No. 17-15470-E

In the
United States Court of Appeals
for the Eleventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CORRINE BROWN,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
NO. 3:16-CR-93-J-32JRK

UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR RELEASE PENDING APPEAL

MARIA CHAPA LOPEZ
United States Attorney

COLIN P. MCDONELL
Assistant United States Attorney
Appellate Division

DAVID P. RHODES
Assistant United States Attorney
Chief, Appellate Division
Florida Bar No. 438741
400 N. Tampa St., Ste. 3200
Tampa, FL 33602
(813) 274-6000

January 8, 2018

United States v. Corrine Brown
No. 17-15470-E

Certificate of Interested Persons and Corporate Disclosure Statement

In addition to the persons and entities identified in the certificate of interested persons and corporate disclosure statement in Corrine Brown's Motion for Release Pending Appeal, the following persons and entities have an interest in the outcome of this case:

1. Andrews, Barbara, victim;
2. Andrews, John, victim;
3. Baker, John D., II, victim;
4. Bentley, A. Lee, III, former United States Attorney;
5. Bittel, Stephen, victim;
6. Caldwell, Leslie, former Assistant Attorney General, United States Department of Justice;
7. C.A.P. Contracting Inc., victim;
8. Charter Communications (ticker symbol: CHTR), victim;
9. Chartrand, Gary, victim;
10. Community Leadership PAC, Inc., victim;

11. Cronon, John P., Acting Assistant Attorney General, United States Department of Justice;

12. CSX Corporate Citizenship (ticker symbol: CSX), victim;

13. Davis, Hon. Brian J., United States District Judge;

14. Delaware North Companies, Inc. Buffalo, NY, victim;

15. Finker, Lonya, victim;

16. Flooring with Dimensions, dba S.L. Gresham Co., victim;

17. Florida East Coast Industries Company, LLC, victim;

18. Geraghty, Pat, victim;

19. Greenpointe Holdings, LLC, victim;

20. Greenspoon Marder, victim;

21. Hall, Loretta, victim;

22. Halverson, Steven T., victim;

23. Hulser, Raymond N., former Chief, Public Integrity Section, United States Department of Justice;

24. Lazzara, Gaspar, victim;

25. Lipsky, Richard, victim;

26. Ludwig Family Foundation, victim;

27. Marta Employees Charity Club, victim;

28. McDonell, Colin P., Assistant United States Attorney;

29. McFarland, Ryan E., Esq.;

30. Mills, Harry, victim;

31. Mills, Rosa, victim;

32. Muldrow, W. Stephen, Acting United States Attorney;

33. Orange Park Mitsubishi, victim;

34. Pajcic & Pajcic, victim;

35. Picerne Developmental Corporation, victim;

36. Picerne, John, victim;

37. Rhodes, David P., Assistant United States Attorney, Chief, Appellate Division;

38. Richardson, Hon. Monte C., United States Magistrate Judge;

39. Simply Heathcare Plans, Inc., victim;

40. Stafftime, LLC, victim;

41. Stermon, Kent, victim;

42. Tirol, AnnLou, Chief, Public Integrity Section, United States Department of Justice;

43. Toomey, Hon. Joel B., United States Magistrate Judge;

44. USSC, LLC, victim;

45. Ward, Michael, victim;

46. Wiggins, Janet, victim; and

47. Wiggins, Sidney, victim.

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 17-15470-E

CORRINE BROWN,
Defendant-Appellant

United States' Opposition to Appellant Corrine Brown's Motion for Release Pending Appeal

The United States opposes Corrine Brown's motion for release pending appeal. (She is not now detained; she is scheduled to report to prison on January 29, 2018.) This Court should deny the motion because the one issue that she has raised is not a substantial one likely to result in reversal on appeal.

Course of Proceedings

Corrine Brown was found guilty at trial of 18 offenses: 14 fraud crimes and 4 tax crimes. Most (though not all) related to Brown's supposed charity—One Door for Education—whose name proved prophetic: although the charity raised hundreds of thousands of dollars purportedly to help underprivileged students further their education, that one door barely opened, providing a total

of $1200 to two students. Brown and her codefendants, meanwhile, pocketed hundreds of thousands. *See generally* Doc. 235.

