBERATIONS

The Petitioner's argument in favor of adopting the *Brown* rule barring discharge of a purportedly recalcitrant juror where there exists *any* evidence that such a juror is not persuaded by the government's case, not only implicates a criminal defendant's Sixth Amendment right to an impartial jury, but also the common law tradition that jury deliberations be conducted in secret. In the instant case, the trial court expelled QA after interviewing jurors as to the content of their deliberations and weighing the credibility of QA and AN in light of their testimony about the content of the deliberations. Both within Connecticut and nationally, the deliberative process is supposed to be sacrosanct. "The primary if not exclusive purpose of jury privacy and secrecy is to protect the jury's deliberations from improper influence." *Komondy v. Zoning Bd. of Appeals*, 127 Conn. App. 669, 685, 16 A.3d 741 (2011), *quoting United States v. Olano,* 507 U.S. 725, 737–38, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Adopting the Petitioner's proposed rule would protect jury deliberations from improper incursions by the court into the secrecy of jury deliberations such as the one that occurred in this case.

Like the right to a unanimous jury verdict, the rule that jury deliberations be held in secret has its roots in medieval Anglo-Saxon custom, and by the fourteenth century, the practice was associated with

protecting the jury from outside influences.[4] One commentator on the English common law described the medieval deliberative process thusly, which sounds little different from our practices nearly 600 years later: "During the reign of Henry IV, after the parties presented all the evidence in a jury trial, the jurors shall confer together, at their pleasure, as they shall think most convenient, upon the truth of the issue before them; with as much deliberation and leisure as they can well desire, being all the while in the keeping of an officer of the court, in a place assigned to them for that purpose, lest anyone should attempt by indirect means to influence them as to their opinion which they are to give in court."[5]

Several centuries later, the English custom crossed the Atlantic, as can be seen in colonial Virginia where "when the case was given to a jury, it was locked up without food or water until it reached a verdict. A jury man could not leave his fellows until a verdict was reached."[6] Over time and to the present day, the secrecy of deliberation became an integral part of the jury trial, for reasons expounded upon by the Second Circuit:

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[4] D. Courselle, Struggling With Deliberative Secrecy, Jury Independence, and Jury Reform, 57 South Carolina Law Review 203, 215-16 (Autumn, 2005), *citing* 1 William Holdsworth, A History of English Law, 318-19 (6th ed. 1938), and William Forsythe, History of Trial by Jury 108,114 (James Appleton Morgan ed. 1857)(1853).

[5] Courselle, *supra*, n.5, *quoting* William Forsyth, History of Trial by Jury 133-34 (James Appleton Morgan ed., 1857)(1853).

[6] Courselle, *supra*, n.5, at 217, *citing* Rita J. Simon, The Jury: Its Role in American Society 5 (1980).

> Juror privacy is a prerequisite of free debate, without which the decisionmaking process would be crippled. The precise value of throwing together in a jury room a representative cross-section of the community is that a just consensus is reached through a thoroughgoing exchange of ideas and impressions. For the process to work according to theory, the participants must feel completely free to dissect the credibility, motivations, and just deserts of other people. Sensitive jurors will not engage in such a dialogue without some assurance that it will never reach a larger audience.

United States v. Thomas, *supra*, 116 F.3d at 619 (citations and internal quotation marks omitted). Our courts have held that among the outside influences from whom the jury must be protected is *the court itself*: "[P]rotecting the deliberative process requires…strict limitations on intrusions from those who participate in the trial itself, including counsel and the presiding judge. A court must limit its own inquiries of jurors once deliberations have begun." *Id.* at 620. The D.C. Circuit has held 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." *Brown*, *supra*, 823 F. 2d at 596. The Ninth Circuit has noted that "there are important reasons why a trial judge must not compromise the secrecy of jury deliberations…if trial judges were permitted to inquire into the reasoning behind jurors' views of pending cases, it would invite trial judges to second-guess and influence the work of the jury."

U.S. v. Symington, *supra*, 195 F.3d at 1086*, citing Thomas*, 116 F.3d at 620.

