No. _____

IN THE

Supreme Court of the United States

JEFF SPRUILL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment permits a federal court to dismiss a deliberating juror (in particular, a known holdout for acquittal) based on alleged bias or sympathy toward the defendant, where there is a reasonable possibility that the request for the juror's removal stemmed not from any bias but from her views on the sufficiency of the evidence.

2. Whether a defendant waives (rather than forfeits) a constitutional right where his counsel merely answers "yes" when asked whether he agrees with the court's decision at trial, in the absence of any evidence that counsel or the court recognized the possibility of a legal error, and in the absence of any plausible tactical benefit to failing to object.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeff Spruill respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-50a) is reported at 808 F.3d 585. The oral decision of the United States District Court for the District of Connecticut dismissing the deliberating juror (App. 80a-81a) is unreported.

JURISDICTION

The Second Circuit entered judgment on December 16, 2015, and denied panel rehearing and rehearing *en banc* on June 28, 2016. App. 51a-52a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND PROCEDURAL RULES INVOLVED

This case involves the right to a unanimous jury verdict in federal criminal prosecutions guaranteed by the Sixth Amendment to the United States Constitution.

This case also involves the question of when to permit plain error review pursuant to Federal Rule of Criminal Procedure 52(b).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

1. The jury is the bedrock of our criminal justice system. Its work is sacrosanct. The Constitution requires the service of lay people, asking them to decide, impartially and together as one, the guilt or innocence of a criminal defendant. In our federal system, the district court must ensure—at all stages of the trial—that the jury is impartial. And, it must also ensure that the jury's verdict is unanimous. But when the court's duty to maintain an impartial jury comes into conflict with the defendant's right to a unanimous jury—specifically, where the dismissal of a dissenting juror is sought during deliberations based on allegations of impartiality or failure to follow the law—what is a trial judge to do?

While dismissal for good cause is an option, *see* Fed. R. Crim. P. 23(b)(3), dismissing a holdout juror based on allegations of impropriety or impartiality that in fact stem from the juror's view of the evidence would violate the defendant's Sixth Amendment right to a unanimous jury. To avoid this unconstitutional outcome, the federal courts have adopted a heightened evidentiary standard that prevents a court from dismissing a holdout where there is a possibility that the dismissal is sought because of the juror's holdout status. The question of constitutional importance that now divides the federal Courts of Appeals is to what category of dismissal requests does this stringent evidentiary standard apply.

Until now, federal courts have applied this standard to a broad range of dismissal questions. But the Second Circuit in this case has broken with other courts, confining the application of its heightened evidentiary standard to dismissal requests premised on allegations of juror nullification. A dissenting juror in the Second Circuit now can be dismissed based on allegations of sympathy or bias even when the dismissal may have been requested ***because*** the juror was a holdout. This Court should resolve this split in Circuit authority on a crucial aspect of trial practice.

2. The Second Circuit's alternative holding in this case also creates a split in Circuit law. The Second Circuit held that Spruill's trial counsel waived, as opposed to forfeited, Spruill's right to challenge the dismissal of the holdout juror by merely answering "yes" to the court's question whether counsel agreed with the court's dismissal decision. There was no colloquy about the applicable legal standard for dismissal, and therefore no indication that counsel (or the court) apprehended the possibility of legal error. Nor was there any plausible tactical benefit for Spruill to agree to the dismissal of the lone holdout for acquittal. Far from indulging every presumption against waiver, the law in the Second Circuit now holds that a simple "yes" answer is sufficient for a defendant's "intentional relinquishment or abandonment of a known right." This holding conflicts with the law of several Circuits, which requires actual evidence of awareness of the potential error in the court's decision before finding the waiver of a right.

This Court should grant certiorari.

STATEMENT OF THE CASE

I. The Dismissal of Juror 11

Petitioner Jeff Spruill was convicted at the conclusion of a jury trial of possession and distribution of a controlled substance and of possession of a firearm by a convicted felon. During deliberations, one juror (Juror No. 11), the lone holdout for acquittal, requested her own dismissal, alleging that her social work in the state correctional system was creating a "conflict of interest." The request followed a series of notes from the jury identifying her as an obstacle to the unanimity sought by her fellow jurors. Although the court and the parties knew of her vocation during jury selection, App. 86a-87a, allegations of her "conflict of interest" surfaced only after deliberations had begun, and only after Juror No. 11 found herself as the lone holdout.

Specifically, during *voir dire*, Juror No. 11 identified herself as a "clinician in the State of Connecticut" who performed "outreach in the prison systems," and expressed concern about potentially running into the defendant at work if he were found guilty. App. 86a. Although Spruill initially exercised a peremptory challenge against her, after "weigh[ing] very carefully," he decided to keep Juror No. 11 on the jury. App. 88a-89a. The court addressed the juror's concern about jury service by charging the empaneled jury that the state and federal criminal justice systems are separate and distinct.

Shortly into deliberations, the jury split 11-1. It sent out two notes. The first referred to "one juror that at this point does not agree with the jury" and who "has doubts and at this point is unwilling to change their vote." App. 54a. The remaining jurors were "unwilling to stop too quickly at the expense of justice." *Id.* The second note asked how to proceed with "one juror who feels in their gut that they have a conflict of interest." *Id.* The subject of both notes was Juror No. 11.

Responding to the first note, the court instructed the jury to continue deliberating. App. 62a-63a. Responding to the second note, the court explained that a "conflict of interest is in the nature of a personal stake or involvement in the case that makes it difficult for the individual to be fair and impartial, to decide the case based solely on the evidence and the applicable law, not on anything else." App. 65a. The court also advised the jurors that they "must be impartial and unbiased, and if there is something in the juror's personal experience that creates a bias or a prejudice, then that's something we would need to know about and do our best to address." App. 66a.

Juror No. 11 accepted the court's tacit invitation and requested her own removal, describing a "gut feeling" that her "involvement with similar cases when working with individuals with similar charges . . . is potentially creating a bias." App. 67a-68a. Crucially, the court recognized two possible explanations for the juror's note: "either Juror Number 11 has a conscientious view that differs from everybody else or she's having difficulty

deliberating as she would wish to do because of what might be thought of as sympathy for Mr. Spruill." App. 71a.

The court, with the parties' consent, questioned Juror No. 11 on the record about this supposed "bias." Though the court cautioned the juror not to reveal anything about deliberations, App. 72a-73a, her status as the lone holdout was already known to the parties, App. 70a. Her testimony painted a picture of a juror who found herself in a challenging and uncompromising position. On the one hand, she explained that she was "trying to be as fair as [she] can be," was "trying to listen to all the evidence," and felt like she "was coming to a fair decision." App. 77a. On the other hand, she testified that "other members also felt maybe [she] didn't [come to a fair decision]"; apparently the majority doubted that her dissenting opinion was impartial given her prison work. App. 73a-75a, 77a. This caused her to question her own impartiality: "But somebody mentioned—I can't bring up the deliberations, but it just kind of made me think about it and it's just been difficult." App. 73a. In short, she sought a way out of what had become an unpleasant stint of jury service, stating that "for the interest of the Court and everybody's time, it might just make sense to have somebody else." App. 77a.

Rather than excuse the juror or direct the jury to resume deliberations, the court asked Juror No. 11 to reflect and decide for herself whether to continue. App. 77a ("I'll rely on you to look within and make the call."). Not surprisingly (given her

uncomfortable position as a lone holdout) she accepted the offer to dismiss herself. In her final note, she wrote of "some difficulty in making a decision on a verdict based on feelings of sensitivity toward individuals who have similar cases to Mr. Spruill." App. 80a. The court took her at her word and dismissed her without discussing the applicable Second Circuit precedent, *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997), which sets forth the legal standard for making this decision. The court made no findings about whether her discharge request was related to her holdout status. After the court substituted Juror No. 11 with a waiting alternate and instructed the jury to begin deliberations anew, the new jury, in about an hour, returned a guilty verdict.

II. The Purported Waiver of the Right to Challenge the Dismissal of Juror 11

Throughout the court's consideration of the jury's notes and its questioning of Juror No. 11, the judge was careful to invite comments and suggestions from counsel for both parties. But at the critical moment, after the court received Juror No. 11's final note, the following exchange occurred:

> THE COURT: . . . Any comments?
>
> MR. GUSTAFSON [counsel for the United States]: No, Your Honor. I guess we need to figure out which is the first alternate. I would think that Juror Number 11 should be excused at this point.
>
> THE COURT: Mr. Weingast?

MR. WEINGAST [counsel for Spruill]: Nothing further, Your Honor.

THE COURT: Are you [a]greed that I need to excuse her?

MR. WEINGAST: Yes, Your Honor.

App. 80a-81a. The Court then dismissed Juror No. 11 with no further comment. App. 81a.

III. The Proceedings Before the Second Circuit

Spruill appealed his conviction, arguing among other things that the juror dismissal violated the rule of *Thomas*. Over a dissent that would have vacated the conviction, the remaining two judges on the panel affirmed the juror's dismissal and the conviction.

A. The Juror-Dismissal Holding

Thomas held that a court abuses its discretion in dismissing a deliberating juror "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." *Thomas*, 116 F.3d at 621-22 (quoting and adopting the rule and reasoning of *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987)). The court in this case held that this heightened evidentiary standard does not apply to the dismissal of Juror No. 11, confining the standard to the express nullification context in which it arose. Specifically, the "strict 'any possibility' rule does not reach beyond nullification to other forms of juror misconduct." App. 19a.

The panel recognized the constitutional concern that a court that dismisses a holdout juror might dismiss a juror "who is simply unpersuaded by the Government's case, which would deny the defendant his right to a unanimous jury." App. 18a. But the panel believed that concern is present only where a juror is accused of intentionally refusing to follow the law. That is, only in the express context of nullification, according to the panel, would an appropriate inquiry into the alleged juror misconduct necessarily conflict with the court's duty to maintain jury secrecy. The "any possibility" standard was inapplicable to the dismissal of Juror No. 11 because, the panel held, her discharge request related to "possible bias from extrinsic factors" (*i.e.*, her employment), and because the trial court was able to determine "with no intrusion whatsoever on jury deliberations . . . that Juror 11 needed to be removed for extrinsic bias." App. 20a, 22a, 24a.

Judge Pooler dissented. She believed that the defendant's right to a unanimous jury required a rule that applied beyond the express nullification context in which it first arose. App. 39a-40a. She wrote that "the 'any possibility' standard was necessary [in *Thomas*] because 'a lower evidentiary standard could lead to the removal of jurors on the basis of their view of the sufficiency of the prosecution's evidence,'" a concern that "appl[ies] with equal if not greater force to this case." *Id.* And, the dissent noted, that happened with Juror No. 11, because "[t]he record reveals the possibility that Juror 11 initially voted to acquit based on her conscientious view of the evidence, but that, after

she learned that she was in the uncomfortable position of being the lone holdout juror, she decided that, in the interest of 'everybody's time,' it 'ma[d]e sense' to replace her." App. 38a.

Judge Pooler agreed with the majority that, in some circumstances, "the true source of the bias 'is both easily identifiable and subject to investigation and findings without intrusion into the deliberative process.'" App. 41a (quoting *Thomas*, 116 F.3d at 621). But, with the type of bias at issue here—namely, bias "in the form of sympathy toward the defendant—it becomes too difficult for the trial judge to discern whether such sympathy stems from an inappropriate bias or a conscientious view of the evidence." App. 41a-42a. Therefore, Judge Pooler would have applied the "any possibility" standard to the dismissal of Juror No. 11 and found the dismissal to be error. App. 43a.

B. The Waiver Holding

The panel majority also held that Spruill had waived any challenge to the removal of Juror No. 11 (and with it his constitutional right to a unanimous jury). Recognizing that "waiver can result only from a defendant's intentional decision not to assert a right," App. 25a, the panel found waiver in Spruill's counsel's mere acquiescence (couched in affirmative language) to the removal of the juror. App. 28a.

In particular, the panel discerned the requisite intent for waiver in the following actions: (a) Spruill's awareness of Juror No. 11's employment during *voir dire*, citing his withdrawn peremptory challenge, App. 28a; (b) Spruill's request during

deliberations that the court "inquire of [Juror No. 11] individually," *id.*; and (c) Spruill's counsel answering "Yes, Your Honor" when asked whether he "[a]greed that [the court] need[ed] to excuse her," App. 29a-30a. The panel concluded that Spruill "actively engaged in the matter and agreed to every action taken by the district court" which "manifest[s] true waiver of any challenge to the district court's inquiry and removal of Juror 11." App. 31a. The only fact directly related to the dismissal of Juror No. 11, however, was counsel's "yes" in response to the court's question whether he agreed with the court's decision to remove Juror No. 11.

Though a tactical benefit is not a "prerequisite to identifying waiver where the totality of circumstances otherwise demonstrate the requisite intentional action," the panel nonetheless speculated about the benefits that might have motivated Spruill's agreement to the removal of the lone holdout against conviction. App. 31a-32a. Specifically, the panel theorized that, after hearing the juror's responses to the court's questioning, "counsel may have thought the juror more likely to succumb to the views of other jurors than maintain an opposing view and, in those circumstances, thought it better to substitute the first alternate and begin deliberations anew." App. 32a. The panel also seemed to think that the defense attorney may have agreed to the dismissal because it was a fair result even though it doomed his client to conviction. *Id.* ("Or counsel may simply have recognized that the juror's final response acknowledged an extrinsic bias that compelled removal.").

Judge Pooler was not convinced, and she dissented from this holding as well. To her, Spruill's actions relating to the inquiry of Juror No. 11—not challenged on appeal—were unrelated to the ultimate dismissal of the juror and therefore irrelevant to the waiver of the right to challenge to that dismissal. App. 45a-46a. "[T]he only action of Spruill's counsel that is relevant to the waiver issue is his statement that he agreed that the district court should remove Juror 11." App. 46a. Judge Pooler found no evidence of intentional waiver in that unadorned "yes." *Id.*

Judge Pooler was also highly skeptical of the theoretical tactical benefits of the dismissal. "[T]here is no conceivable reason why an attorney familiar with *Thomas* would intentionally relinquish or abandon the right to retain the one juror favoring acquittal. There is no conceivable tactical benefit to doing so. Juror 11 was Spruill's only hope." *Id.* Thus, to Judge Pooler, counsel's "yes" was mere "acquiescence," the only explanation for which was that "he was either unfamiliar with *Thomas* or failed to appreciate the *Thomas* error," both of which point to forfeiture, not waiver. App. 47a.

Judge Pooler therefore would have reviewed the juror-dismissal question for "plain error," and would have reversed. App. 49a-50a. In her view, the error was "plain," "affect[ed] substantial rights," and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." App. 43a (internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

Both of the Second Circuit's holdings in this case warrant this Court's review. *First*, the law in the Second Circuit following this case is that, unless a deliberating juror is accused of nullification, the heightened evidentiary standard does not govern dismissal of that juror, and a trial judge has complete discretion to dismiss that juror for cause. By confining this heightened evidentiary standard, the Second Circuit has broken with other Circuits, which do not so limit the application of the heightened evidentiary standard. The Sixth Amendment right to a unanimous jury is now in peril in the Second Circuit because a trial court can break a deadlock by dismissing a holdout for cause despite a reasonable possibility that her removal is sought ***because*** she is a holdout.

Second, the panel's holding that a mere "yes" in response to the court asking whether counsel agrees with its decision is alone sufficient to find a waiver conflicts with decisions of its sister Circuits and this Court's precedent, which require more evidence before a court can find an intentional relinquishment or abandonment of a known right. *See United States v. Olano,* 507 U.S. 725, 733 (1993).

Both holdings—on the dismissal of the juror and on waiver—should be reviewed and reversed.

I. The Narrow Applicability of the Heightened Evidentiary Standard Under Second Circuit Law Conflicts with the Law in the Sister Circuits and Endangers the Right to a Unanimous Jury

A. The Heightened Evidentiary Standard Is Accepted By Five Courts of Appeals

The heightened evidentiary standard traces its origin to *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987), a RICO case in which a holdout member of a divided jury requested his own removal during deliberations. Under questioning from the court, the holdout testified that he disagreed with the RICO laws and was therefore unable to discharge his duties as a juror. The trial court removed him on the ground that he "would not follow the law and thus could not discharge his duty as a juror." *See id.* at 595. On appeal, the D.C. Circuit reversed, finding that the removal violated the defendant's constitutional right to a unanimous jury.

The court started from the uncontroversial premise that "when a request for dismissal stems from the juror's views of the sufficiency of the evidence, . . . a judge may not discharge the juror[.]" *Id.* at 596. Recognizing that "the reasons underlying a request for a dismissal will often be unclear," and aware of the inherent conflict between the duty to maintain a properly deliberating impartial jury with the responsibility not to "intrude on the secrecy of the jury's deliberations," the court concluded that "unless the initial request for dismissal is

transparent, the court will likely prove unable to establish conclusively the reasons underlying it." *Id.*

Therefore, "to protect adequately a defendant's right to be convicted only by a unanimous jury," the court held that "if the record evidence discloses *any possibility* that the request to discharge stems from the juror's views of the sufficiency of the government's evidence, the court must deny the request." *Id.* (emphasis added). Because the juror's testimony was equivocal, and there was a possibility that he simply had doubts about the sufficiency of the evidence against the defendant, *Brown* held that his dismissal violated the defendant's right to a unanimous jury.

Other Circuits soon adopted *Brown*'s heightened evidentiary standard in more or less the same formulation. The Second Circuit in *Thomas* did so in reviewing a dismissal of a holdout for intending to nullify. As in *Brown*, the *Thomas* court announced a rule that erred on the side of retaining a holdout where there is some possibility that the motives for his removal request stemmed from a disagreement with his fellow jurors on the evidence.