The district court sentenced Brown to a total of 60 months' imprisonment. Brown moved to remain on release pending appeal, but the district court denied that motion, concluding that she had "not presented a 'substantial question of law or fact' that would warrant permitting her to remain on release pending appeal." Doc. 258 at 3 (quoting 18 U.S.C. § 3143(b)(1)(B) and *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)).[1] Doc. 258. Brown now asks this Court to allow her to avoid serving her sentence during the appeal, relying on the same appellate issue that the district court rejected.

Argument

The Bail Reform Act of 1984 imposes stringent restrictions on the availability of bail pending appeal. *See* 18 U.S.C. §§ 3143 and 3145. The Act requires a defendant who has been convicted and sentenced to imprisonment to be detained during her appeal, unless she establishes:

> (A) by clear and convincing evidence that [she] is not likely to flee or pose a danger to the safety of any other person or the community if released[;] and

[1]The district court's order denying release (Doc. 258) is Attachment A. Its order denying Brown a new trial (Doc. 200), which addresses in detail the same juror issue, is Attachment B.

> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in [reversal].

18 U.S.C. § 3143(b); *see United States v. Giancola*, 754 F.2d 898, 900–01 (11th Cir. 1985). "[A] 'substantial question' is one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way." *Giancola*, 754 F.2d at 901. (The United States does not dispute the other criteria for release.)

Congress placed the burden on the appellant to establish entitlement to release, reversing the presumption in favor of bail that had existed under the previous statute. *Id.* at 900; *see also* S. Rep. No. 98–147 at 53 (1983) ("Once guilt of a crime has been established in a court of law, there is no reason to favor release pending imposition of sentence or appeal"; indeed, "release of a criminal appellant into the community after conviction may undermine the deterrent effect of the criminal law."). Brown has not satisfied her burden.

In seeking release, Brown relies solely on her challenge to the district court's removal of Juror No. 13. That juror had told the others, at the outset of deliberations (and again later that day), that he had received information from the Holy Spirit that Brown was not guilty of any of the charged counts. *See* Doc. 182 at 50–51. The court's removal of that juror does not entitle Brown to

release pending her appeal, because—as the district court concluded, Doc. 258—her challenge does not present a substantial question of law or fact. *See* 18 U.S.C. § 3145(b)(1)(B). She should begin serving her sentence.

On May 8, 2017, the jury began its deliberations. The following evening, Juror No. 8 informed the courtroom deputy that Juror No. 13 had mentioned "higher beings" with respect to Brown since the beginning of deliberations. Doc. 139 at 5. The district court notified the parties about Juror No. 8's concern and conducted a hearing the following morning. Juror No. 8 confirmed what she had told the courtroom deputy and shared a note she had written:

> 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 (Court Ex. 1). Juror No. 8 stated that Juror No. 13 had made those comments 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. Juror No. 8 was "concerned that it was going to interfere in [Juror No. 13's] ability to" deliberate. *Id.* at 22.

After discussing the issue with the parties, the district court elected to question Juror No. 13. Doc. 139 at 25–33. The court asked the parties how it should inquire of the juror, and both parties agreed that the court should first ask generally whether he had expressed a religious viewpoint that is guiding his ability to deliberate, and then more specifically whether he had said that a higher power had told him that Brown was not guilty on all counts. *Id.* at 34–35.

Juror No. 13 initially 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. But when the court asked him whether he had expressed any religious sentiment to other jurors, he admitted that he had told the other jurors, "I prayed about this, I have looked at the information, and ... I have received information as to what I was told to do in relation to what I heard here ... this past two weeks." *Id.* at 39. When asked for the source of the information, Juror No. 13 stated that he had received the information "[s]ince we've been here" from "My Father in Heaven." *Id.*

The district court excused Juror No. 13 from the courtroom and asked counsel for their views on its asking "the direct question: Did you ever make the statement that a higher being told me that Corinne Brown was not guilty on all charges?" *Id.* at 44. The court also proposed asking the juror whether he

had been following the court's instructions about fully considering the evidence with the other jurors. *Id.* at 45. Brown's lawyer "d[id]n't have any objection to those questions." *Id.* at 46.

