

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v.

Case No. 3:16-cr-93-J-32JRK

CORRINE BROWN

**UNITED STATES' MEMORANDUM OPPOSING DEFENDANT'S
MOTION FOR RELEASE ON BOND PENDING APEAL**

Defendant Corrine Brown's Motion for Release on Bond Pending Appeal (Doc. 250) is without merit and should be denied. The motion identifies a single appellate issue – the dismissal of Juror No. 13 – that the defendant claims presents a “substantial question,” warranting her release pending appeal. She is incorrect.

The Court excused Juror No. 13 after finding, as a factual matter, that Juror No. 13 had violated the Court's instructions, did not understand that he had done so, and would be unable to follow those instructions if the juror remained on the jury. Under such circumstances, the removal of Juror No. 13 did not yield a “substantial” question of law of fact for the defendant's appeal. As to the law, it is beyond dispute that a trial court can (and should) remove a juror based on findings that the juror has failed to follow, and is unable to follow, the court's lawful instructions. As to the facts, it would be extraordinary for an appellate court to review trial transcripts and reverse the factual findings of this Court, which had the first-hand opportunity to question Juror No. 13, observe his demeanor, and assess his ability to discharge his

duties.

Having failed to meet her burden to demonstrate that her appeal raises a substantial question of law or fact, the defendant should be denied bond and ordered into the custody of the Bureau of Prisons during the pendency of her appeal.

I. Background

Jury selection in this case began on April 24, 2017. During *voir dire*, Judge Klindt asked the venire questions designed to identify jurors who would be unable to render a verdict based on the evidence and the law as instructed by the Court. Many questions focused on whether any jurors had personal views, including religious beliefs, that would make it difficult to render a fair and impartial verdict. *See, e.g.*, Doc. 169 at 189 (“Do any of you have any political, religious, or moral beliefs that would preclude you from serving as a fair, impartial juror in this case?”). None of the potential jurors responded affirmatively to this question.

At the beginning of trial, the Court delivered preliminary instructions to the jury, including the instruction that the jurors were not to prejudge the evidence and would be required to base their verdict solely on the evidence adduced at trial and the legal instructions provided by the Court. *See, e.g.*, Doc. 171 at 50 (“Because your job is to decide this case based solely on the evidence you hear in this courtroom. If you didn’t get it in this courtroom, you shouldn’t have it.”). After the close of evidence, the Court similarly charged the jury. *See, e.g.*, Doc. 131 at 2 (“Your decision must

be based only on the evidence presented during the trial. . . .You must follow the law as I explain it– even if you do not agree with the law– and you must follow all of my instructions as a whole.”).

On May 8, 2017, the jury began its deliberations. In the evening of May 9, Juror No. 8 contacted the courtroom deputy and informed her that Juror No. 13 had been discussing “higher beings” since the beginning of deliberations and had done so in reference to the defendant. Doc. 139 at 7. After notifying the parties about Juror No. 8’s concerns, the Court conducted an *in camera* hearing during which both Juror No. 8 and Juror No. 13 were questioned.

Juror No. 8 confirmed what she had said during her brief conversation with the courtroom deputy and provided a letter that stated:

With all due respect, I’m a little concerned about a statement made by Juror #13 when we began deliberation. He said “A Higher Being told me Corrine Brown was Not Guilty on all charges.” He later went on to say he “trusted the Holy Ghost.” We all asked that he base his verdict on the evidence provided, the testimony of the witnesses and the laws of the United States court. Other members of the Jury share my concern.

Doc. 139-1. Juror No. 8 also stated that Juror No. 13’s comments occurred on the first day of deliberations—the first comment “basically right when deliberations began” and the second “maybe a couple of hours later.” Doc. 139 at 23. Although Juror No. 13’s comments had not affected Juror No. 8’s ability to deliberate, she was “more concerned that it was going to interfere in his ability to” deliberate. *Id.* at 22.