Calling it a "high evidentiary standard for the dismissal of a *deliberating* juror for purposeful disobedience of a court's instruction," the Second Circuit expressly adopted "the *Brown* rule as an appropriate limitation on a juror's dismissal *in any case* where the juror allegedly refuses to follow the law—whether the juror himself requests to be discharged from duty or, as in the instant case, fellow jurors raise allegations of this form of misconduct." *Thomas*, 116 F.3d at 618, 622

(emphases in original). "Given the necessary limitations on a court's investigatory authority in cases involving a juror's alleged refusal to follow the law, a lower evidentiary standard could lead to the removal of jurors on the basis of their view of the sufficiency of the prosecution's evidence." *Id*. at 622.

The Ninth Circuit in *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999), likewise adopted the *Brown* standard in the context of a holdout juror accused of not properly deliberating. *Symington* also recognized that a "trial judge faces special challenges when attempting to determine whether a problem between or among deliberating jurors stems from disagreement on the merits of the case." *Id.* at 1086. Like the D.C. and Second Circuits, the Ninth Circuit understood that appropriate respect for the secrecy of deliberations may prevent a judge from distinguishing between the juror who is voting based on the evidence and one who is deliberating improperly. *Id.* Thus, following *Brown* and *Thomas*, the Ninth Circuit held that "if the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." *Id.* at 1087 (emphasis omitted).[1]

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[1] Courts have adopted slight linguistic variations but have hewed to the same fundamental theme: there is a heightened evidentiary standard to protect jurors who are deliberating in a conscientious fashion, but nonetheless have a view different from their fellow jurors. *See United States v. Kemp*, 500 F.3d 257, 303-304 (3rd Cir. 2007) (comparing the "any possibility" standard of *Brown*, with the "any reasonable possibility" standard of *Symington*,

A corresponding heightened evidentiary also applies in the Third, Sixth, and Eleventh Circuits. *See United States v. Patterson*, 587 F. App'x 878, 889-90 (6th Cir. 2014) (unpublished), *cert. denied*, 136 S. Ct. 33 (2015); *United States v. Kemp*, 500 F.3d 257, 304 (3rd Cir. 2007); *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001).

Recognizing this prevailing view, the Solicitor General recently informed this Court that "[c]ourts have ***uniformly agreed*** that a deliberating juror may not be removed because of her views of the case, and they have reviewed the basis for a juror's removal under an evidentiary standard that is 'at once appropriately high and conceivably attainable.'" Brief for United States in Opposition at 22, *Cheadle v. United States*, No. 15-59 (U.S. Oct. 14, 2015), 2015 U.S. S. Ct. Briefs 3619, at *32 (quoting *Symington*, 195 F.3d at 1087 n.5) (emphasis added). That is, "when evaluating a claim of juror misconduct after the start of jury deliberations, ***they have undertaken essentially the same analysis and applied the same core standard***," namely, the heightened evidentiary standards of *Brown*, *Thomas*, and *Symington*. *See id.* at 19-20 (emphasis added).

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and the "no substantial possibility" standard of *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001)). Petitioner agrees with the *Kemp* court and the Solicitor General that any difference among the standards "is one of clarification and not disagreement." *Kemp*, 500 F.3d at 304; *accord* Brief for United States in Opposition at 21-22, *Cheadle v. United States*, No. 15-59 (U.S. Oct. 14, 2015), 2015 U.S. S. Ct. Briefs LEXIS 3619, at *32-33.

According to the Solicitor General, "[t]he application of that stringent standard adequately safeguards a defendant's right to a unanimous jury, raising no concern under the Fifth and Sixth Amendments." *Id.* at 22 n.5. But this "stringent standard" no longer applies in the Second Circuit, other than in a narrow category of cases.

B. Until Now, the Heightened Evidentiary Standard was Applied to a Broad Range of Holdout Dismissal Requests

Before this case, courts applied the heightened evidentiary standard to requests for the dismissal of a deliberating juror in a wide range of circumstances, including nullification, failure to deliberate, inability to deliberate, and bias or sympathy. *See, e.g.*, *Patterson*, 587 F. App'x at 889-90 (juror lying during jury selection); *United States v. Martinez*, 481 F. App'x 604, 608-09 (11th Cir. 2012) (unpublished) (juror "unable to reach a verdict because she did not personally observe [defendant] commit the offenses"); *Kemp*, 500 F.3d at 304 (allegations of "bias, failure to deliberate, failure to follow the district court's instructions, or jury nullification"); *United States v. Ginyard*, 444 F.3d 648, 652 (D.C. Cir. 2006) (employment-related need); *Symington*, 195 F.3d at 1088 (unwillingness or incapacity to properly deliberate); *cf. United States v. McIntosh*, 380 F.3d 548, 556 (1st Cir. 2004) (citing *Brown* standard in affirming decision not to remove holdout juror for alleged failure to deliberate).

Where these courts have found the standard inapplicable, they have done so with respect to

discharge requests grounded in conduct completely unrelated to the deliberative process. *See, e.g.*, *United States v. Vartanian*, 476 F.3d 1095, 1098-99 (9th Cir. 2007) (juror misconduct outside jury deliberation room); *United States v. Edwards*, 303 F.3d 606, 629-31, 633 (5th Cir. 2002) (juror's lack of candor with the court and inability to follow the court's instructions); *United States v. Barone*, 114 F.3d 1284, 1309 (1st Cir. 1997) (receipt of extra-judicial information, in the absence of any indication that the juror was a holdout). These types of questions "focus on 'some event, or . . . relationship between a juror and a party, that is both easily identifiable and subject to investigation and findings without intrusion into the deliberative process.'" *Symington*, 195 F.3d at 1087 n.6 (quoting *Thomas*, 116 F.3d at 621). *But see United States v. McGill*, 815 F.3d 846, 869 (D.C. Cir. 2016) (standard does not apply to dismissal for juror secreting information from jury room, but would apply if "an ostensibly independent basis for a juror's dismissal amounts to a pretext, and the actual ground for dismissal involves the juror's views about the adequacy of the government's evidence").

Even before *Spruill*, the Second Circuit began to wander from the predominant view in the Circuits in *United States v. Baker*, 262 F.3d 124 (2d Cir. 2001), which held that the heightened evidentiary standard of *Thomas* does not apply to the dismissal of a holdout accused of refusing to deliberate. *Id.* at 132. *Contra Kemp*, 500 F.3d at 304 ("[W]e hold that the district courts may discharge a juror for . . . failure to deliberate . . . when there is no reasonable possibility that the allegations of misconduct stem

from the juror's view of the evidence."). The decision in Spruill's case completes the Second Circuit's break. Now, in the Second Circuit, the heightened evidentiary standard applies only to allegations of juror nullification. The state of the law as described by the Solicitor General a few months before this case is no longer accurate, and the right to a unanimous jury is now in peril in the Second Circuit.

C. This Court Should Grant Certiorari to Clarify that a Heightened Evidentiary Standard is Necessary to Protect a Defendant's Right to a Unanimous Jury

The heightened evidentiary standard was adopted to protect against the Sixth Amendment problem that would arise if a holdout juror were dismissed because he was a holdout. No dissenting juror should be removed because of how he or she views the evidence. *Cf. Williams v. Florida*, 399 U.S. 78, 100 (1970) ("[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."). Without this heightened standard, a district court can dismiss a holdout juror even if it is reasonably possible that the juror's removal is sought to break a deadlock.

While the impetus for the standard arises out of the conflict between a district court's investigative authority and the need to maintain jury secrecy, its necessity does not depend on such conflict. For

example, in the nullification context, to determine whether a juror is intent on nullifying and not "simply unpersuaded by the Government's evidence," a trial judge "would generally need to intrude into the juror's thought processes." *Thomas*, 116 F.3d at 621. For the *Thomas* court, the heightened evidentiary standard would discourage such intrusion. *See id.* at 622 ("A lower evidentiary standard would encourage the court faced with ambiguous evidence of such impropriety to investigate further . . . ."). But even where such intrusion is acceptable, *see, e.g.*, *United States v. Boone*, 458 F.3d 321, 329-30 (3rd Cir. 2006) (court has authority to investigate "credible allegations of jury nullification"), it is difficult or impossible to distinguish with any certainty between the deliberating holdout who is "bent on defiant disregard of the applicable law" and one whose comrades in the majority have come to view him "not only as unreasonable, but as unwilling to follow the court's instructions on the law." *See Thomas*, 116 F.3d at 621-22; *Brown*, 823 F.2d at 596 ("[U]nless the initial request for dismissal is transparent, the court will likely prove unable to establish conclusively the reasons underlying it."). Requiring a court to make that decision would mean that a court "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." *Thomas*, 116 F.3d at 622.

These concerns are not confined to the nullification context. For example, where a holdout juror is accused of refusing to deliberate, discerning

"whether [she] is refusing to deliberate or has simply reached a conclusion contrary to the other jurors is a question of exquisite delicacy" and the "line between the two can be vanishingly thin." *See McIntosh*, 380 F.3d at 556; *see also Symington*, 195 F.3d at 1088 (noting that juror disagreements on the merits "can certainly manifest themselves in concerns about a juror's reasonableness or general capacity as a juror"). The same is true for claims of juror bias. *See Kemp*, 500 F.3d at 303 ("While the jurisprudence discussing the discharge of jurors during deliberations has largely focused on a refusal to deliberate or jury nullification, its reasoning applies with equal force to claims of juror bias.").

Consider Juror No. 11 here. Her work in the prisons was discussed during jury selection, in front of the *venire*, and the only concern raised was whether she might meet the convicted defendant at work, not whether her work would affect her impartiality. *See* App. 86a. Only after she found herself as the lone holdout for Spruill's acquittal, disagreeing with every other juror in the room, did allegations of a "conflict of interest" based on her work surface. Had she raised this concern during jury selection, it could have been assessed and, if necessary, she could have been excused. But, once deliberations begin, the die is cast. The jurors finally are permitted to talk about the case and exchange their views. Differences of opinion are made manifest. The line between a difference of opinion driven by an impermissible bias and one based on an impartial assessment of the evidence permissibly colored by the juror's life experience becomes "vanishingly thin." Indeed, though the

district court expressly recognized as much, *see* App. 71a, it never dispelled the possibility that the holdout sought her own dismissal because of her disagreement with the other eleven jurors. The court's decision to dismiss her interfered with Spruill's right to a unanimous jury verdict.

The heightened evidentiary standard applied in other Circuits would have guarded against this unconstitutional outcome, requiring the court to send the juror back for further deliberations, declare a mistrial, or—if it could do so without unduly intruding upon the secrecy of jury deliberations—investigate further until the court was able to ensure that Juror No. 11 was not seeking her own dismissal because she disagreed with the majority. As the Third Circuit explained:

> The need for such a high standard prior to dismissal comes from the federal criminal defendant's Sixth Amendment right to a unanimous jury verdict. If the Government is able to remove a holdout juror because of ambiguous allegations of improper behavior during deliberations, and replace this holdout with a more amenable juror, then the defendant's constitutional right to a unanimous verdict has been violated.

Kemp, 500 F.3d at 304 n.26.

This Court should grant this petition to provide guidance to the Circuits as to how to safeguard the right to a unanimous jury by protecting against the removal of a holdout juror

whose dismissal is requested because of her view of the evidence.

II. The Second Circuit's Waiver Holding Departs from the Approaches of Sister Circuits by Ignoring Waiver's "Known Right" Requirement

This Court has drawn a clear line between a claim that is forfeited and a claim that is waived. "Whereas forfeiture is the failure to make the timely assertion of a right," entitling an appellant to plain-error review, waiver is "the intentional relinquishment or abandonment of a *known right*," foreclosing appellate review. *Olano*, 507 U.S. at 733 (emphasis added) (internal quotation marks omitted). The panel majority discarded the "known right" requirement when it defined waiver as the "intentional decision not to assert a right," App. 25a, thereby creating a split amongst federal Courts of Appeal.

Consistent with *Olano*, in the Third, Fifth, Seventh, Ninth, and Tenth Circuits, a decision to waive a right must not only be intentional, but also knowing. Acquiescence to or agreement with a district court's erroneous ruling does not demonstrate the requisite awareness of the error or the right to challenge it. To find waiver, these courts demand evidence that a party was aware of a right to challenge that error or a tactical benefit that may be gained and from which knowing acceptance of the error could be inferred.

Nothing in the record here suggests that Spruill's counsel was aware of the Sixth Amendment

right to challenge the improper removal of Juror No. 11. Nor was there any tactical benefit to abandoning that right. The panel majority nonetheless found waiver because counsel's verbal agreement with the district court showed an intentional decision to accept the dismissal of Juror No. 11. By failing to consider whether that decision was knowingly made, the Second Circuit departs from the approaches taken by the Third, Fifth, Seventh, Ninth, and Tenth Circuits.

The Second Circuit's omission of waiver's "known right" requirement is particularly troubling because the right at issue is constitutional in nature. Thus, the panel contravened this Court's repeated declaration that waiver of a constitutional right requires awareness of the existence of a constitutional argument and the consequences of forgoing it. *See, e.g.*, *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (stating that a "waiver of important rights . . . is valid only if done voluntarily, knowingly, and intelligently").

A. Mere Acquiescence Fails to Evince Waiver in the Third, Fifth, Seventh, Ninth, and Tenth Circuits Absent Awareness of the Waived Right

The Third, Fifth, Seventh, Ninth, and Tenth Circuits all agree that acquiescence to or agreement with a district court's error fails to evince waiver absent record evidence that a party was aware of a right to challenge that error.

The Ninth Circuit applied *Olano*'s requirement that waiver must be both intentional

and knowing in *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997) (en banc). In *Perez,* defendants proposed jury instructions that omitted an element of the offense, which the district court mistakenly accepted. *Id.* at 843-44. The government argued that defendants waived their right to challenge the flawed instructions because they had invited the error. *Id.*

Although defendants' actions introduced the error, the Ninth Circuit did not find waiver. Rather, the court recognized that *Olano* requires "evidence in the record that the defendant was aware of, *i.e.*, knew of, the relinquished or abandoned right." *Id.* at 845. In fact, the record showed "that neither defendants, the government, nor the court was aware of [the] requirement that the [omitted] element be submitted to the jury." *Id.* Specifically, there was "no evidence that [defendants] considered submitting the [omitted] element to the jury, but then, for some tactical or other reason, rejected the idea." *Id.* Thus, "it cannot be said that [they] waived their right to have this element submitted to the jury." *Id.* at 846. If knowledge is required for the invited error doctrine to apply, it follows that knowledge should be required for a court to construe acquiescence of waiver.

The Third Circuit adopted this approach in *Government of the Virgin Islands v. Rosa*, 399 F.3d 283 (3d Cir. 2005), holding that counsel's replies of "That's correct, sir" and "I am satisfied, your Honor" to the court's questioning regarding its use of an erroneous instruction did not demonstrate waiver. *See id.* at 287-88, 293. Because "[t]here [was] no

indication that [defendant's] attorney knew of and considered the controlling law," the Third Circuit was "satisfied that [counsel's] failure to object, and moreover his agreement on at least three occasions to the erroneous jury instructions, stemmed from the circumstance that he was unaware of the correct rule of law or, if aware of it, did not realize that the intent instruction misstated it." *Id.* at 291-92.

Similarly, in the Fifth Circuit, explicit acceptance of a court's erroneous decision does not amount to waiver. In *United States v. Arviso-Mata*, 442 F.3d 382 (5th Cir. 2006), the defense attorney said at sentencing "Your Honor, we have no objections to the PSR." This statement alone was insufficient to establish waiver of the right to challenge a Guidelines miscalculation because "[t]here is no evidence . . . counsel knew of the sentencing guidelines issue and that he consciously chose to forgo it." *Id.* at 383-84. Likewise, in the Tenth Circuit, counsel's affirmative approval of the court's Guidelines miscalculation alone (*e.g.*, "Your Honor, the offense was correctly calculated by Probation[.]") does not demonstrate waiver absent evidence that counsel "actually identified" or "deliberately considered" the sentencing error. *See United States v. Zubia-Torres*, 550 F.3d 1202, 1204-05, 1207 (10th Cir. 2008). "A defendant's failure to object to a district court's [error], or even the affirmative statement, 'No, Your Honor,' in response to the court's query 'Any objections?'" demonstrates only that the "objection was forfeited through neglect, not waived through knowing and voluntary relinquishment." *United States v. Harris*, 695 F.3d

1125, 1130 n.4 (10th Cir. 2012) (citing *Zubia-Torres*, 550 F.3d at 1205).

The Seventh Circuit likewise agrees that express acceptance of an erroneous outcome does not constitute waiver where a party was unaware of the grounds for a challenge, and has applied plain-error review even where defense counsel "voluntarily and affirmatively stated that he had no objection to any Government exhibits." *United States v. Doyle*, 693 F.3d 769, 771 (7th Cir. 2012). In *Doyle*, defense counsel accepted introduction of the exhibits into evidence because he mistakenly believed they were authored by a certain witness. *Id.* A subsequent cross-examination disabused counsel of this error, but "[b]y then it was too late; the Government's evidence was in." *Id.* Because counsel was ignorant of the basis for objection at the time the government introduced the exhibits, his "voluntar[y] and affirmative[]" acceptance was insufficient to show waiver. *Id.*

Similarly, the Seventh Circuit found no waiver where defense counsel "assented . . . by remarking 'Okay . . . , that's all I have'" to the imposition of drug testing as a condition of supervised release, because "it would be reading too much into a brief colloquy to characterize counsel's mere utterance of the word 'okay' as a signal that [defendant] was deliberately abandoning any challenge to the testing." *United States v. Paul*, 542 F.3d 596, 599 (7th Cir. 2008).