The district court brought the juror back and asked him whether he had said something like, "A higher being told me that Corrine Brown was not guilty on all charges?" *Id.* at 48. He responded, "When we were giving why we were—insight, as far as not guilty or whatever for the first charge, yes." *Id.* at 49. The court then asked, "Did you say the words, A higher being told me that Corrine Brown was not guilty on all charges?" *Id.* Juror No. 13 responded, "No. I said the Holy Spirit told me that," and he confirmed that he had "mentioned it in the very beginning when we were on the first charge." *Id.*

After hearing argument from the parties (the United States for removal, Brown against), *id.* at 50–54, the district court found that Juror No. 13 believed he had received information from a higher source that Brown was innocent of all counts, 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 57–59. (The court had instructed the jurors, both preliminarily and at the close of the evidence, that they must base their verdict solely on the evidence at trial and the court's instructions. *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."); 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.").)

The district court further found "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 the court's instructions. Doc. 139 at 59. As a result, the court excused Juror No. 13, over Brown's objection, and replaced him with an alternate juror. *Id.* at 60, 64–65, 72. The reconstituted jury deliberated for an additional day and a half before finding Brown guilty of 18 of the 22 counts against her. Doc. 133.

Brown moved for a new trial, arguing that the district court had erred by excusing Juror No. 13. Doc. 187. The court denied the motion, setting out in detail the factual findings supporting its ruling. Doc. 200. The court acknowledged that Juror No. 13 was "very earnest and sincere, and … likely believed that he was trying to follow the Court's instructions." *Id.* at 13. But "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*. Furthermore, Juror No. 13 had admitted to the court that he "had expressed a conclusion from the beginning of the deliberations and without discussion with his fellow jurors, in violation of the Court's instructions." *Id*. at 22. The court explained its assessment of Juror No. 13's credibility, noting that the juror had been "initially 'hesitant' to explain how his religious views came to the fore during deliberations, but as questioning continued, he eventually confirmed the actual statement brought to the Court's attention by Juror No. 8—that being that the Holy Spirit 'told him' that the defendant was not guilty on all charges." *Id.* at 13–14. Moreover, the court found, Juror No. 13 "appeared to continue to believe that a higher power was telling him how he ought to proceed in the deliberations" and "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 14, 20. 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, the court found Juror No. 13's "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 district court "carefully drew a distinction between a juror who is praying for guidance or seeking inspiration, from this situation where the juror actually stated that an outside source 'told him' that the defendant was not guilty of all charges." *Id.* And, finally, the court reiterated its finding "beyond a reasonable doubt," "based on the evidence before it," that there was "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 and that he was using external forces to bring to bear on his decision-making in a way that's inconsistent with his jury service and his oath." *Id.*

Brown then sought release pending appeal, Doc. 250, which the United States opposed, Doc. 254. The district court denied her motion, concluding that her challenge to the removal of Juror No. 13 does not present a "substantial question of law or fact" entitling her to remain free during the appeal. Doc. 258. Her motion in this Court, based on the same juror-removal issue, likewise should be denied.

For starters, this Court reviews only for abuse of discretion the district court's decision to remove a juror. *United States v. Register*, 182 F.3d 820, 839 (11th Cir. 1999). And, as is the case here, the "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). Thus, this Court "will reverse the district court only if … it discharged the juror 'without factual support, or for a legally irrelevant reason.'" *Register*, 182 F.3d at 839 (quoting *United States v. Smith*, 918 F.2d 1501, 1512 (11th Cir. 1990)). This deferential standard of review (and the limited scope of review) weigh against this being a substantial question that "very well could be decided the other way," *Giancola*, 754 F.2d at 901.