The Court next questioned Juror No. 13 directly. Initially, Juror No. 13 denied that he was having difficulties with any religious or moral belief that would interfere with “his ability to decide the case on the facts presented and on the law.” *Id.* at 37. When the Court asked him whether he had expressed any religious sentiment to other jurors, Juror No. 13 admitted that he had told the other jurors that he had “prayed about this, [he had] looked at the information, and that [he had] received information as to what I was told to do.” *Id.* at 39. When asked for the source of the information he had “received,” the juror stated that he had received information from “My Father in Heaven” “[s]ince we’ve been here.” *Id.*

After excusing Juror No. 13 from the courtroom and conferring with counsel, the Court called him back and asked him specifically, “Did you say the words, A higher being told me that Corrine Brown was not guilty on all charges?” Juror No. 13 responded, “No. I said the Holy Spirit told me that,” and confirmed that he “mentioned it in the very beginning when we were on the first charge.” *Id.* at 49. After hearing argument from the parties, the Court found that Juror No. 13 believed he had received a divine mandate that the defendant was innocent, which was “essentially a violation . . . of the court’s instructions to base the decision only on the law and the facts that were adduced at trial, and in accordance with the court’s instructions.” *Id.* at 59. Likewise, the Court determined, “beyond a reasonable

doubt,” that there was “no substantial possibility” that Juror No. 13 was capable of basing his decision only on the evidence and following the Court’s instructions, and, as a result, Juror No. 13 was excused and replaced with an alternate juror. *Id.* at 60, 64-65, 72. The reconstituted jury deliberated for an additional day and a half before convicting the defendant on eighteen of twenty-two counts. Doc. 133.

The defendant subsequently moved for a new trial, claiming that the Court had erred when it had excused Juror No. 13. Doc. 187. The Court properly denied that motion. Doc. 200.

In doing so, the Court highlighted several factual findings that supported its ruling excusing Juror No. 13. The Court noted that “by making statements to his fellow jurors at the beginning of deliberations that he was receiving information from a higher authority who was directing him as to what verdict he should reach, he was acting inconsistently with the Court’s instruction that the case be decided solely on the law and the evidence in the case.” *Id.* at 13. Further, in assessing Juror No. 13’s credibility, the Court found that he “was initially ‘hesitant’ to explain how his religious views came to the fore during deliberations,” but that he later “confirmed that actual statement brought to the Court’s attention by Juror No. 8,” specifically, “that the Holy Spirit ‘told him’ that the defendant was not guilty on all charges.” *Id.* at 13-14 (quoting *in camera* hearing transcript). Moreover, the Court found that Juror No. 13 “appeared to continue to believe that a higher power was telling him

how he ought to proceed in the deliberations,” *id.* at 14, and that “his religious beliefs compelled him to disregard [the Court’s] instructions and instead follow direction from the ‘Holy Spirit’ to find the defendant ‘not guilty on all charges,’” *id.* at 20. In this regard, the Court found that Juror No. 13 “seemed unaware of the inconsistency” between his beliefs and the Court’s instructions, rendering him “unable to follow the Court’s instructions,” *id.* at 20-21, and leaving him positioned to “continue in the same vein if permitted to remain” on the jury, *id.* at 22-23. Ultimately, “[t]he Court found his expressed views to be inconsistent with the duties of a sworn juror because he was not able to deliberate in a way that reaches decision based only on the evidence adduced at trial and the law and instructions given by the Court.” *Id.* at 14.

The defendant now claims that issue of whether the Court properly excused Juror No. 13 presents a “substantial question” for her appeal, which would support her release under the Bail Reform Act. *See generally* Doc. 250.

II. The Bail Reform Act

The Bail Reform Act, 18 U.S.C. § 3143(b), presumes that a defendant (like Corrine Brown), who has been convicted and sentenced to a term of imprisonment, should be detained without bond. *See United States v. Giancola*, 754 F.2d 898, 900 (11th Cir. 1985) (“Specifically, Congress intended to reverse the presumption in favor of bail that existed under the prior state, the Bail Reform Act of 1966.”). It is also

presumed that a defendant's conviction is valid and that she should be incarcerated. *Id.* at 900-01. The defendant bears the burden to overcome these presumptions. *Id.* ("The 1984 Act was intended to change the presumption so that the conviction is presumed correct and the burden is on the convicted defendant to overcome that presumption.").