These cases from several Circuits all stand for a vital legal principle: absent an identifiable strategic benefit, mere affirmative acceptance of a

court's erroneous decision does not constitute waiver. *See United States v. Anderson*, 604 F.3d 997, 1001-02 (7th Cir. 2010) ("Waiver principles must be construed liberally in favor of the defendant. . . . Where the government cannot proffer any strategic justification for a decision [to abandon the right], we can assume forfeiture."). A "defendant ha[s] a strategic reason to forego [an] argument . . . only if the defendant's counsel would not be deficient for failing to raise the objection." *United States v. Allen*, 529 F.3d 390, 394-95 (7th Cir. 2008).

Thus, in the Third, Fifth, Seventh, Ninth, and Tenth Circuits, courts give weight to *Olano's* "known right" requirement. 507 U.S. at 733. In these Circuits, acquiescence of the sort found here cannot establish waiver because, standing alone, statements explicitly acquiescing to or agreeing with a court's error do not show knowledge or awareness of a right—*i.e.*, a valid basis—to challenge the error. To evince waiver, there must be record evidence that a party was aware of the supposedly waived right, for example, by considering an argument but then deciding to forgo it. *See, e.g.*, *Arviso-Mata*, 442 F.3d at 384. The existence of a clear tactical benefit to waiver of a right may also permit the inference that the decision not to exercise that right was knowingly made. *See, e.g.*, *Allen*, 529 F.3d at 395. But absent such evidence or tactical benefit, acquiescence constitutes only forfeiture, not waiver. *Id.*

B. The Second Circuit Breaks with its Sister Circuits by Finding Waiver Without Awareness of the Supposedly Waived Right

1. There is no Evidence that Counsel Knowingly Accepted the Dismissal of Juror No. 11

The panel majority found waiver based solely on counsel's voluntary decision to accept Juror No. 11's dismissal, without considering whether counsel was aware of his client's constitutional right to prevent such dismissal. In so holding, the Second Circuit split from the other Circuits discussed above.

The *Spruill* majority identified three grounds for its waiver holding, none of which involve a finding that Spruill or his counsel knew of the Sixth Amendment right to challenge the dismissal of the holdout juror under *Thomas*.

First, the panel held that "long before jury deliberation commenced . . . , during voir dire, Spruill initially exercised, but then withdrew, a peremptory challenge to Juror 11 based on concern that she might be 'jaded' because of her work.'" App. 28a. But, an interest in exercising a preemptory challenge prior to empanelment does not reflect awareness of the right to prevent removal during deliberations.

Second, the panel states that defense counsel "urged the district court to undertake the very inquiry of Juror 11 that he now challenges." App. 28a. This is irrelevant because, as the dissent

pointed out, Spruill never challenged the court's *inquiry* of Juror No. 11. App. 46a. To the extent it shows anything, Spruill's counsel's encouragement of the district court's potentially improper inquiry into the jury deliberation process shows ignorance (not awareness) of the *Thomas* error. *See Perez*, 116 F.3d 845-46 (proposal of erroneous jury instructions did not show awareness of error); *see also Rosa*, 399 F.3d at 287.

Third, the panel's "[m]ost important" reason for its finding of waiver was defense counsel's express agreement with the court's unconstitutional dismissal of Juror No. 11. App. 29a-30a. But express agreement standing alone fails to demonstrate the awareness of the right that the Third, Fifth, Seventh, Ninth, and Tenth Circuits require to find waiver. *See supra* Section II.A. None of the three grounds identified by the Second Circuit in support of its waiver holding was probative of whether Spruill abandoned a "known right."

2. There was no Tactical Benefit in Accepting the Dismissal of Juror No. 11

Nor did the Second Circuit identify any plausible tactical benefit that would permit the inference of the requisite intent. The panel majority theorized that that "counsel may have thought [Juror No. 11] more likely to succumb to the views of other jurors than to maintain an opposing view." App. 31a-32a. All the parties were aware that eleven jurors believed Spruill was guilty, and Juror No. 11 was the only person standing between Spruill and federal prison. Under the circumstances, any

competent defense attorney would have known that Juror No. 11 was his client's only hope.[2] There was no tactical benefit to dismissal of the lone holdout favoring acquittal, and any defense attorney who agreed to such dismissal when his client had a constitutional right to prevent it would have rendered ineffective assistance. *See Allen*, 529 F.3d at 395 (no strategic value in conduct amounting to as ineffective assistance).

The panel majority offered the alternative hypothesis that "counsel may simply have recognized that the juror's final response acknowledged an extrinsic bias that compelled removal." App. 32a. But counsel's acceptance of Juror No. 11's dismissal based on his belief that the juror's statements "compelled removal" would have been tactically sound only if there was no good faith argument that Spruill could have made in opposition to the juror's exclusion. That was not the case here.

3. The Second Circuit Breaks with Sister Circuits by Jettisoning Waiver's "Known Right" Requirement

The Second Circuit held that Spruill waived a constitutional right without a shred of evidence that

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[2] In *McIntosh*, the First Circuit recognized the absurdity of a *defendant's* "argument [that] in effect asks us to hold that the district court erred by not dismissing the lone holdout for acquittal," and noted "[t]his proves once again that irony is no stranger to the law." 380 F.3d at 556 n.3 (internal quotation marks omitted).

he or his counsel—or for that matter, the government or the district court—were aware of that right's existence. Nor did the Second Circuit identify a plausible tactical benefit. Instead, the court premised waiver on counsel's voluntarily accepting the district court's unconstitutional dismissal. This drastically departs from its sister Circuits' requirement that conduct resulting in waiver must be both voluntary *and* knowing.

A waiver may be voluntary inasmuch as it was not compelled by force or threats, even though it may not have been knowing. This is a familiar distinction in the law. For example, Fifth Amendment jurisprudence draws this distinction: when a defendant in custody is questioned without the benefit of *Miranda* warnings, the defendant may make statements voluntarily, but the waiver of rights is not knowing due to the failure to provide *Miranda* warnings to the defendant. *See Edwards v. Arizona*, 451 U.S. 477, 482 (1981) ("[W]aivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege.").

The same is true here. To be sure, Spruill and his attorney were in no way compelled to accede to the dismissal of the holdout juror. Rather, the defense failed to object based on unawareness of the governing law. Likewise, when federal courts decide whether to accept a guilty plea, the court must confirm both that the defendant's waiver of his right to trial is voluntary (*i.e.*, not coerced) and knowing (*i.e.*, made with an awareness of the right being waived). *See* Fed. R. Crim. P. 11(b)(1), (2) (providing

for distinct questioning at plea allocution relating to guilty plea being both knowing and voluntary); *Henderson v. Morgan*, 426 U.S. 637, 647 (1976). Not all voluntary actions are knowing, and the panel decision failed to grasp this distinction.

C. The Decision Below Conflicts with this Court's Precedent that Waiver of a Constitutional Right Requires Awareness of that Right

The Second Circuit's waiver holding also diverged from this Court's rulings with respect to the waiver of constitutional rights, as Spruill's right to prevent the improper removal of Juror No. 11 was constitutional in nature. *See, e.g.*, *Thomas*, 116 F.3d at 621-22; *Brown*, 823 F.2d at 595-96 (citing *Apodaca v. Oregon*, 406 U.S. 404 (1972)).

"A defendant's waiver of a fundamental constitutional right is not to be lightly presumed; rather, a court must 'indulge every reasonable presumption against waiver of fundamental constitutional rights.'" *Fairey v. Tucker*, 132 S. Ct. 2218, 2220 (2012) (quoting *Carnley v. Cochran*, 369 U.S. 506, 514 (1962)). This Court explained that "[w]aivers of constitutional rights not only must be voluntary but *must be knowing*, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970) (emphasis added); *see also Bradshaw*, 545 U.S. at 183 (2005). Prior to this case, the Second Circuit faithfully adhered to this strict waiver standard in defense of a federal criminal defendant's constitutional right to unanimous verdict. *See United States v. Chavis*, 719

F.2d 46, 48 (2d Cir. 1983).[3] The *Spruill* majority signaled the Second Circuit's rebellion against the Supreme Court's clear command when it found waiver of a constitutional right based solely on defense counsel's *voluntary* acceptance of Juror No. 11's dismissal, without any consideration whether such acceptance had also been knowing and intelligent.

III. This Case is the Ideal Vehicle for Resolving These Important Issues

Granting certiorari here allows this Court to address a question of constitutional importance that now divides the circuits: how to safeguard the right to a unanimous jury verdict when faced with the possible dismissal of a holdout juror. If holdout jurors can be dismissed under the circumstances presented here, because deliberations are easier without a dissenting voice, then the right to a unanimous jury is compromised. The way to safeguard the right to a unanimous jury is by

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[3] In *Chavis*, a deadlocked jury sent a note to the district court that "we have one juror who is in disagreement with the eleven other jurors. He says he had made his mind up and will not change it." 719 F.2d at 47. The defense counsel told the judge "I have discussed with the government the possibility of taking a verdict of eleven. My client has agreed." *Id.* The defendant also personally requested an eleven-juror verdict. *Id.* Nonetheless, the Second Circuit reversed and remanded for a new trial because the district court failed to make "a searching inquiry to insure that the defendant was fully aware of his right to a unanimous verdict and that he had given up that right of his own free will and not as a result of a misunderstanding, or a promise, threat or someone's suggestion." *Id.* at 48.

application of a heightened evidentiary standard to juror dismissal decisions. The selection of the standard is often outcome determinative, as it was here. It cannot be disputed that there was a reasonable possibility that Juror No. 11 requested her own dismissal because she disagreed with the remaining jurors on the merits, and that her alleged sympathy or bias based on her prison social work was an excuse to escape her uncomfortable and uncompromising position as the lone holdout for acquittal. In another circuit (and for Judge Pooler), this dismissal would have been plain error. But here, because the Second Circuit has confined its heightened evidentiary standard to the nullification context only, it was not error. This Court should grant this petition to resolve the question of whether the heightened standard should apply in cases that involve circumstances other than nullification.

The petition also should be granted to clarify the distinction between waiver and forfeiture that now divides Courts of Appeal. In the Third, Fifth, Seventh, Ninth, and Tenth Circuits, waiver of a right must be both voluntary and knowing. But the Second Circuit requires only voluntary conduct in finding waiver of a constitutional right, in apparent disregard of this Court's declaration that "[w]aivers of constitutional rights not only must be voluntary but must [also] be knowing." *Brady*, 397 U.S. at 748. The failure to follow this Court's precedent is unfair to defendants within the Second Circuit and also creates a Circuit split.

CONCLUSION

The petition for certiorari should be granted.

September 26, 2016 Respectfully submitted,

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APPENDIX

13-4069-CR
United States v. Spruill

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

August Term, 2014

(Argued: October 1, 2014
Decided: December 16, 2015)

Docket No. 13-4069-cr

UNITED STATES OF AMERICA,

Appellee,

—v.—

JEFF SPRUILL,

Defendant-Appellant.

Before: POOLER, RAGGI, and HALL,
Circuit Judges.

On appeal from a judgment of conviction entered in the United States District Court for the District of Connecticut (Chatigny, *J.*), defendant

invokes United States v. Thomas, 116 F.3d 606 (2d Cir. 1997), to argue that the district court committed plain error in dismissing an alleged holdout juror for cause under Fed. R. Crim. P. 23. Thomas does not support defendant's argument because the principles it enunciated do not pertain here, where the cause for dismissal was extrinsic bias determined without intrusion into juror deliberations. In any event, defendant waived any challenge to the inquiry and dismissal of the juror at issue by specifically telling the district court that he did not object to either and by, in fact, recommending the very disposition he now challenges. The remainder of defendant's arguments on appeal are addressed in a summary order issued the same day.

Judge POOLER dissents in a separate opinion.

AFFIRMED.

SARALA V. NAGALA, Assistant United States Attorney (Marc H. Silverman, Assistant United States Attorney, *on the brief*), *for* Deirdre M. Daly, United States Attorney for the District of Connecticut, New Haven, Connecticut, *for Appellee*.

HARRY SANDICK (Andrew D. Cohen, *on the brief*), Patterson, Belknap, Webb & Tyler L.L.P., New York, New York, *for Defendant-Appellant*.

REENA RAGGI, *Circuit Judge*:

Defendant Jeff Spruill appeals from a judgment of conviction entered on July 12, 2013, in the United States District Court for the District of Connecticut (Robert N. Chatigny, *J.*), after a jury trial at which he was found guilty of two counts of possession with intent to distribute and distribution of cocaine and cocaine base (Counts One and Two), one count of possession with intent to distribute cocaine (Count Three), and one count of unlawful possession of a firearm by a convicted felon (Count Four). See 18 U.S.C. §§ 922(g)(1), 924(a)(2); 21 U.S.C. § 841(a)(1), (b)(1)(C). Spruill argues that the district court erred in dismissing a "holdout" juror for cause during the course of jury deliberations, in violation of principles enunciated in United States v. Thomas, 116 F.3d 606 (2d Cir. 1997). He also challenges the sufficiency of the evidence supporting his convictions on Counts One, Two, and Four; the procedural reasonableness of his sentence, in particular the district court's application of a career offender enhancement under U.S.S.G. § 4B1.1; and the effectiveness of former counsel's representation in failing to challenge the § 4B1.1 enhancement. In a supplemental pro se brief, Spruill further argues that knowledge of "drug type" is a here-unproved predicate element of the drug offenses for which he was convicted.[1]

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[1] On March 4, 2015, months after this case was argued, Spruill's appellate counsel moved for leave to allow Spruill to file a supplemental pro se brief. This Court granted the motion and subsequently received Spruill's supplemental brief and the Government's response.

As we explain herein, Spruill's juror removal challenge fails for two reasons. First, the challenged removal is not subject to Thomas's "any possibility" rule, see 116 F.3d at 621–22, because the concern underlying Thomas, juror nullification, was not here at issue. Rather, removal was based on extrinsic bias, a matter about which the district court could—and did—inquire without intruding on jury deliberations. See id. at 621. Second, Spruill waived any challenge to dismissal of the juror in question by specifically telling the district court that he did not object either to its colloquy with the juror or to the juror's removal, and by in fact recommending the very disposition he now challenges.

For reasons explained in a summary order issued this same day, we reject Spruill's remaining counseled and pro se arguments.

Accordingly, we affirm the judgment of conviction.

I. Background

A. Controlled Purchases

In the summer of 2012, two confidential informants under the direction of Middletown, Connecticut police purchased cocaine and cocaine base from defendant Spruill. The second purchase was made at 18 Glover Place, home of Spruill's girlfriend, Chanelle McCalla.

B. Search Warrant

Soon thereafter, police applied for and were granted a warrant to search 18 Glover Place and Spruill's person. Upon executing the warrant, police found Spruill to be carrying on his person

two small plastic bags, one containing marijuana and the other containing cocaine.[2]

At 18 Glover Place, they discovered men's clothing and toiletries in the master bedroom, as well as a bullet, which McCalla claimed was a souvenir from a date at a shooting range. An unlocked door near the entrance to the master bedroom led to the attic, where police found plastic bags containing Spruill's clothing, as well as garbage bags containing a bulletproof vest and two leather bags, from which police seized a .357-caliber handgun, a .40-caliber handgun with three boxes of ammunition, and a .380-caliber pistol with one box of ammunition.

C. Trial: Jury Selection & Deliberations

Jury selection in Spruill's case took place on July 9, 2013. The focus of our attention on this appeal is Juror 11.[3] During voir dire, this juror identified herself as a "clinician in the State of Connecticut . . . do[ing] outreach in the prison systems in Hartford." App. 51. Juror 11 explained that "it's not a reason not to serve . . . I'm just thinking like if somebody's found guilty, I could also see this person in the prison system." Id.[4] In

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[2] Spruill does not challenge his conviction for the controlled substance found on his person.

[3] "Juror 11" denotes the juror's place on the petit jury. During voir dire, this individual was denominated Juror 27. To limit potential confusion, we use the petit jury designation, Juror 11, to refer to this juror throughout our discussion.

[4] The district court thereafter explained the difference between the state and federal prison systems to assuage any concern Juror 11 might have had as to the likelihood of future contact with Spruill.

response to a follow-up question from Judge Chatigny asking whether any jurors had "experiences or connections . . . involving law enforcement," Juror 11 explained that she worked in the Connecticut Offender Reentry Program, and that the Program's mission is to help inmates with mental health issues receive treatment and to "represent them in the prison and [to] work on their . . . life goals." Id. at 53, 56.

Spruill's counsel initially applied, but then withdrew, a peremptory challenge to Juror 11. The record reflects the following exchange:

> THE COURT: Mr. Weingast [defense counsel], I'm just interested in why you removed [Juror 11].
>
> MR. WEINGAST: We discussed that very carefully. The fact that she worked in prisons . . . was basically what tipped the scales . . . .
>
> THE COURT: What is your concern?
>
> MR. WEINGAST: I think with work, she's a bit jaded. That was a decision by both me and my client.
>
> THE COURT: But Mr. Spruill wanted you to remove her?
>
> MR. WEINGAST: Yes, Your Honor. Can I just doublecheck?
>
> THE COURT: Yes.
>
> (Pause)

> MR. WEINGAST: We'll keep her instead.
>
> THE COURT: I'm sorry?
>
> MR. WEINGAST: We'll keep her.
>
> . . . .
>
> THE COURT: To be clear, Mr. Weingast, I don't want Mr. Spruill to think that I am here to influence his exercise of peremptories, because I'm not.
>
> MR. WEINGAST: No, Your Honor absolutely not. This is . . . one we weighed very carefully, and on balance with what the Court just said, we talked about it some more and my client would like to keep her.
>
> THE COURT: Okay.