On top of that, this Court reviews for clear error the district court's fact findings concerning a juror's ability to serve. *United States v. Godwin*, 765 F.3d 1306, 1316 (11th Cir. 2014). Once a jury has begun its deliberations, the court may excuse a juror "for good cause," *id.*, which exists if, for example, a juror "refuses to apply the law or to follow the court's instructions," *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001); *see also Godwin*, 765 F.3d at 1316. But the court may not dismiss the juror unless "no 'substantial possibility' exists that [he] is basing [his] decision on the sufficiency of the evidence." *Abbell*, 271 F.3d at 1303. In making this assessment, the district court "is uniquely situated to make the credibility determinations that must be made in

cases like this one[,] where a juror's motivations and intentions are at issue." *Id.*

Here, the district court set out the correct legal standard and carefully made a fact finding that comported with that standard. It found "beyond a reasonable doubt," "based on the evidence before [it]," "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 and that he [was] using external forces to bring to bear on his decision-making in a way that's inconsistent with his jury service and his oath." *See* Doc. 200 at 14. So "the only question" for this Court on appeal is whether the district court "clearly erred in finding that the juror was refusing to follow [its] instructions." *Godwin*, 765 F.3d at 1318.

Brown's challenge on appeal does not present a substantial question. Clear error, in this context especially, "is seldom easy to establish." *Id.* As this Court likewise recognized in *Godwin*, "The district court was on the scene, viewed the jurors as they described the problem, and therefore was 'uniquely situated to make the credibility determinations that must be made' whenever 'a juror's motivations and intentions are at issue.'" *Id.*; *see also United States v. Fajardo*, 787 F.2d 1523, 1525–26 (11th Cir. 1986) (declining to second-guess district court's finding that juror's removal was warranted, despite

underwhelming evidence, because this Court's "review is limited to an antiseptic record and is ordinarily an inferior substitute for the first-hand observations of the trial court").

Therefore, the governing standard and scope of review—whether the district court clearly erred in finding that Juror No. 13 was refusing to follow its instructions—like the overall, abuse-of-discretion standard, weighs against this issue's presenting a substantial question that "very well could be decided the other way," *Giancola*, 754 F.2d at 901; *see Univ. of Ga. Athletic Ass'n v. Laite,* 756 F.2d 1535, 1543 (11th Cir. 1985) ("While the 'clearly erroneous' standard of review is less stringent than the well-known sports rule, 'The referee is always right,' it nevertheless presents a formidable challenge to appellants who ... seek to overturn the factual findings of a district court."). Yet, despite that formidable challenge, Brown does not even attempt to satisfy the clear-error standard in her 30-page motion, asserting only that the standard shouldn't apply. *See* Brown's motion at 27. And she does not even mention the abuse-of-discretion standard, let alone explain why she thinks she can satisfy it here.

She cannot. The record amply supports the district 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 repeated comments that a "Higher Being" had told him that "Corrine Brown was Not Guilty on all charges" and that he "trusted the Holy Ghost." Doc. 139 (Court Ex. 1); Doc. 139 at 23. The court personally observed Juror No. 13's responses to questions and also his demeanor. When the court asked direct questions regarding this issue, he 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, [that he had] looked at the information, and that [he had] received information as to what [he] was told to do" from his "Father in Heaven." *Id.* at 39. Notwithstanding his acknowledgment that he had received information telling him what to do, he persisted that he was following the court's instructions to decide the case solely on the evidence. *Id.* at 40. During the second questioning, though, he confirmed that he had told his fellow jurors at the beginning of deliberations that the "Holy Spirit" had told him that Brown was not guilty of all charges. *Id.* at 49.

Given this evidence, and the district court's findings of fact, Brown has not raised a substantial question, that is, 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 that Brown was not guilty of every single count plainly violated 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. So too, of course, would a juror's statement at the outset of deliberations that he had received word from the Holy Spirit that Brown was *guilty* of all counts.[2]

The issue is not a substantial one, and that is so even though this Court has not previously addressed the precise scenario presented by the juror's actions here; this Court's treatment of the issue in other juror-removal cases answers the version now before it. Indeed, in the several opinions in which this Court has addressed the issue, in every case save one it has upheld the district court's exercise of its discretion to remove a juror during deliberations. *See United States v. Oscar*, No. 14-14584, 2017 WL 6513995 (11th Cir. Dec. 20, 2017) (juror who said she was biased, was too emotional to follow the law, and felt the need to "defend [her] people") (published); *United States v. Godwin*, 765