A defendant may remain on bond pending appeal only if the defendant can demonstrate the following four elements:

- (1) that the defendant is not likely to flee or to pose a danger to the safety of any other person or to the community if released;
- (2) that the defendant's appeal is not for the purpose of delay;
- (3) that the appeal raises a substantial question of law or fact; and
- (4) that if the substantial question is determined favorably to the defendant on appeal, the decision is likely to result in reversal of conviction, an order for a new trial of all counts on which imprisonment has been imposed, a sentence that does not include a term of imprisonment, or a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b)(1); *Giancola*, 754 F.2d at 901.

III. The Single Issue Identified by the Defendant – the Dismissal of Jury No. 13 – Does Not Present A Close Question for the Eleventh Circuit

Although the United States does not dispute that the first, second and fourth requirements under 18 U.S.C. § 3143(b)(1) can be met in this case, the defendant is still not entitled to relief. She has failed to meet her burden to satisfy the third requirement (*i.e.*, demonstrating the existence of a substantial question), rendering

her ineligible for release pending appeal.

The one issue raised by the defendant – whether this Court erred when it excused Juror No. 13 – is not a “substantial question” for purposes of the Bail Reform Act. A “‘substantial question’ is one of more substance than would be necessary to a finding that it was not frivolous.” *Giancola*, 754 F.2d at 901. It must be a “‘close’ question or one that very well could be decided the other way.” *Id.* “[T]here are no blanket categories for what questions do or do not constitute ‘substantial’ ones.” *Id.* Instead, that determination needs to be made “on a case-by-case basis.” *Id.*

This Court’s decision to excuse Juror No. 13 was based on well-settled law and should be affirmed by the Court of Appeals for the Eleventh Circuit. This is not a close legal question. The defendant does not dispute (because she cannot) that it is entirely within a trial court’s discretion to excuse a juror who “refuses to apply the law or to follow the court’s instructions.” *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001); *United States v. Godwin*, 765 F.3d 1306, 1316 (11th Cir. 2014). Indeed, it presumably is error to fail to excuse such a juror. Likewise, the defendant does not dispute (because she cannot) that the Court articulated the correct legal standard for excusing a juror during deliberations – finding “no substantial possibility” that the juror is basing his or her decisions solely on the sufficiency of the evidence. *Id.*; see Doc. 200 at 14 (recounting that the “Court therefore found ‘no

substantial possibility that [Juror No. 13 was] able to base his decision only on the evidence and the law as the court gave it to him in the instructions”) (emphasis added).

Under such circumstances, where this Court acted within its authority and articulated the correct legal standard for removing a juror, “*the only question*” for the Court of Appeals is whether this Court “clearly erred in finding that the juror was refusing to follow the instructions” of the Court. *Godwin*, 765 F.3d at 1318 (emphasis added).

That this “clear error” standard applies all but eliminates the possibility that Corrine Brown’s appeal presents a “close question” that would support granting her release. This is so because “[i]t is seldom easy to establish clear error.” *Id.*

Indeed, “a district court’s discretion . . . is at its zenith when the alleged [juror] misconduct relates to statements made by the jurors themselves” *United States v. Bradley*, 644 F.3d 1213, 1277 (11th Cir. 2011) (internal quotation marks omitted).

Having the ability to see, hear, and question jurors, the trial court is “uniquely situated to make [] credibility determinations . . . where a juror’s motivations and intentions are at issue.” *Abbell*, 271 F.3d at 1303 (citing *United States v. Gabay*, 923 F.2d 1536, 1543 (11th Cir. 1991) (recognizing that the district judge is in a position to observe jurors on a daily basis and listen to their pledges to deliberate fairly and is therefore in the best position to judge demeanor of jurors)). As such, the Court of

Appeals “will reverse the district court only if . . . it discharged the juror ‘without factual support, or for a legally irrelevant reason.’” *United States v. Register*, 182 F.3d 820, 839 (11th Cir. 1999) (quoting *United States v. Smith*, 918 F.2d 1501, 1512 (11th Cir. 1990)).