Id. at 116–17. Juror 11 ultimately served on the jury.

After the close of evidence, during deliberations, the court received two jury notes in close succession. The first revealed that the jury was divided, apparently 11 to 1, and sought clarification as to the law of constructive possession:

> Your Honor, we have one juror that at this point that does not agree with the jury. He/she has doubts and at this point is unwilling to change their vote. There is also the law for constructive possession and clarity on the law. We would like you to confirm that we should take what is stated on page 20 as law.

> The majority of the jurors are unwilling to stop too quickly at the expense of justice. How should we proceed? Do we continue discussing the points?

Id. at 521. The second note indicated one juror's concern about a conflict of interest:

> We have one juror who feels in their gut that they have a conflict of interest. We need to understand how to proceed.

Id.

Invited to comment on the first note, both the prosecutor and Spruill's counsel stated that the jury did not appear deadlocked and should be instructed to continue deliberations. As to the second note, counsel agreed that it was not clear whether the "holdout" juror in the first note and the "conflicted" juror in the second note were one and the same. With counsel's agreement, the court decided to give the jury further instruction.

In response to the first note, the court reminded the jurors that "[e]ach of you must decide the case for yourself" and "if after carefully considering all the evidence and the arguments of your fellow jurors you entertain a conscientious view that differs from the others, you are not to yield your conviction simply because you are outnumbered." Id. at 530–31. This immediately prompted a third note, requesting a definition of "conscientious view." The court explained, "the term refers to a view of the case based on fair and impartial consideration of all the evidence and full and fair discussion of the issues in the case with

the other jurors." Id. at 532. The court then asked counsel whether they agreed with the stated definition, and both responded with approval.

Addressing the second note, the district court instructed the jury on "conflict of interest" as follows:

> Like judges, jurors are required to be impartial and unbiased. A juror is not permitted to have a personal bias for or against any party.
>
> A conflict of interest can arise when a juror has a financial interest in a case, knows one of the lawyers or parties or witnesses, or has been personally involved in a situation like the one at issue in the case.
>
> A conflict of interest is in the nature of a personal stake or involvement in the case that makes it difficult for the individual to be fair and impartial, to decide the case based solely on the evidence and the applicable law, not on anything else.
>
> . . . .
>
> [I]f after considering these brief comments it appears that there may be a conflict of interest, then that is something that would need to be disclosed and I would need to address it.

Id. at 533–34. When the jury resumed its deliberations, the court confirmed that counsel had no objections to any part of the instruction

given: "Not from the government, Your Honor"; and "No, Your Honor, thank you," from Spruill's counsel. Id. at 535.

Shortly thereafter, the court received a fourth note, this time from Juror 11, which stated as follows:

> I had concerns during jury selection about being in a position where I have involvement with similar cases when working with individuals with similar charges. After hearing deliberations, I'm finding my "gut feeling" is potentially creating a bias.
>
> If possible, it may make sense to be replaced at this time by another juror.

Id. at 536. The court shared the note with counsel and solicited guidance on how to proceed. Agreeing with the Government, Spruill's counsel urged further inquiry:

> I think the Court would need to inquire of her whether she can set aside the bias and deliberate, and I suppose also the nature of the bias so that we know if it's something that is truly a bias in terms of jury deliberations. . . .
>
> I think the court needs to inquire of her individually.

Id. at 537–38.

In discussing how to conduct such an inquiry without intruding on jury deliberations, see id. at 538–39 (observing, "I don't want to intrude on the

jury's deliberations, I don't want to know about the jury deliberation, but I need to respond intelligently to this note"),[5] the district court posited two scenarios: "either [1] Juror 11 has a conscientious view that differs from everybody else or [2] she's having difficulty deliberating as she would wish to do because of what might be thought of as sympathy for Mr. Spruill," id. at 539. With counsels' consent, the court then called Juror 11 into the courtroom.

Before making any inquiry, Judge Chatigny cautioned the juror:

> [I]t's important that you not reveal to me anything about the jury deliberations. . . . That's a matter for the jury alone and we need to respect the confidentiality of the jury's work and the secrecy of the jury's deliberations. But with regard to your own personal situation as a juror, we can talk about whatever problem is causing you concern.

Id. at 541.

Juror 11 explained that her employment experience was the source of her concern:

> I think when we had the jury selection . . . I had mentioned [that] I work in the prison system and I work with inmates all

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[5] The record consistently demonstrates Judge Chatigny's commendable caution in identifying the concerns presented by the court's inquiry of a deliberating juror regarding a potential conflict, and in further consulting with counsel before every action taken.

> the time. And I feel . . . like that was sort of a conflict in the beginning. . . . But I said, okay, well, maybe there isn't a problem, because I presented it to you as a judge and you continued to let me stay in there, so I figured it probably wasn't a problem.
>
> . . . I'm trying to do my best . . . to make the best unbiased decisions, but I also am feeling like my work and my involvement with people in that matter and the things that I've heard from other inmates in cases, similar cases that they have like this—you know, I work with people that have had drug convictions and things like that—and things that they say to me . . . [are] somewhat clouding my views. I'm trying not to. . . . I'm trying to look at the evidence and trying to make a decision on all that, and I feel like in some ways I kind of am. But somebody mentioned—I can't bring up the deliberations, but it just kind of made me think about it and it's just been difficult.
>
> And they were asking me all this stuff and I was, look, I don't know, you know. So I'm just trying to be honest about it. I'm trying to do my best . . . .

Id. at 542–43. The court then asked, "So in a very real sense, you have clients who are similarly situated to Mr. Spruill?" id. at 543, to which Juror 11 replied:

> Yes. I've had experience with that.
>
> . . . .
>
> And a lot of [my clients] have mentioned things to me that makes me think about the system and things—I don't know what's truth and what's not—to create some cloudiness in my head about certain things.

Id. at 543–44.

The court then presented Juror 11 with the two possible scenarios discussed previously with counsel, and she replied:

> I'm trying to be as fair as I can be and I feel like I've been trying to listen to all the evidence and I feel like I was coming to a fair decision, but I feel like other members also felt maybe I didn't, you know. So I don't know where I feel like if I can even—I don't know. I mean, for [the] interest of the Court and everybody's time, it might just make sense to have somebody else. I just don't know.

Id. at 546. The court made no decision at that time as to whether Juror 11 could continue to serve or should be dismissed. Instead, it suggested to Juror 11 that she take time to consider whether she could "fairly and impartially judge the case based solely on the evidence." Id. It directed her not to "be concerned about time or imposing on other people," and "simply [to] focus on whether you are able to be a fair and impartial judge of the case or

whether it's really not a suitable case for you given the work that you do." Id. at 547.

After the juror departed the courtroom, the court asked counsel whether they had "[a]ny objection to anything that happened just now," to which both responded, "No, Your Honor." Id. at 548. The court again solicited guidance on how to proceed, whereupon Spruill's attorney stated, "I think we just need to give her a few minutes . . . . We just have to recess and . . . be nearby . . . ." Id.

A short time later, the court received a fifth note. Therein, Juror 11 asked to be dismissed, stating that she was having "some difficulty in making a decision on a verdict based on feelings of sensitivity toward individuals who have similar cases to Mr. Spruill." Id. at 549. When Judge Chatigny invited comment, the prosecutor stated that Juror 11 "should be excused at this point." Id. at 550. Asked whether he agreed, Spruill's counsel responded, "Yes, Your Honor." Id. The court then dismissed Juror 11, replacing her with an alternate.

The jury began its deliberations anew, and soon thereafter returned a guilty verdict on all counts.

D. Sentencing

At Spruill's October 10, 2013 sentencing hearing, the court considered the Presentence Investigation Report ("PSR") in determining Spruill's sentencing range under the United States Sentencing Guidelines. Referencing a transcript of state court proceedings at which Spruill had pleaded guilty to (1) the sale of narcotics in violation of Conn. Gen. Stat. 21a-277(a) and (2) possession of narcotics with intent to sell

in violation of Conn. Gen. Stat. 21a-277(a), the PSR recommended that a § 4B1.2 enhancement be applied to Spruill's firearm conviction and that he be designated a career offender under § 4B1.1, yielding a Guidelines range of 210 to 262 months' imprisonment. With objections not relevant here, the court adopted the PSR's calculation, considered the factors set out in 18 U.S.C. § 3553(a), and sentenced Spruill to a below-Guidelines sentence of 120 months' imprisonment.

This timely appeal followed.

II. Discussion

Citing language in United States v. Thomas, 116 F.3d 606 (2d Cir. 1997), stating 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,'" id. at 621–22 (emphasis omitted) (quoting United States v. Brown, 823 F.2d 591, 596 (D.C. Cir. 1987)), Spruill argues that the district court erred in dismissing Juror 11 because she was the holdout against conviction based on doubts as to the sufficiency of the evidence, see id. at 622 & n.11. Because Spruill did not object to Juror 11's dismissal in the district court, we would normally review the challenged decision only for plain error. See United States v. Marcus, 560 U.S. 258, 262 (2010) (holding that party claiming plain error must show (1) error; (2) that is clear or obvious, rather than subject to reasonable dispute; (3) that affected party's substantial rights; and (4) that seriously affected fairness, integrity, or public reputation of judicial proceedings); United States

v. Wernick, 691 F.3d 108, 113 (2d Cir. 2012). As we explain in the next section of this opinion, Spruill cannot demonstrate plain error because Juror 11 was not removed for possible nullification, the concern underlying Thomas's "any possibility" rule, but, rather, for extrinsic bias, which the district court was able to assess without intruding on jury deliberations. In any event, Spruill did not simply forfeit but, rather, waived any challenge to the district court's inquiry and dismissal of Juror 11 by affirmatively agreeing to those actions.

A. The Alleged Plain Error Under *Thomas*

To demonstrate error in the removal of a deliberating juror for cause under Fed. R. Crim. P. 23(b), Spruill must show that the district court abused the considerable discretion it is accorded in this area. See United States v. Simmons, 560 F.3d 98, 109 (2d Cir. 2009); cf. United States v. Farhane, 634 F.3d 127, 168 (2d Cir. 2011) (according district court "broad flexibility" in handling alleged juror misconduct, "mindful that addressing juror misconduct always presents a delicate and complex task, particularly when the misconduct arises during deliberations" (internal quotation marks and citations omitted)).[6] Such

[6] We have observed that where a juror is the "lone holdout for acquittal" that juror's removal must be "meticulously scrutinized." United States v. Hernandez, 862 F.2d 17, 23 (2d Cir. 1988); accord United States v. Thomas, 116 F.3d at 624–25. But even in such cases, what the removal is scrutinized for is abuse of discretion. See United States v. Baker, 262 F.3d 124, 129–30 (2d Cir. 2001) (applying abuse of discretion standard in rejecting Thomas challenge to apparent holdout juror).

discretion extends to decisions whether, and to what degree, to question a deliberating juror regarding circumstances that may give cause for removal. See United States v. Baker, 262 F.3d 124, 129 (2d Cir. 2001). Such questioning must be pursued cautiously, however, so as not to intrude on one of the cornerstones of our jury system: preservation of the secrecy of jury deliberations. See United States v. Thomas, 116 F.3d at 618 (observing that "delicate and complex task" of investigating reports of juror misconduct or bias becomes "particularly sensitive" where court investigates allegations of juror misconduct during deliberations).

Spruill's claim that Juror 11's removal was Thomas error ignores a critical context difference. The concern here was juror partiality or bias attributable to an extrinsic cause: the juror's employment experience. In Thomas, the concern was possible juror nullification, i.e., a purposeful refusal to consider the evidence and the court's instructions on the law in reaching a verdict. See id. at 614. Thomas stated that "a juror who intends to nullify the applicable law is no less subject to dismissal than is a juror who disregards the court's instructions due to an event or relationship that renders him biased or otherwise unable to render a fair and impartial verdict." Id. At the same time, Thomas recognized that where "no allegedly prejudicial event or relationship" is at issue, id. at 621, juror disregard of the law is "a particularly difficult allegation to prove and one for which an effort to act in good faith may easily be mistaken," id. at 618. Thus, a court presented with a claim of nullification during deliberations

confronts a serious dilemma. Without an adequate inquiry, the court may remove a juror who is simply unpersuaded by the Government's case, which would deny the defendant his right to a unanimous verdict. See id. at 621. But to conduct such an inquiry of a deliberating juror suspected of nullification necessarily gives rise to an "especially pronounced" conflict between a trial court's "duty to dismiss jurors for misconduct" and its duty to "safeguard[] the secrecy of jury deliberations." Id. at 618. It was to balance these concerns properly that Thomas pronounced a strict limitation on the removal of a deliberating juror "in any case where the juror allegedly reuses to follow the law": "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." Id. at 621–22 (emphasis and internal quotation marks omitted).[7] It was because the

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[7] The first quotation belies our dissenting colleague's assertion that "[n]othing in Thomas . . . suggests that the 'any possibility' standard applies only in the juror nullification context." Dissenting Op., post at **[4]**. Indeed, Thomas makes the point again in pronouncing the standard "an imperfect rule" that, while "leav[ing] open the possibility that jurors will engage in irresponsible activity . . . outside the court's power to investigate or correct," nevertheless serves a system of justice where "the judge's duty and authority to prevent nullification and the need for jury secrecy co-exist uneasily." United States v. Thomas, 116 F.3d at 622 (emphasis added). The Thomas footnote cited by the dissent itself makes clear that nullification is the concern of the any possibility rule: "Accordingly, if the record raises any possibility that the juror's views on the merits of the case, rather than a purposeful intent to disregard the court's instructions, underlay the request that he be discharged, the juror must

record in Thomas admitted such a possibility that we concluded that the district court erroneously removed the juror. See id. at 624.

Thomas itself recognized that where concerns as to a deliberating juror's continued ability to serve arise in a context other than nullification—for example, juror unavailability or incapacitation—its strict "any possibility" rule is not required because a trial judge can "conduct a thorough examination of the basis for removal" and "make appropriate findings of fact," including juror credibility, "without any inquiry into the juror's thoughts on the merits of the case." Id. at 620 (emphasis in original). Thomas observed that "[t]he need to protect the secrecy of jury deliberations begins to limit the investigatory powers where the asserted basis for a deliberating juror's possible dismissal is the juror's alleged bias or partiality in joining or not joining the views of his colleagues." Id. at 620–21 (emphasis added). But Thomas did not apply the "any possibility" rule to all such claims. Rather it recognized that where the claimed bias or partiality is attributable to an extrinsic event, a judge might well be able to determine its prejudicial likelihood "without intrusion into the deliberative process." Id. at 621; see United States v. Egbuniwe, 969 F.2d 757, 762–63 (9th Cir. 1992) (cited approvingly in Thomas) (upholding removal of deliberating juror whose girlfriend had been arrested and mistreated by police); United States v. Ruggiero, 928 F.2d 1289, 1300 (2d Cir. 1991) (upholding dismissal of deliberating juror

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not be dismissed." United States v. Thomas, 116 F.3d at 622 n.11 (emphasis omitted and emphasis added).

subjected to intimidation by two men in driveway); United States v. Casamento, 887 F.2d 1141, 1186–87 (2d Cir. 1989) (upholding dismissal of deliberating juror whose daughter received threatening phone call). In short, by contrast to cases of alleged nullification, where "the judge may well have no means of investigating the allegation without unduly breaching the secrecy of deliberations," in cases of possible bias from extrinsic factors, "the presiding judge can make appropriate findings and establish whether a juror is biased or otherwise unable to serve without delving into the reasons underlying the juror's views on the merits of the case [because] an event or relationship itself becomes the subject of investigation." United States v. Thomas, 116 F.3d at 621. Thus Thomas mandated its "any possibility" rule in the former circumstance but not in the latter. See id. at 623 (stating that it adopted rule in nullification context because where "duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in favor of the lesser of two evils—protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity").

Since Thomas was decided, this court has reiterated that its strict "any possibility" rule does not reach beyond nullification to other forms of juror misconduct. Notably, in United States v. Baker, 262 F.3d at 131–32, we identified a "subtle, but important," distinction between a juror "determin[ed] to vote without regard to the evidence" and a juror who admittedly "refused to

participate in deliberations as required by her obligations as a juror," such that the "stringent rule announced in Thomas" applied in the former circumstance but not in the latter. See id. (explaining that "stringent rule announced in Thomas . . . is based on the difficulty in detecting the difference between a juror's illegal act of nullification . . . and the juror's failure to be convinced of the defendant's guilt"; where "juror refused to participate in deliberations as required by her obligations as a juror, the rule of Thomas does not apply . . ."). Thus, we held that the district court acted within its discretion in removing a juror who had "improperly made up her mind prior to the beginning of deliberations and refused to engage in deliberations with the other jurors." Id. at 130.

Our sister circuits also have recognized that the Thomas rule does not apply where a district court can safely distinguish between instances of actual juror misconduct and a juror's views on the merits, such as in cases involving partiality or bias that can be assessed without reference to the jury's deliberations. See United States v. Symington, 195 F.3d 1080, 1087 n.6 (9th Cir. 1999) (distinguishing between allegations that go to "quality and coherence" of juror's views on merits, which require strict Thomas-based standard of dismissal, and questions of juror bias or competence that focus on some identifiable event or relationship, which do not demand strict standard); see also United States v. Kemp, 500 F.3d 257, 303 n.25 (3d Cir. 2007) (observing that strict no-reasonable-possibility rule does not apply in "many instances" of alleged juror bias where

district court can "focus on the existence of a particular act that gives rise to the bias").