The facts in *United States v. Thomas* illustrate the risks attendant upon a trial court's inquiry into the deliberative process subsequent to a juror complaint concerning the purported recalcitrance of a holdout juror. As in the instant case, the trial court below had received equivocal information concerning Juror 5's behavior during deliberations. *Thomas*, *supra* at 611. Prior to launching its inquiry, the court had heard from several different jurors that Juror 5 had made up his mind and was preventing the jury from reaching a verdict. *Id*. When it became apparent there was discord and friction in the jury room arising from the majority's frustration, the court interviewed the panel. *Id.* Juror 5 assured the court that his views were entirely based on the evidence, and several of his fellow-jurors indicated to the court that Juror 5 had expressed that he found the government's evidence insufficient. *Id*. at 623-24.

Following the interviews, the government urged that the court discharge Juror 5 for improperly seeking nullification, and the court dismissed him, over defense counsel's objection, on the grounds that he was distracting the jurors and removal might allow them to better deliberate. *Id*. at 612. The Second Circuit vacated the subsequent guilty verdict and remanded because the dismissal of Juror 5 had the appearance of being based as much on Juror 5's views of the merits of the case, as it did on the court's finding that the juror was not following its instructions. *Id*. at 624. The *Thomas* court adopted the rule in *Brown* urged by the Petitioner here, in part on the grounds that "this evidentiary standard

protects not only against the wrongful removal of jurors; it also serves to protect against overly intrusive judicial inquiries into the substance of jury deliberations…. One unavoidable consequence of imposing a lower evidentiary standard would thus be to open up the possibility that judges, in response to the demands of counsel or otherwise, would wind up taking sides in disputes between jurors on allegations of juror nullification – in effect, to permit judicial interference with, if not usurpation of, the fact-finding role of the jury." *Id.* at 622.

Every step of the court's inquiry in the instant case concerning QA's purported statements about witness bribery constituted improper judicial probing into the deliberative process, as well as a validation of the Second Circuit's warning that such inquiries can result in the court taking sides with the other jurors against the holdout. *U.S. v. Thomas*, *supra*, 116 F.3d at 622; *see also Garcia v. Colorado*, 997 P.2d 1, 3-5, 7 (Col., 2000)(finding of error where, subsequent to the court being passed the jury foreman's note indicating a holdout juror refused to accept medical expert testimony as evidence, would not change his mind, and would not follow the court's instruction, the court's interview with the foreperson and dismissal of the holdout resulted in conviction by a reconstituted jury; on the grounds that the court "impermissibly invaded" the jury's deliberations by inquiring of the foreperson as to the holdout's conduct in the deliberation room).

This Court should follow the Petitioner's request to review and reject the Connecticut Supreme Court's analysis and recognize the rule from *Brown*, which bars discharge of a recalcitrant

juror during deliberations where there is any evidence that such a juror harbors doubts about the government's case. This rule would protect the sanctity of jury deliberations by preventing the court's intervention into the jury room and eliminate the temptation for a presiding judge to side with the frustrated majority, thereby placing a judicial thumb on the scale in an effort to avoid a mistrial.

It is in the interest of the *Amici*, and indeed all of those concerned with preserving the integrity of our jury system, that this elegant, bright line standard be used to safeguard the sanctity of the jury's deliberations.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Proloy K. Das, Esq.*
Thomas A. Plotkin, Esq.
Rome McGuigan, P.C.
One State Street
Hartford, CT 06103
(860) 549-1000
pdas@rms-law.com
Counsel for Amici Curiae

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**Counsel of Record*

(*counsel listing continues on next page*)

Elisa L. Villa, Esq.
President
Connecticut Criminal Defense Lawyers Association
P.O. Box 1766
Waterbury, CT 07621

Jeffrey T. Green, Esq.
Co-Chair, *Amicus* Committee
National Association of Criminal Defense Lawyers
1660 L Street, N.W.
Washington, DC 20036
(202) 872-8600

John T. Philipsborn, Esq.
Amicus Committee Chair
California Attorneys for Criminal Justice
507 Polk Street, Suite 350
San Francisco, CA 94102
(415) 771-3801