In this case, plainly there was factual support for the Court’s findings that Juror No. 13 was not following the Court’s instructions, did not understand that he was not following those instructions, and would likely continue not to follow those instructions if left on the jury. Juror No. 8 was concerned enough about Juror No. 13 that she brought to the Court’s attention his multiple comments that a “Higher Being” told him that “Corrine Brown was Not Guilty on all charges” and that he “trusted the Holy Ghost.” Doc. 139-1; Doc. 139 at 23. In response, the Court questioned Juror No. 13, personally observing not only his responses to questions, but also his demeanor and cadence. When the Court asked direct questions regarding this issue at hand, Juror No. 13 was initially hesitant to provide direct answers. *Id.* at 37-39. He eventually admitted that he had told the other jurors that he had “prayed about this, [he had] looked at the information, and that [he had] received information as to what I was told to do,” specifically from his “Father in Heaven.” *Id.* at 39. Notwithstanding this admission, Juror No. 13 insisted that he was following the Court’s instructions to decide the case solely on the evidence. *Id.* at 40. During a second round of questioning, he unapologetically confirmed that he

told his fellow jurors at the beginning of deliberations that the “Holy Spirit” told him that Corrine Brown was not guilty of all charges. *Id.* at 49.

Under such circumstances, the defendant has not raised a substantial question or a “close” question that very well could be decided the other way on appeal. *See Giancola*, 754 F.2d at 901. Juror No. 13’s announcement at the beginning of deliberations that the Holy Spirit told him the defendant was not guilty was a plain violation of the Court’s instructions that the jury was to decide the case based solely on the law and evidence in the case and “only after fully considering the evidence with the other jurors.” Doc. 131 at 2, 29. Learning of Juror’s No. 13’s actions provided an unexpected, mid-deliberation issue for the Court to resolve. Analysis of Eleventh Circuit precedent, however, soon made it clear that the issue of the non-compliant juror is one that has been addressed, repeatedly, by Courts of Appeals.¹ This Court conducted a proper factual inquiry, applied the correct law, and rendered a sound ruling, which will be afforded significant deference on appeal.

¹ The defendant’s assertion that this is a novel issue for which there is no precedent is true only in the sense that every case presents a fresh set of facts. But there is ample controlling authority (cited here and by the Court) addressing the manner, means, and propriety of excusing a juror who fails to follow a court’s instructions. In this case, there is no reason to believe that the Eleventh Circuit will engage in anything other than a straightforward application of that case law to the facts at hand, which, as this Court has already found, support Juror No. 13’s dismissal.

CONCLUSION

For the above reasons (as well as those set forth in the United States' Memorandum Opposing Defendant Corrine Brown's Motion for a New Trial and the Court's Order denying the Defendant's Motion for a New Trial), the Court properly excused Juror No. 13. That decision has not given rise to a "close" or "substantial" question for appeal. In the absence of such a question, Corrine Brown should be imprisoned during the pendency of her appeal. Accordingly, the United States respectfully requests that this Honorable Court deny the defendant's motion for bond pending appeal.

Respectfully submitted,

W. STEPHEN MULDROW
Acting United States Attorney

/s/ Michael J. Coolican

A. Tysen Duva
Assistant United States Attorney
Florida Bar No. 0603511
Michael J. Coolican
Assistant United States Attorney
USA No. 156
300 N. Hogan Street, Suite 700
Jacksonville, Florida 32202
Telephone: (904) 301-6300
Facsimile: (904) 301-6310
Tysen.Duva@usdoj.gov
Michael.Coolican@usdoj.gov

ANNALOU TIROL
Acting Chief

/s/ Eric G. Olshan
Eric G. Olshan
Public Integrity Section
Criminal Division
United States Department of Justice
1400 New York Ave. NW, Suite 12100
Washington, D.C. 20005
(202) 514-1412
Eric.Olshan@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

James Wesley Smith, III (Counsel for Corrine Brown)

/s/ Michael J. Coolican
Michael J. Coolican
Assistant United States Attorney