Applying these principles here, we observe that even if the record suggests that Juror 11 was a holdout, it raises no nullification concern as in Thomas. To the contrary, the record indicates that Juror 11 understood and accepted the duty to base a verdict on the evidence and the law, but that she herself voiced concern about her ability to perform that duty in light of an extrinsic factor: her work in the state prison system, which may have been causing a bias in favor of defendant. This is not a circumstance akin to Thomas, where an excusal inquiry necessarily risked intrusion on jury deliberations as to require application of a strict "any possibility" standard to the district court's removal decision. Rather, it is a circumstance where the removal inquiry and decision could, and did, focus on the extrinsic matter identified.

This is not to ignore the challenges confronting the district court in making a decision to excuse Juror 11. As the able trial judge recognized, initially the juror herself was not clear as to whether she was, in fact, operating under an actual bias favoring defendant, or whether she simply possessed a conscientious view of the evidence at odds with her fellow jurors. See App. 539 (observing that Juror 11 either "has a conscientious view that differs from everybody else or she's having difficulty deliberating as she would wish to do because of what might be thought of as sympathy for Mr. Spruill"). Compare id. at 536 (stating, in jury note, that "I had concerns during jury selection about being in a position where I have involvement with similar

cases when working with individuals with similar charges," and that "[a]fter hearing deliberations, I'm finding my 'gut feeling' is potentially creating a bias"), with id. at 542 ("I'm trying to look at the evidence and trying to make a decision on all that, and I feel like in some ways I kind of am.").

Judge Chatigny, however, was careful to resolve that ambiguity with minimal inquiry of the juror, and certainly without any inquiry into the juror's views of the evidence. Cf. United States v. Baker, 262 F.3d at 132 (observing, in upholding dismissal of deliberating juror, that "it is often difficult to steer such interviews clear of revealing the jurors' views"). He commendably afforded the juror additional time to consider for herself whether she was "able to be a fair and impartial judge of the case or whether it's really not a suitable case for you given the work that you do." App. 547; see generally United States v. Nelson, 277 F.3d 164, 202–03 (2d Cir. 2002) ("[I]t is important that a juror who has expressed doubts about his or her impartiality also unambiguously assure the district court, in the face of these doubts, of her willingness to exert truly best efforts to decide the case without reference to the predispositions and based solely on the evidence presented at trial." (emphasis in original)). Moreover, he ensured that the juror would feel no pressure to make a hasty decision, emphasizing that she should not be concerned with the amount of time needed or any possible inconvenience. See App. 546–47.

After taking some time, Juror 11 reported to Judge Chatigny that she was having "some difficulty in making a decision on a verdict based

on feelings of sensitivity toward individuals who have similar cases to Mr. Spruill." Id. at 617 (emphasis added). On this record, and with no intrusion whatsoever on jury deliberations, the district court was able to determine—and both prosecution and defense counsel agreed—that Juror 11 needed to be removed for extrinsic bias. These circumstances are thus distinguishable from Thomas, and not controlled by its "any possibility" rule. See United States v. Baker, 262 F.3d at 131–32.

Accordingly, Spruill cannot show error, let alone plain error, in the dismissal of Juror 11. See generally United States v. Ruggiero, 928 F.2d at 1300 (observing that appellate court "would be rash indeed to second guess the conclusion of the experienced trial judge, based in large measure upon personal observations that cannot be captured on a paper record, that [the juror] was disabled by fear from continuing to participate in the jury's deliberations"); see also United States v. Baker, 262 F.3d at 129, 131 (upholding dismissal where record indicated deliberating juror was not removed for "nonconforming view of the evidence," notwithstanding her insistence that views were "based on the evidence"). In any event, Spruill confronts an even higher hurdle than plain error, because, as we explain in the next section, his challenge to Juror 11's removal is precluded by waiver.

B. Spruill's Waiver of Any Challenge to Inquiry and Removal of Juror 11

Under Fed. R. Crim. P. 52(b), this court has discretion to correct errors that were forfeited because not timely raised in the district court, but

no such discretion applies when there has been true waiver. See United States v. Olano, 507 U.S. 725, 731–34 (1993); United States v. Kon Yu-Leung, 51 F.3d 1116, 1121 (2d Cir. 1995) (explaining that "forfeiture does not preclude appellate consideration of a claim in the presence of plain error, whereas waiver necessarily 'extinguishes' the claim altogether"). Forfeiture occurs when a defendant, in most instances due to mistake or oversight, fails to assert an objection in the district court. See United States v. Kon Yu-Leung, 51 F.3d at 1122 ("If a party's failure to take an evidentiary exception is simply a matter of oversight, then such oversight qualifies as a correctable 'forfeiture' for the purposes of plain error analysis."); see also United States v. Nouri, 711 F.3d 129, 138 (2d Cir. 2013) (reviewing jury instruction for plain error where defendant failed to make timely objection at trial); United States v. Gore, 154 F.3d 34, 42 (2d Cir. 1998) (observing that defendant's failure to present timely argument or objection to merger issue amounted to forfeiture). By contrast, waiver can result only from a defendant's intentional decision not to assert a right. See United States v. Quinones, 511 F.3d 289, 321 n.21 (2d Cir. 2007) (defining waiver as "intentional relinquishment or abandonment of a known right" (internal quotation marks omitted)); accord United States v. Ferguson, 676 F.3d 260, 282 (2d Cir. 2011); see also United States v. Zubia-Torres, 550 F.3d 1202, 1205 (10th Cir. 2008) (observing that "waiver is accomplished by intent, but forfeiture comes about through neglect" (alterations and internal quotation marks omitted)). We here identify such intentional action

by Spruill with respect to the district court's inquiry and removal of Juror 11.

Various circumstances can manifest a defendant's intentional relinquishment of a known right. For example, this court has recognized waiver where a party actively solicits or agrees to a course of action that he later claims was error. See, e.g., United States v. Quinones, 511 F.3d at 320–22 (stating that defendants who solicited and agreed to erroneous jury instruction that, if death penalty were not imposed, life imprisonment was mandated, could not later claim that imposition of life sentence was plain error); United States v. Coonan, 938 F.2d 1553, 1561 (2d Cir. 1991) (concluding that defendant who welcomed admission of evidence relating to gang membership waived right to appeal admission of that evidence); see also United States v. Teague, 443 F.3d 1310, 1316 (10th Cir. 2006) (stating that when defendant, through counsel, proposed and agreed to conditions of supervised release, defendant could not later appeal conditions). We have identified waiver where a party asserts, but subsequently withdraws, an objection in the district court. See, e.g., United States v. Weiss, 930 F.2d 185, 198 (2d Cir. 1991) (holding that defendant who withdrew objection to exclusion of documents waived right to appeal exclusion); see also United States v. Zubia-Torres, 550 F.3d at 1205 ("We typically find waiver in cases where . . . a party attempts to reassert an argument that it previously raised and abandoned below."); United States v. Denkins, 367 F.3d 537, 543–44 (6th Cir. 2004) (holding that defendant waived any competency challenge to guilty plea where counsel

secured competency evaluation but later abandoned competency argument and withdrew any previous objections). We have also recognized waiver where a party makes a "tactical decision" not to raise an objection. United States v. Kon Yu-Leung, 51 F.3d at 1122–23 (holding that, where defendant objects to certain evidence as irrelevant and prejudicial but opts, as tactical matter, not to object to other evidence, such inaction "constitutes a true 'waiver,' which will negate even plain error review"); accord United States v. Quinones, 511 F.3d at 321. In each of these circumstances, the record has supported the critical determination that the defendant, through counsel, acted intentionally in pursuing, or not pursuing, a particular course of action.[8]

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[8] Judge Pooler observes that Spruill did not personally waive any objection to the removal of Juror 11. See Dissenting Op., post at [10]. To be sure, personal waiver is required for certain rights; a defendant "has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Florida v. Nixon, 543 U.S. 175, 187 (2004) (internal quotation marks omitted). But while "there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval." Taylor v. Illinois, 484 U.S. 400, 417—18 (1988) (footnote omitted). Spruill has nowhere argued that his consent to the removal of a deliberating juror had to be personal rather than through counsel to foreclose a challenge on appeal. Nor has the dissent cited any authority supporting that conclusion. As the cited cases show, most waivers are effected through counsel. And as we observe infra at **[37—39]**, a defendant who thinks his attorney's waiver of a point was unreasonable and prejudicial may have a Sixth Amendment claim for ineffective representation.

The record in this case convincingly demonstrates that Spruill, through counsel, also acted intentionally when he affirmatively agreed to and, at times, even recommended the actions he now challenges with respect to the removal of Juror 11. Thus, his Thomas argument is not simply forfeited without plain error, but waived.

From the start of trial, and long before jury deliberations commenced, Spruill was aware that Juror 11's employment might affect her jury service. Indeed, during voir dire, Spruill initially exercised, but then withdrew, a peremptory challenge to Juror 11 based on concern that she might be "jaded" because of her work. App. 116. Thus, when, during jury deliberations, Juror 11 expressed concern about a possible conflict based on her work, Spruill specifically urged the district court to undertake the very inquiry of Juror 11 that he now challenges.

> I think the Court would need to inquire of her whether she can set aside the bias and deliberate, and I suppose also the nature of the bias so that we can know if it's something that is truly a bias in terms of jury deliberations. . . .
>
> I think the Court needs to inquire of her individually.

Id. at 537–38. A colloquy ensued in which the district court remarked that it was "reasonable to infer that the jury has taken a vote on the merits and Juror 11 is alone in opposing the other jurors," either because she had a "conscientious view that differs from everybody else" or because

"she's having difficulty deliberating as she would wish to do because of what might be thought of as sympathy for Mr. Spruill." Id. at 538–39. Even after hearing these observations—which anticipate the argument he makes on appeal—Spruill expressed only support for, not opposition to, the district court's questioning of Juror 11. Notably, when Judge Chatigny advised the parties that he wished, "with your consent," to inquire further of Juror 11, Spruill's counsel provided that consent: "Yes, Your Honor, thank you." Id. at 540. At this juncture, Spruill could have objected to the inquiry he now challenges. His decision not to object, but rather to encourage further inquiry, was an intentional, tactical decision that we deem a true waiver of any Thomas challenge to the inquiry.

Our conclusion is only reinforced by Spruill's subsequent actions. For example, rather than argue that Juror 11 should not have been questioned, Spruill's counsel indicated agreement both with how the court conducted its minimal inquiry, and with its suggestion that Juror 11 take more time to consider her ability to deliberate fairly and impartially. When specifically asked if Spruill had "[a]ny objection to anything that happened just now," defense counsel replied, "No, Your Honor," and stated, "I think we just need to give her a few minutes . . . . [W]e just have to recess and . . . be nearby . . . ." Id. at 548.

Most important, when Juror 11 sent her next note expressing "difficulty in making a decision on a verdict based on feelings of sensitivity toward individuals who have similar cases to Mr. Spruill"

and proposing that she be excused, id. at 549, Spruill voiced no objection but, rather, agreed that the juror needed to be excused: "The Court: Are you [a]greed that I need to excuse her? Mr. Weingast: Yes, Your Honor," id. at 550.

In sum, the record reveals that (1) from voir dire forward, Spruill recognized Juror 11's potential work-related bias; (2) when, during deliberations, juror notes were ambiguous as to the reason jurors could not reach a verdict, Spruill encouraged further instructions, specifically agreeing to the district court's "conscientious view" and "conflict of interest" instructions; (3) when Juror 11 herself expressed a conflict concern, Spruill encouraged and agreed to a district-court inquiry as to the nature and extent of any bias; (4) when, upon such inquiry, Juror 11 expressed uncertainty about her ability to deliberate fairly and impartially, Spruill supported the court's decision to give the juror time to consider the matter further; and (5) when Juror 11 reported that it may be best to excuse her—because she would have difficulty returning a verdict, due to sensitivity toward persons with similar cases—Spruill's counsel agreed that she should be excused. Indeed, after Juror 11 was replaced and the jury was instructed to begin its deliberations anew, Spruill's counsel affirmed that he did not object "to anything that ha[d] transpired." Id. at 554.[9]

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[9] Judge Pooler observes that Spruill challenges Juror 11's removal, not her questioning, on appeal. See Dissenting Op., post at [5]. Nevertheless, to the extent waiver is a product of intent, it is appropriate to review the totality of circumstances leading to Juror 11's removal to determine

This record plainly demonstrates that Spruill's counsel did not "fall asleep at the wheel" with respect to the inquiry or dismissal of Juror 11. United States v. Kon Yu-Leung, 51 F.3d at 1123. Rather, he actively engaged in the matter and agreed to every action taken by the district court. These intentional actions manifest true waiver of any challenge to the district court's inquiry and removal of Juror 11. See United States v. Quinones, 511 F.3d at 320–23.

In urging otherwise, Spruill maintains that his trial counsel's actions were not a permissible "tactical decision" and, thus, cannot demonstrate waiver. We disagree. As an initial matter, while an identifiable tactical benefit provides some evidence that the relinquishment of a right was intentional, see, e.g., id. at 320–22, we have not made a tactical benefit a prerequisite to identifying waiver where the totality of circumstances otherwise demonstrate the requisite intentional action, see, e.g., United States v. Celaj, 649 F.3d 162, 170 n.5 (2d Cir. 2011) (holding that defense counsel's agreement to factual stipulation regarding interstate commerce element of offense waived sufficiency challenge, without identifying tactical benefit of action). In any event, we cannot foreclose a tactical motivation for counsel's actions regarding Juror 11. Counsel may initially have thought that further inquiry would resolve tension between the first two notes in a way that would secure his client a mistrial. Thereafter, upon

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what intent is evident with respect to removal. See Grayton v. Ercole, 691 F.3d 165, 174—78 (2d Cir. 2012) (examining record as whole to find defendant's Confrontation Clause rights implicitly waived).

observing Juror 11 firsthand and hearing her repeated equivocal responses and uncertainty as to whether she could proceed impartially, counsel may have thought the juror more likely to succumb to the views of other jurors than to maintain an opposing view and, in those circumstances, thought it better to substitute the first alternate and begin deliberations anew. Or counsel may simply have recognized that the juror's final response acknowledged an extrinsic bias that compelled removal.

Whether such determinations—if, in fact, counsel's view—were objectively reasonable can, like other attorney actions, be raised on a Sixth Amendment challenge to counsel's representation. Cf. Strickland v. Washington, 466 U.S. 668, 688 (1984); United States v. Best, 219 F.3d 192, 201 (2d Cir. 2000) (holding that counsel's "election to forgo an unsupported argument" reflected sound trial strategy); see also Bell v. Cone, 535 U.S. 685, 701 (2002) (rejecting habeas challenge to state court's determination that counsel's waiver of final argument in capital case was legitimate trial tactic); United States v. Natanel, 938 F.2d 302, 310 (1st Cir. 1991) (holding that counsel's waiver of closing argument on count submitted to jury independently, "while admittedly a gamble," was reasonable strategic choice where jury had acquitted defendant on all other counts); United States v. Jackson, 918 F.2d 236, 243 (1st Cir. 1990) (stating that "counsel's failure to object to the prosecutor's remark and to request a curative instruction seems consistent with a reasonable tactical decision to minimize any harm the prosecutor's remark may have caused, by not

inviting further attention to it"). Because such a challenge must generally be brought collaterally to allow adequate development of the record, see Massaro v. United States, 538 U.S. 500, 504 (2003) (recognizing that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance"), we express no conclusive view on that matter, although our rejection of Spruill's Thomas challenge may well bear on a Sixth Amendment claim. As to waiver, we conclude only that a defense action is no less intentional, and thus, no less a "true waiver," merely because a defendant may subsequently claim ineffective assistance of counsel.

We therefore conclude that Spruill, through counsel, having intentionally urged the questioning of Juror 11 and specifically agreed to her dismissal, waived the challenges that he now raises on appeal.

III. Conclusion

To summarize, we conclude:

1. Spruill waived any challenge to dismissal of the juror in question by specifically telling the district court that he did not object either to its colloquy with the juror or to the juror's removal, and by in fact recommending the very disposition he now challenges.

2. Even if Spruill had not waived any Thomas argument, the challenged juror removal is not subject to Thomas's "any possibility" rule, see 116 F.3d at 621–22, because the concern underlying Thomas, juror nullification, was not here at issue. Rather, removal was based on extrinsic bias, a mat-

ter about which the district court could—and did—inquire without intruding on jury deliberations.

Accordingly, for the reasons stated above and in a summary order addressing the remaining issues on appeal, the district court's judgment of conviction is AFFIRMED.

POOLER, *Circuit Judge*, dissenting:

In *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997), we held that if there is "any possibility" that a request to discharge a juror stems from the juror's view of the sufficiency of the government's evidence, the court "must deny the request." *Id.* at 622. The jury deliberating Jeff Spruill's fate was split 11-1. The foreman told the judge that the lone holdout would not change her vote. The judge interviewed the holdout, who said that she was trying her best to view the evidence impartially, but that her work with inmates in the prison system was "somewhat clouding" her views. She said that although she believed that she was coming to a fair decision, the other members of the jury disagreed. After further questioning, the juror suggested that it might be best if she were replaced. The judge did so, and the newly composed jury then promptly convicted Spruill.

Under *Thomas*, this was error. Because the record evidence disclosed the possibility that the holdout's request to be discharged stemmed from her views of the sufficiency of the government's evidence, the district court should have denied the request. The majority concludes that *Thomas*'s "any possibility" standard does not apply because the holdout expressed a potential bias, whereas in *Thomas* the concern was jury nullification. The majority then holds that, in any event, Spruill waived his *Thomas* argument when his attorney acquiesced to the juror's dismissal. Thus, Spruill receives no review—not even plain error review—of the district court's decision to dismiss the one juror who wished to acquit. Because I believe the majority opinion reads *Thomas* far too narrowly,

and expands the waiver doctrine far too broadly, I respectfully dissent.

I. The *Thomas* Error

"[W]e subject a Rule 23(b) dismissal to 'meticulous' scrutiny in any case where the removed juror was known to be the sole holdout for acquittal." *Thomas*, 116 F.3d at 624–25; *see also United States v. Hernandez*, 862 F.2d 17, 23 (2d Cir. 1988) ("[R]emoval of the sole holdout for acquittal is an issue at the heart of the trial process and must be meticulously scrutinized.").

There can be no dispute that Juror 11 was known to be the lone holdout for acquittal. The first note from the jury indicated that there was "one juror [who] at this point . . . does not agree with the jury." App'x at 521. The note went on to state that this one juror had "doubts" and was "unwilling to change [her] vote." App'x at 521. The second note, which the court received shortly after the first, stated that "one juror feels in their gut that they have a conflict of interest." App'x at 521. After the district court instructed the jury that a true conflict of interest would need to be disclosed, Juror 11 herself wrote a note to the judge stating that her "gut feeling" was "potentially creating a bias." App'x at 536. The district court concluded from these notes that it was "reasonable to infer that the jury has taken a vote on the merits and Juror 11 is alone in opposing the other jurors," and that there were two possibilities: "either Juror 11 has a conscientious view that differs from everybody else or she's having difficulty deliberating . . . because of what might be thought of as sympathy for Mr. Spruill." App'x at 538–39.

It is clear from this record that the holdout juror referenced in the first note and Juror 11 were one and the same. Thus, we must "meticulously scrutinize" the decision to remove her.

The district court's decision to remove Juror 11 cannot withstand such scrutiny. To determine whether to dismiss Juror 11 for cause, the district court was required to apply the evidentiary standard set forth in *Thomas* 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." 116 F.3d at 621–22 (emphasis omitted) (quoting *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987)).

The record evidence discloses such a possibility. As noted above, the first note from the jury indicated that Juror 11 had "doubts" and was "unwilling to change [her] vote." App'x at 521. Juror 11 told the district court repeatedly that she was "trying to do [her] best . . . to make the best unbiased decisions," App'x at 542, that she was "trying to be as fair as [she] c[ould] be," App'x at 546, and that she was "trying to listen to all the evidence and . . . com[e] to a fair decision," *id.* She explained,

> I'm trying to look at the evidence and trying to make a decision on all that, and I feel like in some ways I kind of am. But somebody mentioned—I can't bring up the deliberations, but it just kind of made me think about it and it's just been difficult. And they were asking me all this stuff and I was, look, I don't know, you know. So I'm

> just trying to be honest about it. I'm trying to do my best . . . .

App'x at 542–43; *see also id.* at 546 ("I feel like I was coming to a fair decision, but I feel like other members also felt maybe I didn't, you know. . . . I mean, for [the] interest of the Court and everybody's time, it might just make sense to have somebody else. I just don't know.").

This record reveals the possibility that Juror 11 initially voted to acquit based on her conscientious view of the evidence, but that, after she learned that she was in the uncomfortable position of being the lone holdout juror, she decided that, in the interest of "everybody's time," it "ma[d]e sense" to replace her. Because the record evidence discloses this possibility, the district court erred in granting Juror 11's request to be discharged. Indeed, the *Thomas* court contemplated this precise scenario and concluded that the "any possibility" standard was necessary to protect holdouts such as Juror 11 who may feel pressure from their fellow jurors. *See* 116 F.3d at 622 ("The evidentiary standard we endorse today . . . serves to protect these holdouts from fellow jurors who have come to the conclusion that the holdouts are acting lawlessly.").

To avoid the obvious *Thomas* problem, the majority concludes that Juror 11's removal "is not subject to *Thomas*'s 'any possibility' rule" because "the concern underlying *Thomas*, juror nullification, was not here at issue." Majority Op., *ante* at 4. Nothing in *Thomas*, however, suggests that the "any possibility" standard applies only in the juror nullification context. To the contrary, the

Thomas court stated that "courts must *in all cases* guard against the removal of a juror—who aims to follow the court's instructions—based on his view on the merits of the case." 116 F.3d at 622 n.11 (emphasis added). "Accordingly, if the record raises any possibility that the juror's views on the *merits of the case*, rather than a purposeful intent to disregard the court's instructions, underlay the request that he be discharged, the juror must not be dismissed." *Id.*

The majority nonetheless contends that "*Thomas* itself recognized that where concerns as to a deliberating juror's continued ability to serve arise in a context other than nullification . . . [,] its strict 'any possibility' rule is not required . . . ." Majority Op., *ante* at 21. But the *Thomas* court recognized no such exception to the "any possibility" standard. It is true that the *Thomas* court discussed how a judge may, in some circumstances, be able to determine whether to dismiss a juror for cause without any inquiry into the juror's thoughts. *See* 116 F.3d at 620 (discussing how "[e]vidence of the nature and extent of a juror's unavailability or incapacitation . . . is ordinarily available without inquiring into the substance of deliberations" (citations omitted)). But nothing in this portion of *Thomas*, which concerns a judge's *inquiry* into juror misconduct, suggests that *Thomas*'s holding concerning a judge's *dismissal* of a juror should be constrained in the manner the majority suggests.

The reasons the *Thomas* court gave for limiting a district court's ability to remove a holdout juror apply with equal if not greater force to this case. The *Thomas* court determined that the stringent

"any possibility" standard was necessary because "a lower evidentiary standard could lead to the removal of jurors on the basis of their view of the sufficiency of the prosecution's evidence," *id.* at 622, and "to remove a juror because he is unpersuaded by the Government's case is to deny the defendant his right to a unanimous verdict," *id.* at 621.

In *Thomas*, the district judge received a note that a juror had a "predisposed disposition" to acquit. *Id.* at 611. The other jurors gave varying accounts for what they believed to be the basis for the juror's predisposition. One juror, for example, "described Juror No. 5 as favoring acquittal because the defendants were his 'people,'" and another "suggested that it was because Juror No. 5 thought the defendants were good people." *Id.* On the other hand, "several jurors recounted Juror No. 5 couching his position in terms of the evidence." *Id.* The *Thomas* court framed this as a "nullification" issue and vacated the conviction, despite the "painstaking care and caution" with which the district judge proceeded throughout the trial, because "the record evidence raise[d] a possibility that the juror was simply unpersuaded by the Government's case against the defendants." *Id.* at 624.

Here, Juror 11 expressed a potential bias based on her experience working in the prison system, but she also stated that she was trying to be unbiased, trying to be fair, and felt that her decision was "in some ways" based on the evidence. App'x at 542–43, 546. As in *Thomas*, this evidence "raises a possibility that the juror was

simply unpersuaded by the Government's case against the defendants." 116 F.3d at 624.

The *Thomas* court also found the "any possibility" standard necessary to protect the secrecy of jury deliberations. "Where . . . a presiding judge receives reports that a deliberating juror is intent on defying the court's instructions on the law, the judge may well have no means of investigating the allegation without unduly breaching the secrecy of deliberations." *Id.* at 621. Thus, the "any possibility" standard "serves to protect against overly intrusive judicial inquiries into the substance of the jury's deliberations." *Id.* at 622.

This concern is equally present here, where the judge received a report that Juror 11 was potentially defying the court's instructions on the law by allowing a bias to affect her decision. It is true that in some cases of claimed bias, the true source of the bias "is both easily identifiable and subject to investigation and findings without intrusion into the deliberative process." *Id.* at 621. For example, in "instances of jurors who felt threatened by one of the parties, who are discovered to have a relationship with one of the parties, or whose life circumstances otherwise change during the course of deliberations in such a way that they are no longer considered capable of rendering an impartial verdict," *id.* at 613–14 (citations omitted), the judge can "make appropriate findings and establish whether a juror is biased or otherwise unable to serve without delving into the reasons underlying the juror's views on the merits of the case," *id.* at 621. But where, as here, the claimed bias is in the form of

sympathy toward the defendant, it becomes too difficult for the trial judge to discern whether such sympathy stems from an inappropriate bias or a conscientious view of the evidence. In such cases, the "any possibility" standard is necessary "to protect against overly intrusive judicial inquiries into the substance of the jury's deliberations." *Id.* at 622.

The majority also contends that "[s]ince *Thomas* was decided, this court has reiterated that its strict 'any possibility' rule does not reach beyond nullification to other forms of juror misconduct." Majority Op., *ante* at 23 (citing *United States v. Baker*, 262 F.3d 124, 131–32 (2d Cir. 2001)). *Baker*, however, says only that "the stringent rule announced in *Thomas* applies to removal of a juror by reason of the juror's determination to vote without regard to the evidence." 262 F.3d at 131. *Baker* does not limit *Thomas* to the juror nullification context; to the contrary, it recognizes that the *Thomas* rule applies where the juror is allegedly "determin[ed] to vote without regard to the evidence." *Id.*; *see also id.* ("*Thomas* ruled that a juror may not be removed for refusal to allow his or her decision to be governed by the evidence unless it is clear the motivation for the removal is not in fact the juror's nonconforming view of the sufficiency of the evidence to convict."). To be sure, the *Baker* court noted that the *Thomas* rule was "based on" the difficulty in detecting the difference between "a juror's illegal act of nullification" and "the juror's failure to be convinced of the defendant's guilt," *id.*, but nothing in *Baker* suggests that the *Thomas* rule does not apply to circumstances outside the nullification

context where, as here, it is equally difficult to detect whether the juror's request to be discharged stems from an inappropriate bias or a conscientious view of the evidence.

Because I see nothing in *Thomas* itself or our case law that limits *Thomas* to cases of jury nullification, I would conclude that the "any possibility" standard applies here. Under that standard, the district court erred in removing Juror 11. Because this error is "plain" and "affect[s] substantial rights," we have discretion to correct it if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467 (1997) (alterations in original). As the *Thomas* court stated, "to remove a juror because he is unpersuaded by the Government's case is to deny his right to a unanimous verdict." 116 F.3d at 621. The right to a unanimous jury is a constitutional right guaranteed by the Sixth and Seventh Amendments. *Andres v. United States*, 333 U.S. 740, 748 (1948). We have recognized that this right is "inextricably rooted in our jurisprudence, and remains 'one of the indispensable features of [a] federal jury trial.'" *United States v. Pachay*, 711 F.2d 488, 494 (2d Cir. 1983) (Meskill, J., concurring) (citation and emphasis omitted) (quoting *Johnson v. Louisiana*, 406 U.S. 356, 369 (1972)). Given the importance of the right at stake, we ought to exercise our discretion to correct the *Thomas* error, vacate Spruill's conviction, and remand for a new trial.

II. Waiver

Ultimately, the majority's entire discussion of *Thomas* is dictum because it is irrelevant to the majority's holding, which is that Spruill waived his right to challenge the removal of Juror 11. According to the majority, Spruill is entitled to no review—not even plain error review—of the district judge's decision to dismiss the one juror who wished to acquit. Before today, we have never applied the doctrine of waiver so broadly. I am deeply troubled by the majority's expansion of the waiver doctrine to bar review of Spruill's claim of error in this case, especially given the constitutional dimension of the alleged error.

"Waiver is different from forfeiture." *United States v. Olano*, 507 U.S. 725, 733, (1993). "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). We have further distinguished the difference between forfeiture and waiver as follows:

> If a party's failure to [object] is simply a matter of oversight, then such oversight qualifies as a correctable "forfeiture" for the purposes of plain error analysis. If, however, the party consciously refrains from objecting as a tactical matter, then that action constitutes a true "waiver," which will negate even plain error review.

United States v. Yu-Leung, 51 F.3d 1116, 1122 (2d Cir. 1995); *see also United States v. Cosme*, 796 F.3d 226, 231–32 (2d Cir. 2015) ("[I]f a 'party

consciously refrains from objecting as a tactical matter, then that action constitutes a true waiver, which will negate even plain error review.'" (quoting *Yu-Leung*, 51 F.3d at 1122)); *United States v. Quinones*, 511 F.3d 289, 321 (2d Cir. 2007) ("[I]f, 'as a tactical matter,' a party raises no objection to a purported error, such inaction 'constitutes a true "waiver" which will negate even plain error review.'" (quoting *Yu-Leung*, 51 F.3d at 1122)). Thus, we have stated that "courts applying [the] waiver doctrine have focused on strategic, deliberate decisions that litigants consciously make." *United States v. Dantzler*, 771 F.3d 137, 146 n.5 (2d Cir. 2014). And we have declined to hold an argument waived where there was "nothing in the record suggesting . . . a strategic, calculated decision." *Id.*

The majority concludes that Spruill waived his right to challenge the removal of Juror 11 because he "acted intentionally" when he "affirmatively agreed to and, at times, even recommended the actions he now challenges with respect to the removal of Juror 11." Majority Op., *ante* at 32. First, to be clear, nothing in the record indicates that Spruill himself ever "affirmatively agreed to" or "recommended" the removal of Juror 11. This distinction is critical because in some cases, depending on the right at issue, a defendant "must personally participate in the waiver." *Olano*, 507 U.S. at 733.

Second, the majority discusses at length Spruill's counsel's actions during voir dire and during the inquiry of Juror 11, noting that at times counsel "specifically urged the district court to undertake the very inquiry of Juror 11 that he

now challenges." Majority Op., *ante* at 33. But Spruill's counsel's encouragement or approval of the district court's *inquiry* of Juror 11 is irrelevant to the court's *dismissal* of Juror 11. Spruill makes clear in his appellate brief that he "does not challenge the propriety of the questioning of Juror No. 11." Appellant's Reply Br. at 10. Thus, the only action of Spruill's counsel that is relevant to the waiver issue is his statement that he agreed that the district court should remove Juror 11.

The question is whether this statement was an "intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733. The answer to that question must be no because there is no conceivable reason why an attorney familiar with *Thomas* would intentionally relinquish or abandon the right to retain the one juror favoring acquittal. There is no conceivable tactical benefit to doing so. Juror 11 was Spruill's only hope.

The majority tries valiantly to come up with some tactical benefit, surmising that defense counsel "may have thought the juror more likely to succumb to the views of other jurors than to maintain an opposing view and, in those circumstances, thought it better to substitute the first alternate and begin deliberations anew." Majority Op., *ante* at 37. With respect, this argument cannot be made with a straight face. At best, an alternate juror would have voted to acquit, placing Spruill in essentially the same position he was in with Juror 11 on the panel. But Spruill's counsel had to know that the far more likely outcome was that an alternate juror would, like 11 of the 12 original jurors, vote to convict.

Counsel's consent to the removal of Juror 11 could not have been a tactical decision.

The only explanation for counsel's acquiescence is that he was either unfamiliar with *Thomas* or failed to appreciate the *Thomas* error. The record supports this explanation, as neither the district judge, nor the government, nor defense counsel ever mentioned *Thomas* in considering how to handle Juror 11's request to be discharged. But if counsel's acquiescence was simply due to such an oversight, it "qualifies as a correctable 'forfeiture' for the purposes of plain error analysis." *Yu-Leung*, 51 F.3d 1122; *see also Dantzler*, 771 F.3d at 146 n.5 (finding that argument was forfeited, not waived, where there was "nothing in the record suggesting . . . a strategic, calculated decision" and "[t]he applicability of [the case supporting defendant's argument on appeal] was never mentioned in the District Court"); *United States v. Villafuerte*, 502 F.3d 204, 207 (2d Cir. 2007) ("[I]ssues not raised in the trial court because of oversight . . . are normally deemed forfeited on appeal . . . .").

The constitutional nature of the right at stake further cautions against a finding of waiver here. *Thomas*'s "any possibility" standard serves to prevent the removal of a juror because she is unpersuaded by the government's evidence. 116 F.3d at 622. As noted above, to remove a juror for such a reason "is to deny [the defendant] his right to a unanimous verdict." *Id.* 621. The right to a unanimous jury is a constitutional right, *Andres*, 333 U.S. at 748, that is "inextricably rooted in our jurisprudence, and remains 'one of the indispensable features of [a] federal jury trial.'"

Pachay, 711 F.2d at 494 (Meskill, J., concurring) (citation and emphasis omitted) (quoting *Johnson*, 406 U.S. at 369). "There is a presumption against the waiver of constitutional rights . . . ." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights." *Carnley v. Cochran*, 369 U.S. 506, 514 (1962) (quoting *Johnson*, 304 U.S. at 464–65). "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970).

In *Pachay*, we held that a defendant cannot waive his right to a unanimous jury where the district court proposes accepting a non-unanimous verdict. 711 F.2d at 490. In so doing, we recognized the problem inherent in allowing the district court to seek a criminal defendant's consent to a non-unanimous jury. *Id.* Allowing such a possibility "would be unfair to the criminal defendant, who might feel coerced into agreeing to a suggestion of a non-unanimous verdict by the risk of . . . the trial judge . . . impos[ing] a harsher sentence on a non-consenting defendant . . . ." *Id.* at 490–91. Similarly, in *United States v. Chavis*, 719 F.2d 46 (2d Cir. 1983), we held that even where defense counsel introduces the idea of accepting a non-unanimous verdict, we may conclude that the right to a unanimous jury was waived only where "the trial judge ha[s] made a searching inquiry to [e]nsure that the defendant was fully aware of his right to a unanimous

verdict and that he had given up that right of his own free will and not as a result of a misunderstanding, or a promise, threat or someone's suggestion." *Id.* at 48.

I read these cases to suggest that if there is any uncertainty as to whether Spruill truly intended to waive his challenge to the removal of Juror 11, we should err on the side of finding no waiver in view of the fundamental and constitutional nature of the right at stake. Here, the district court conducted no inquiry of Spruill to ensure that he wished to consent to the dismissal of the lone holdout juror. There is no evidence that defense counsel considered that Spruill might have a viable argument that the holdout juror must be retained under *Thomas*. And, as noted above, Spruill gained no conceivable tactical benefit by agreeing to dismiss Juror 11. In these circumstances, I conclude that Spruill's counsel's consent to the dismissal of Juror 11 is more akin to an "oversight" than it is to an "intentional relinquishment or abandonment of a known right." Accordingly, I would review the removal of Juror 11 for plain error.

CONCLUSION

The majority holds that the waiver doctrine bars review where counsel "acts intentionally" in conceding an argument, even if there is no tactical reason for doing so. While I believe that this expansion of the waiver doctrine is misguided as a matter of law, more fundamentally, it is unclear to me what values such an expansion serves to promote. In cases involving a tactical benefit, the waiver doctrine prevents the unfairness that

would result if a party who conceded an issue at trial for tactical reasons was then allowed to raise that issue on appeal. But I see no value in denying Spruill review in this case. We simply punish Spruill for the oversight of his attorney.

I would review Spruill's challenge to the removal of Juror 11 for plain error. Under that standard, I would hold that the district court plainly erred in removing Juror 11 because the record evidence disclosed a possibility that Juror 11's request to be discharged stemmed from her status as a holdout. Accordingly, I would vacate Spruill's conviction and remand for a new trial. Because the majority opinion holds otherwise, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of June, two thousand sixteen.

ORDER
Docket No: 13-4069

UNITED STATES OF AMERICA,

Appellee,

—v.—

JEFF SPRUILL,

Defendant-Appellant.

Appellant, Jeff Spruill, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	No. 3:13CR23 (RNC)
vs.	HARTFORD, CONNECTICUT
JEFF SPRUILL, Defendant.	July 12, 2013

JURY TRIAL — VOLUME III

BEFORE:

HON. ROBERT N. CHATIGNY, U.S.D.J.

APPEARANCES:

FOR THE GOVERNMENT:

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Darlene A. Warner, RDR-CRR
Official Court Reporter

10:59 A.M.

(Jury deliberations continue.)

THE COURT: Good morning. For the record, we've received two notes from the jury marked Court Exhibits 5 and 6.

Exhibit 5 reads as follows: Your Honor, we have one juror that at this point that does not agree with the jury. He/she has doubts and at this point is unwilling to change their vote. There is also the law for constructive possession and clarity on the law. We would like you to confirm that we should take what is stated on page 20 as law.

The majority of the jurors are unwilling to stop too quickly at the expense of justice. How should we proceed? Do we continue discussing the points?

It's signed by a member of the jury, Juror Number 2.

Simultaneously we have a second note, Court Exhibit 6, which reads: We have one juror who feels in their gut that they have a conflict of interest. We need to understand how to proceed.

It's signed by the same juror.

These notes have been shown to counsel. Any comments?

MR. GUSTAFSON: Sure, Your Honor, I'll take a shot.

Let's start—I would suggest starting with the easy issue, which is the Exhibit 5, the portion of the note concerning the law and constructive possession.

I think you can certainly tell the jury and confirm that what you said on page 20 you meant and it is the law and remains the law. I don't see where they've asked for anything more specific. Sometimes it's a nuance they want flushed out, and I would suggest or propose that the jurors be brought back in and you can confirm for all of them that page 20 and any other aspect of the charge still remains the law and it's not clear there's a need for any further clarification. If there is, they can certainly send a more precise note on that issue or any other issues.

With respect to—again I'm referring to Exhibit 5. The first portion of Exhibit 5, which is the first paragraph concerning the possibility of one juror does not agree with the others and has doubt. And that's fine, that's what jurors are for. I guess there would be no need for any comment other than to say, it doesn't sound like you're asking for instructions on what to do when the jury is deadlocked because you're not reporting you're deadlocked, and you can get your lunch and continue deliberating as you see fit.

Then Exhibit 6, I don't know, and I don't think anyone knows, with respect to the one juror who feels in their gut they have a conflict of interest. I don't know if they're referring to the same juror with a doubt, whose doubt is now driven by a conflict of interest, or if it's a separate person who might have an issue.

I think that conflict of interest is different from doubt. I take it to mean it's different. If you're conflicted, that means sometimes you're not sure if it's guilt or innocence or any decision, but this is more precise. It says "conflict of interest." I think that needs to be flushed out.

Because if a person is unable to deliberate because of a conflict of interest they've identified in their heart, that's probably got to be something the Court should address individually with that juror to determine is it a real conflict of interest and, if so, is it one that would necessitate removal of that juror and substitution of an alternate.

THE COURT: Thank you.

MR. WEINGAST: Thank you, Your Honor.

On the first point is the instruction on constructive possession, it actually begins on page 18 of your instructions and ends at the top of 20 with the end of the discussion of constructive possession. So maybe that page number doesn't mean as much as I think it does.

But I would agree that it does not appear the jury is deadlocked yet.

And I would also agree as to the conflict of interest. I don't know if they mean by that because it's a five to one vote or if somebody's saying they have an actual conflict of interest that wasn't revealed prior to that.

THE COURT: Okay. Well, I think we're in general agreement. I'm happy to go along with you and bring the jury in and confirm that the law on constructive possession as stated in the jury charge is the law and it must be followed.

With regard to the status of deliberations, the jury should deliberate until such time as they're able to come to a verdict or not, but they should give it their best effort and the charge includes instructions on that, which they're welcome to review. For instance at page 37.

With regard to the phrase "conflict of interest," I agree, it's ambiguous. We don't know if this is the same juror who does not agree with the others or somebody else. In any event, we don't know what is meant by the phrase.

I agree that if in fact a member of the jury has come to the realization that he or she has a conflict of interest, that would require some follow up.

I'm very reluctant to interfere with a deliberating jury in any way, shape or form, and I'm reluctant to undertake to interview the jurors singly or otherwise concerning what is going on in the jury room, but if you'd like, I could define the term "conflict of interest" and explain what that means or I could just leave it alone.

But they said they need to understand how to proceed.

MR. GUSTAFSON: I think—one interpretation of the note is they're not proceeding right now because one person says "I don't feel comfortable," this is my paraphrasing because I don't know what's happening. "I don't feel comfortable, I have a conflict of interest, it wouldn't be right for me to tell you what my conflict of interest is or get into the details, but I can't in good conscience participate in the deliberations." If that's the indication, they're stuck and they shouldn't be stuck because we have two alternates who are theoretically not conflicted.

MS. DYE: And just to add, Your Honor, at that point a conflict of interest isn't so much part of the deliberations itself, but rather their inability to participate in the deliberations, because all the jurors are required to have no conflict when considering the evidence.

THE COURT: I don't know what the conflict might be.

MR. GUSTAFSON: Right.

THE COURT: So do you want me to explain to them what we mean by a conflict of interest? One that disqualifies a person from participating in the decision? Do you want me to do that?

MR. WEINGAST: I think it has to be made clear, Your Honor, that a conflict of interest is not just a disagreement over what the verdict should be.

THE COURT: Sure. A conflict of interest is not something that's based on the evidence or a juror's perception of the evidence. Is that what you'd like me to do?

MR. GUSTAFSON: I agree, Your Honor, having a conversation with a juror—while I'd like to see that happen—is probably the last resort, because you're getting real close into deliberations, so I get that.

So let's start with defining a conflict, what it is, and then with that explanation, offering the opportunity to never come back and continue deliberating or ask for further instructions on what the conflict is, and we can drill down further, I guess.

Or if the person comes back with a note saying, yes, I've heard what a conflict is and I want to disclose I have a conflict, we can go from there.

THE COURT: All right. Let me take a few minutes to see if I can't come up with a good definition of the phrase "conflict of interest" that would allow us to explain what we mean by the phrase and give the jurors some guidance. All right?

(Whereupon, a recess followed)

THE COURT: Thank you for your patience. We endeavored to find some helpful authority and we were unsuccessful. There isn't anything readily at hand that provides guidance on what constitutes a conflict of interest for a juror, and I haven't had

any luck looking for a definition of the phrase that might be helpful to these folks.

So having tried without success to find something on point, and believing that in these situations less is more oftentimes, what I propose to do is something like the following:

In response to your reference to a possible conflict of interest, I remind you that jurors must be impartial and unbiased. They are not to have a personal bias for or against any party. A conflict of interest can arise when a juror has a financial interest in a case, knows one of the parties to the case or has been personally involved in a situation like the one at issue in the case, and if a member of the jury thinks that he or she might have a conflict of interest that gets in the way of being fair and impartial, then that's something that needs to be disclosed.

I had hoped in the course of jury selection to help everybody identify any possible conflict of interest. It does happen from time to time that a juror may not appreciate the existence of a conflict until after evidence has been heard. But whatever the case may be, if a member of the jury, he or she thinks they have a conflict, then a follow-up note would be appreciated.

Would that be sufficient?

MS. DYE: The only thing the government would add is that it also did quick research and ran into the same problem that the Court has expressed, and what kept coming up for jurors when a search for conflict of interest was inputted

was "bias" and "prejudice" that came up. And I believe Your Honor touched on that in the beginning on how you mean to speak to the jurors.

I think perhaps touching on the idea that they may be using the term "conflict of interest" for something that more adequately fits "bias" or "prejudice," and so just letting them know if they realize they have that as well, that could be something to express in the note. So having unbiased and unprejudiced jurors is important to both parties.

THE COURT: Any comments, Mr. Weingast?

MR. WEINGAST: Just, Your Honor, if it comes down to a bias or prejudice, we'd have to see what that is, to see if it's actually bias or prejudice. I just want to be very careful on this.

MS. DYE: Correct. Also expressing a note as being requested rather than raising your hand and saying, "I have this feeling."

THE COURT: All right. Please bring in the jury.

(Whereupon, the jury entered the courtroom.)

THE COURT: Good afternoon. I want to begin by thanking you again for your jury service and I want to apologize to you for keeping you waiting today with regard to the notes that you sent me. Under our law, when a jury has a note, the judge is required to share the note with the parties and give everybody an opportunity to consider the note. It's necessary for the judge to discuss with

the parties how best to respond, and we have done that.

At this point I'm going to do my best to respond.

We have two notes signed by the jury foreman, Juror Number 2. Are you the foreman?

THE FOREMAN: I am. I apologize for the scribbling. If everybody saw my scribbling, sorry.

THE COURT: It's not a problem at all. It's perfectly good handwriting. We haven't had any difficulty reading the notes.

These notes which we received at the same time encompass a number of points. The first longer note states that one juror does not agree with the others. He or she has doubts and at this point is unwilling to change his or her vote.

Addressing that first, the written jury instructions include a discussion of the law that applies in this situation. If you look at page 37, you will see that the instructions include the following: Each of you must decide the case for yourself but you should do so only after considering all the evidence, listening to the views of your fellow jurors, and discussing the case fully with the other jurors. You should not hesitate to change an opinion which after discussion with your fellow jurors appears erroneous. However, if after carefully considering all the evidence and the arguments of your fellow jurors you entertain a conscientious view that differs from the others,

you are not to yield your conviction simply because you are outnumbered.

That's essentially the way it's supposed to work.

THE FOREMAN: Can I ask a question?

THE COURT: I'm afraid no, you can't. Although you can write another note. Okay?

In the course of instructing you generally, I have explained that you should give the case as much time as is fair and reasonable to reach a unanimous verdict on any given question, and to that end, jurors are obliged to follow the principles that I just restated from page 37 of the instructions.

It is not unusual for a jury to take a vote and to find that one or more members of the jury do not agree with the others, and ordinarily in that circumstance the judge will ask the jury to keep trying, and that's what I would propose to do at this point in time.

THE FOREMAN: May I hand the note?

THE COURT: Sure.

Terri, we have a note. Would you please accept the note from our foreperson?

(Pause)

THE COURT: Okay. In the note you ask: Can you define "conscientious view"?

I think that the term refers to a view of the case based on fair and impartial consideration of all the evidence and full and fair discussion of the issues in the case with the other jurors.

Is that agreeable?

MR. WEINGAST: Yes, Your Honor.

MS. DYE: No objection from the government, Your Honor.

THE COURT: All right, thank you.

So if after full and fair and impartial consideration of the evidence and full and fair and impartial consideration of the views of the other jurors, a member of the jury were to entertain a conscientious view different from the others, then that would be entirely appropriate.

Continuing with the first note, there is also the law of constructive possession and you ask whether I can confirm that you should take what is stated on page 20 as the applicable law.

Looking at the written jury instructions, we see that constructive possession is defined beginning at the bottom of page 18 and continuing on page 19.

As stated there, constructive possession exists when a person knowingly has the power and the intention at a given time to exercise dominion and a control over an object either directly or through others, and we give the example of the safe deposit box. In that instance, although the person doesn't have actual physical custody of the items in the box, he exercises substantial control over

them and thus has legal possession of them. He has constructive possession of them in the eyes of the law.

The law as set out in the instructions is correct and it is binding and everybody is required to follow that law whether he or she happens to agree with it or not.

You ask in this note whether you should continue discussing the points, and we would ask you to please do so.

In your second note, you state that one member of the jury feels in his or her gut that he or she has a conflict of interest and you need to understand how to proceed.

In response to that note, let me offer the following comments to you: Like judges, jurors are required to be impartial and unbiased. A juror is not permitted to have a personal bias for or against any party.

A conflict of interest can arise when a juror has a financial interest in a case, knows one of the lawyers or parties or witnesses, or has been personally involved in a situation like the one at issue in the case.

A conflict of interest is in the nature of a personal stake or involvement in the case that makes it difficult for the individual to be fair and impartial, to decide the case based solely on the evidence and the applicable law, not on anything else.

At jury selection we tried to help people identify whether they have a conflict of interest, and it can happen that a person would not realize that he or she has a conflict of interest until after evidence has been presented.

In any event, I don't know if a member of our jury does in fact have a conflict of interest, but if after considering these brief comments it appears that there may be a conflict of interest, then that is something that would need to be disclosed and I would need to address it.

Again, the basic principle is that a juror must be impartial and unbiased, and if there is something in the juror's personal experience that creates a bias or a prejudice, then that's something that we would need to know about and do our best to address.

THE FOREMAN: How do we—

THE COURT: You would need to send me a note explaining further what the situation is, and then I would need to share that with the parties and we would need to decide how best to respond.

THE FOREMAN: To be fair, I think we should go back to do the note.

THE COURT: Okay.

THE FOREMAN: Because I would not be comfortable writing it on someone else's behalf and reviewing it before I gave it to you.

THE COURT: I appreciate that. It sounds right.

I would think that if a juror did have or thought that he or she might have a conflict of interest, that is something I would need to address one-on-one with that person, okay? So it's something that probably would be best coming from that person. Okay?

Thank you for your continued service. I hope that this has been helpful. If you need further guidance, don't hesitate to send us a note.

(Whereupon, the jury left the courtroom.)

THE COURT: Please be seated.

Is there any objection to any of my comments?

MS. DYE: Not from the government, Your Honor.

MR. WEINGAST: No, Your Honor, thank you.

THE COURT: All right, thank you.

MR. GUSTAFSON: I think we shouldn't go too far. Seems like there might be another note coming.

THE COURT: I got that sense too.

(Pause)

THE COURT: We'll stand by and a wait further word. It should be here momentarily.

(Whereupon, a recess followed)

THE COURT: We have another note which will be marked as a Court Exhibit 8. It reads: I had concerns during jury selection about being in a position where I have involvement with similar

cases when working with individuals with similar charges. After hearing deliberations, I'm finding my 'gut feeling' is potentially creating a bias.

If possible, it may make sense to be replaced at this time by another juror.

Signed Juror 11.

This note has been shared with counsel. Any comments?

MR. GUSTAFSON: Your Honor, the comment is that I think it's—the person who's expressing the bias and inability to continue to deliberate is couched in terms "it may make sense to be replaced" as opposed to an affirmative "I want off." So in that sense it possibly requires Court to interview or meet with the juror to discuss the bias without getting into which way the bias goes.

As I read this note, I can see a scenario biased for the government and a scenario biased against the government or biased for the defendant or against the defendant. But in any event, it's a bias, and bias is bias, which at that point would render any juror unqualified to continue jury service.

And the person, after having heard your instructions, has written a heartfelt note harking back to something from jury selection, and it's still bothering this person.

So I guess I would recommend that we bring Juror Number 11 in to confirm whether she wants off or if she is simply flagging a possible bias, that

if she ensures the Court she could continue deliberating, could go back. But it's a bias, heartfelt when she says "may make sense." If that's her way of saying "I want off because I can't continue to deliberate," we should honor her request.

But at this point reading the note, I can't ultimately say she's got to go right now, but I do know there's a bias and I'm not sure which way it goes. Don't really care to know. I think bias is bias.

THE COURT: Okay, thank you.

Mr. Weingast?

MR. WEINGAST: Thank you, Your Honor. I think the Court would need to inquire of her whether she can set aside the bias and deliberate, and I suppose also the nature of the bias so that we know if it's something that is truly a bias in terms of jury deliberations.

As Mr. Gustafson said, it's really somewhat ambiguous, so we need to—I think the Court needs to inquire of her individually.

THE COURT: Okay.

MR. GUSTAFSON: To be fair, the government is not interested in knowing which way the bias runs. I think that would probably impose on the deliberative process or could certainly get us very close to it. It's not something that we're interested in knowing.

THE COURT: If you read this note in the context of the other notes, it's reasonable to infer that the jury has taken a vote on the merits and Juror 11 is alone in opposing the other jurors.

In the upshot of that, is this note which discusses a gut feeling. I don't know what the gut feeling is. I don't know how I can sensibly communicate with this juror in response to her note without asking her to expand upon the note and tell me what she's experiencing, what is the gut feeling. If the gut feeling is a conscientious view of the evidence, as we discussed earlier, that's one thing, but I don't know what she means. How can I intelligently respond to her without knowing more about what's going on?

I don't want to intrude on the jury's deliberations, I don't want to know about the jury deliberation, but I need to respond intelligently to this note. So I'm not sure - Go ahead. I don't want to keep having you stand up and sit down. Please say what's on your mind.

MS. DYE: I'm sorry, Your Honor. I think you've already said exactly what the government would probably recommend, is asking her whether or not she has a conscientious objection concerning the evidence and that she's actually concerned about the evidence that's been presented, or if what she's feeling has nothing to do with the evidence, whether it's in favor of the government, whether it's against the government, whether it has something to do with the evidence itself, or whether it has to do with her or her feelings, and

finding out whether it's something that she can set aside and continue or not.

THE COURT: The inference I draw from these notes is that either Juror Number 11 has a conscientious view that differs from everybody else or she's having difficulty deliberating as she would wish to do because of what might be thought of as sympathy for Mr. Spruill.

She talks about her work with similar cases involving individuals with similar charges. To me that suggests she is thinking in terms of those other individuals as she finds herself engaged in deliberations here and she's having difficulty objectively, dispassionately, assessing the evidence, in applying the law and listening to her fellow jurors and discussing the case fully with them. That's to me what seems to be going on, and I would be inclined to ask her to clarify. If she explains that in fact her personal experience working in outreach with people facing similar charges gets in the way of doing her work as a juror, then I may need to excuse her on that basis.

So what I would propose to do with your consent would be to ask this juror to come in and I'll speak with her and see what we find out.

Is that agreeable?

MR. GUSTAFSON: It's agreeable for the government, Your Honor.

MR. WEINGAST: Yes, Your Honor, thank you.

THE COURT: All right. Is it agreeable to you if we have the juror sit in the jury box?

MR. GUSTAFSON: Yes, Your Honor.

MR. WEINGAST: Yes, Your Honor.

THE COURT: Okay. Terri, would you please ask Juror Number 11 to come in?

(Whereupon, the juror entered the courtroom.)

THE COURT: Good afternoon. I have received your note and shared it with the parties and we've talked about how best to proceed and we've decided that the best thing to do is to ask you for clarification. I'm happy to provide you with additional guidance if I can.

Your note is clearly a serious and heartfelt one and we appreciate your conscientious effort to do your best, and I'd like to help you if I can, but it's important that you not reveal to me anything about the jury deliberations. I don't mean to suggest that you should tell me about that. In fact, I want to be careful to caution you to please not tell me about that. That's a matter for the jury alone and we need to respect the confidentiality of the jury's work and the secrecy of the jury's deliberations. But with regard to your own personal situation as a juror, we can talk about whatever problem is causing you concern.

So without getting into what is going on in the deliberations, but focusing just on whatever problem you are experiencing, we can hopefully make some progress, and in that context, I would

ask you to please clarify the problem that you're having.

As I read your note, and as I think about jury selection and the total situation, I'm not sure what you're experiencing at this point.

JUROR: Well, I think when we had the jury selection—yes, when we had the jury selection, I had mentioned the type of work that I do, and I work in the prison system and I work with inmates all the time. And I feel that, you know—I felt like that was sort of a conflict in the beginning. And then you said to me, you know—I kind of did not get, you know, to not be on this case. But I said, okay, well, maybe there isn't a problem, because I presented it to you as a judge and you continued to let me stay in there, so I figured it probably wasn't a problem.

But as going along and doing the whole work, you know, I'm trying to do my best to try to make the best unbiased decisions, but I also am feeling like my work and my involvement with people in that matter and the things that I've heard from other inmates in cases, similar cases that they have like this—you know, I work with people that have had drug convictions and things like that—and things that they say to me about things is somewhat clouding my views. I'm trying not to. I mean, I'm trying to look at the evidence and trying to make a decision on all that, and I feel like in some ways I kind of am. But somebody mentioned—I can't bring up the deliberations, but it just kind of made me think about it and it's just been difficult.

And they were asking me all this stuff and I was, look, I don't know, you know. So I'm just trying to be honest about it. I'm trying to do my best, but—

THE COURT: Well, I understand that given your work you would naturally tend to think in terms of other cases.

Is it correct to think of the people you work with as your clients?

JUROR: Yeah.

THE COURT: So in a very real sense, you have clients who are similarly situated to Mr. Spruill?

JUROR: Yes. I've had experience with that.

THE COURT: As a counselor, again, your mission is to try to help these individuals reenter society in a way that will maximize their chance of success?

JUROR: Exactly. I work with inmates that are in the prison system that have up to two years. We don't work with people longer than two years. They're getting out. We have people that have 20 year sentences that are coming out in two years now. So we'll work with them for the two years or less in the prison system doing psycho educational groups, which is groups that teach life skills, that teach them to learn how to reenter society.

We also provide that bridge.

Once I work with that individual, if they're from the Hartford area—because the people that

we work with in groups come from different towns and we have other staff that come in from those different towns. If they're from Hartford, then I will work with that individual in the prison and when they get out, and I also work with them to help them get connected with their psychiatric treatment, which I mentioned most of the people that I work with also have a psychiatric illness. And then we help them get jobs, we help them reenter, we help them rebuild their lives.

And a lot of them have mentioned things to me that makes me think about the system and things—I don't know what's truth and what's not—to create some cloudiness in my head about certain things. I don't know.

THE COURT: It might be helpful if I described two alternative scenarios as points of reference for you.

As I have explained in the jury instructions, the juror's duty is to decide the case based solely on the evidence, not on anything else, and that includes bias, prejudice or sympathy. It also includes putting to the side any personal experiences the juror might have had that could, as you put it, cloud the juror's clear thinking about the evidence in the case.

The juror's duty is to decide the case objectively, dispassionately, using the power of reason to examine the evidence and to decide what the evidence shows.

If as a result of your work you are having trouble doing that, that is to say in deciding the

case objectively, dispassionately, without reference to your clients who have had similar situations, then that's one thing. In that event I think that I would need to ask you to consider whether I should relieve you due to your personal experience as a clinician dealing with clients whose matters are such that they are similarly situated to Mr. Spruill.

In contrast, if you have formed what we have previously referred to as a conscientious view based on objective, dispassionate analysis of the evidence and application of the law as I have given it to you, then that's not a conflict of interest, that's simply a conscientious view.

If you were to reach such a view after giving fair and impartial consideration to all the evidence, then that's not a conflict of interest, that's simply your view of the case, and in that event there would be no reason for me to relieve you.

Beyond that, I'm not sure there is a lot I can say to be of assistance to you.

In all candor, if I had appreciated that you had a clinician/patient or clinician/client relationship with people similarly situated to Mr. Spruill, which perhaps I should have, I would have wanted to explore that more with you. So please don't feel awkward about raising this now. It's something that I feel in retrospect I should have pursued with you more carefully.

So what would you like to do at this time? Would you like to give this more thought or do you have a sense of how we ought to proceed?

JUROR: I'm trying to be as fair as I can be and I feel like I've been trying to listen to all the evidence and I feel like I was coming to a fair decision, but I feel like other members also felt maybe I didn't, you know. So I don't know where I feel like if I can even — I don't know. I mean, for interest of the Court and everybody's time, it might just make sense to have somebody else. I just don't know.

THE COURT: Okay. Well, I appreciate your consideration. I think at this point the thing to do is to ask you to consider whether you are able to fairly and impartially judge the case based solely on the evidence, not on anything else, and if you are, that's fine, and if you aren't, that's fine.

Please don't be concerned about time or imposing on other people. I would ask you to put that from your mind and simply focus on whether you are able to be a fair and impartial judge of the case or whether it's really not a suitable case for you given the work that you do. Okay? I'll rely on you to look within and make the call.

If there's more that I can do for you by way of helping work through it, I'm here, and I'd be happy to speak with you further. But I think that I should leave it to you to decide how you would like to proceed.

I do very much appreciate your conscientious service. Okay?

JUROR: Thank you.

Should I go back and then give you another note or something?

THE COURT: I think you should do what makes sense for you. If you want to take a walk, if you want to just take a few minutes in the hallway, if you want to go back and rejoin the group, it's up to you. I would leave it up to you to do what you think makes the most sense.

Have you had your lunch?

JUROR: No, we haven't, it's not here yet.

THE COURT: All right. Well, that's too bad.

THE CLERK: There was a mix up and it should be here.

THE COURT: It should be here.

THE CLERK: We confirmed that they have the order.

THE COURT: Well, maybe the lunch is there, and if you feel comfortable going in and having lunch, that would be another option. But I'll stand by and wait to hear further.

JUROR: All right.

THE COURT: Okay?

(Whereupon, the juror left the courtroom.)

THE COURT: Any objection to anything that happened just now?

MR. WEINGAST: No, Your Honor.

MR. GUSTAFSON: No, Your Honor, thank you.

THE COURT: Any suggestions as to what we ought to do?

MR. WEINGAST: I think we just need to give her a few minutes, Your Honor. She'll probably want to take lunch, so it may take a few minutes more but—

THE COURT: I'm happy to hear any suggestions you might have. Please don't feel shy.

MR. WEINGAST: Nothing beyond that, Your Honor. I think we just have to recess and see what she—we just have to be nearby, I guess.

MS. DYE: I think it's appropriate to convey that she can take the time to make the decision, but I think it also has to be conveyed that she needs to make the decision whether or not she can continue to deliberate or not.

Obviously it's implicit if she stays that she can continue, I just think she needs to make up her mind.

THE COURT: Well, I think that's all we can do for now. We'll wait to hear further. I guess the thing to do would be to stand by in case we do have further word.

MR. GUSTAFSON: Thank you, Your Honor.

(Whereupon, a recess followed)

THE COURT: Good afternoon. We have received a another note from Juror 11. It reads as follows: Judge, after thinking things further, I still feel some difficulty in making a decision on a verdict based on feelings of sensitivity toward individuals who have similar cases to Mr. Spruill. I feel it may be best choice to have me replaced by another juror.

In the future I do hope the Court and/or legislature considers employees who work in correctional system to may have significant biases towards these types of cases—either heavily sympathetic or heavily unsympathetic, depending on the nature of their job in the correction system.

Thank you.

It's signed by Juror 11.

Counsel have been given copies. Any comments?

MR. GUSTAFSON: No, Your Honor. I guess we need to figure out which is the first alternate. I would think that Juror Number 11 should be excused at this point.

THE COURT: Mr. Weingast?

MR. WEINGAST: Nothing further, Your Honor.

THE COURT: Are you greed that I need to excuse her?

MR. WEINGAST: Yes, Your Honor.

THE COURT: All right. Then Terri, is Juror 13 nearby?

THE CLERK: She is.

THE COURT: Okay. I think what I need to do is call in Juror 11 and excuse her and then bring in Juror 13.

(Whereupon, the juror entered the courtroom.)

THE COURT: Thank you. We received your note.

I shared it with the parties and the parties are in agreement that I should excuse you.

On behalf of the parties and the Court, I want to thank you very much for your service. I regret that it has been a difficult one in some respects, but I hope that it will prove to be a good experience, all things considered.

I want to say that I respect you for the service that you've performed and also for the work that you do, and I think that your suggestion about the Court being sensitive to the situation that you're in is a good one, and I'll certainly be alert to it in the future.

So thank you, I'm going to release you, and I think you've probably satisfied your obligation for some period of time, but I hope you'll have another chance to serve as a trial juror at some point.

For now, thank you very much.

JUROR: Thank you.

(Whereupon, the juror left the courtroom.)

MR. WEINGAST: Can I just inquire? Was it your intention after you bring in Juror 13, to bring in the entire panel?

Thank you, Your Honor.

(Whereupon, the juror entered the courtroom.)

THE COURT: Good afternoon. It turns out that we're going to need to ask you to participate in deliberations. One of the other jurors has been excused and so you're going to substitute for that juror and become part of the deliberating jury.

In a moment we're going to ask the 11 jurors to come from the jury assembly room to the courtroom, and I'll explain to them that this has happened and that deliberations will need to start over. Under the law, when an alternate becomes part of the deliberating jury, the jury needs to reset, so to speak, and start again.

So that's the situation, and I wanted to alert you to that before we brought in the other jurors, okay?

So I think that it would be best if you took—let's see—why don't you just take the end seat.

I do appreciate your standing by these last days, and it turns out that it was a good thing that you did so, and we are grateful to you.

JUROR: Should I get my things from the other room now?

THE COURT: Yes, please.

(Pause)

THE COURT: Did you get your lunch okay?

JUROR: Yes, I did, thank you.

THE COURT: I was told that there was a mix up in the deliveries because we have two deliberating juries and ours went to the others and theirs came here, but I guess we got it straightened out.

(Whereupon, the jury entered the courtroom.)

THE COURT: Thank you everyone.

I asked that you please come to the courtroom because at this time we're going to substitute our first alternate juror for a member of the jury who has been excused. When this happens, as it does from time to time, it's necessary for the deliberations of the jury to begin again.

The jury works as a group, as I told you in my instructions. Deliberations can't take place unless all jurors are present. Consistent with that principle, when an alternate is substituted for a member of the jury, the deliberations have to begin again so that the jury as newly constituted resets and proceeds from there. So that's what we're going to do.

As always, I am grateful to you for your hard work, and on behalf of everybody else involved in the case, I want to express our appreciation to you.

At this time I'll ask you to retire to the jury assembly room to proceed with deliberations.

Thank you.

(Whereupon, the jury left the courtroom.)

THE COURT: Any objection to anything that has transpired?

MR. GUSTAFSON: No, Your Honor, thank you.

MR. WEINGAST: No, Your Honor.

THE COURT: All right, then we'll stand by. Thank you.

(Whereupon, a recess followed)

THE COURT: Good afternoon. We have a note from the jury informing us that the jury has reached a verdict. Are you ready for the jury?

MS. DYE: Yes, Your Honor.

MR. WEINGAST: Yes, Your Honor.

THE COURT: Thank you.

(Whereupon, the jury entered the courtroom.)

THE COURT: Thank you members of the jury. We've received your note informing us that the jury has reached a verdict.

Let me ask the foreperson: Has the jury reached a unanimous verdict?

THE FOREMAN: Yes, we have, Your Honor.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	No. 3:13CR23 (RNC)
vs.	HARTFORD, CONNECTICUT
JEFF SPRUILL, Defendant.	July 9, 2013

JURY SELECTION

BEFORE:

HON. ROBERT N. CHATIGNY, U.S.D.J.

APPEARANCES:

FOR THE GOVERNMENT:

U.S. ATTORNEY'S OFFICE-Hfd
450 Main Street
Hartford, Connecticut 06103
BY: MICHAEL J. GUSTAFSON, AUSA
NATASHA DYE, SAUSA

FOR THE DEFENDANT:

LAW OFFICES OF JEREMY N. WEINGAST
650 Farmington Avenue
Hartford, Connecticut 06105
BY: JEREMY N. WEINGAST, ESQ.

Darlene A. Warner, RDR-CRR
Official Court Reporter

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PROSPECTIVE JUROR: Sure. Yes, my number is 27. I just want to say that I work as a clinician in the State of Connecticut, and what I do is I do outreach in the prison systems in Hartford. I go out to Somers and all that. So it's not a reason not to serve, but I'm just thinking like if somebody's found guilty, I could also see this person in the prison system.

THE COURT: Okay, thank you.

Thank you very much for your help with the questionnaire.

Sir, your number again, please?

PROSPECTIVE JUROR: Twenty-eight. I just remembered that while I was in college, I did take two criminal law courses and a constitutional law as part of the criminal justice.

THE COURT: Okay, thank you.

* * *

THE COURT: Juror 27, you mentioned that as a clinician you work in the prison system with regard to outreach. Can you tell me where you work and what sort of work that entails, please?

PROSPECTIVE JUROR: Yes. I do outreach in Osborn prison, which is in Somers. I also do outreach at Garner prison, which is in Newtown. And also the York prison, which is in the Niantic area.

And what I do is psycho educational groups for people that are transitioning and getting out into the community. But I walk through the halls and see all kinds of inmates. And I'm there two, three times a week.

THE COURT: Okay. So typically you spend your day-to-day meeting with inmates one on one or in small groups?

PROSPECTIVE JUROR: Group sessions, and also one on one when we do screenings to see if the person is qualified for the groups.

THE COURT: And what is your mission, so to speak?

PROSPECTIVE JUROR: I work for the Connecticut Offender Reentry Program. Our mission is to get inmates that have a mental diagnosis, because I also work at Capital Region in Hartford, so they transition out of prison into mental health treatment. But also we represent them in the prison and work on their—all their life goals.

THE COURT: Okay, thank you very much.

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THE COURT: Mr. Weingast, I'm just interested in why you removed juror 27.

MR. WEINGAST: We discussed that very carefully. The fact that she worked in prisons, works closely, was basically what tipped the scales basically.

THE COURT: What is your concern?

MR. WEINGAST: I think with work, she's a bit jaded. That was a decision by both me and my client.

THE COURT: But Mr. Spruill wanted you to remove her?

MR. WEINGAST: Yes, Your Honor. Can I just doublecheck?

THE COURT: Yes.

(Pause)

MR. WEINGAST: We'll keep her instead.

THE COURT: I'm sorry?

MR. WEINGAST: We'll keep her.

MS. DYE: You're going to keep her?

THE CLERK: You're keeping 27. So she's coming out.

THE COURT: To be clear, Mr. Weingast, I don't want Mr. Spruill to think that I am here to influence his exercise of peremptories, because I'm not.

MR. WEINGAST: No, Your Honor absolutely not. This is — that was one we weighed very carefully, and on balance with what the Court just said, we talked about it some more and my client would like to keep her.

THE COURT: Okay.