[2]Brown argues that the directive from the Holy Spirit was just Juror No. 13's "mental process" and "that should have been the end of the matter." Brown's motion at 20. But the juror did not say that it was just his mental process—he said that he had "received information from … my Father in Heaven" that Brown was not guilty of each and every count. The district court correctly decided that that should not have been the end of the matter. Otherwise, a juror could announce at the outset of deliberations that he's done deliberating—because the Holy Spirit has told him that the defendant is guilty—and neither the defendant nor the district court could do anything about it.

F.3d 1306, 1316 (11th Cir. 2014) (juror who refused to follow court's instructions or to apply instructions to evidence presented at trial); *United States v. Martinez*, 481 F. App'x 604, 608 (11th Cir. 2012) (juror who said she was unable to reach verdict because she had not personally observed defendant commit offenses); *United States v. Vega*, 450 F. App'x 844 (11th Cir. 2012) (juror who repeatedly told court that, because of past experience, he could not be unbiased); *United States v. Augustin*, 661 F.3d 1105 (11th Cir. 2011) (juror who "evasively" responded to court's questions on whether she would follow the law and apply it to evidence); *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001) (juror who thought she did not have to follow the law and considered court's instructions merely advisory); *United States v. Geffrard*, 87 F.3d 448 (11th Cir. 1996) (juror whose religious beliefs rendered her unable to "live with a verdict of guilty for any of the accused on any of the charges"); *United States v. Register*, 182 F.3d 820, 840 (11th Cir. 1999) (juror who had indirectly received extrinsic information from defendants); *United States v. Smith*, 918 F.2d 1501, 1512 (11th Cir. 1990) (juror who was upset that jury deliberations would interfere with family's holiday plans); *United States v. Wilson,* 894 F.2d 1245 (11th Cir. 1990) (pregnant juror who had repeatedly gotten ill during trial); *United States v. Barker*, 735 F.2d 1280, 1283 (11th Cir. 1984) (juror who had been seen putting her hand on defendant's shoulder and

smiling).[3] The sole exception is *United States v. Spence*, 163 F.3d 1280, 1283–84 (11th Cir. 1998), which is nothing like this case (or any of the other ones, for that matter). There, this Court held that the district court had abused its discretion by dismissing a juror at 3:00 p.m. due to her reaction to some medication, even though nothing even suggested that she could not have returned the following morning to continue deliberating. *Id.*

Although Brown attempts to recast the issue—the facts, really—by asking whether the district court may remove a juror for "asking God for guidance," Brown's motion at 28, that's not what the district court did (nor is it what Juror No. 13 did). The district court made that vividly clear:

> Had Juror No. 13 simply stated to his fellow jurors that he was praying for guidance during the deliberations, that would not have been problematic (and I doubt Juror No. 8 would have brought it to the Court's attention). But that is not what happened here. Juror No. 13 announced at the beginning of deliberations that he was following instructions from an outside source, which is not permitted, even when that source derives from one's own religious beliefs.

---

[3]We are not suggesting, of course, that the district court's decision to replace a juror is unassailable. To the contrary, it is a very significant decision that warrants careful review by this Court. But the history of these juror-removal claims in this Court illustrates both that district courts exercise their discretion carefully before taking the significant step of excusing a deliberating juror and that this Court conscientiously applies the abuse-of-discretion standard of review. In any event, the circumstances of this case—including Juror No. 13's admissions and the district court's careful evaluation of those circumstances—render Brown's claim here especially insubstantial, independent of this Court's resolution of the issue previously.

Doc. 200 at 23–24.

Nor did the district court remove Juror No. 13 "based on his sincere religious belief," as Brown also suggests. *See* Brown's motion at 25. The court made this clear as well: "I am not at all suggesting that persons of religious faith are unsuitable to serve as jurors." Doc. 200 at 23. Contrary to Brown's assertion, the district court findings comport with this Court's principle in *Geffrard*: that a "juror is fully entitled to h[is] religious beliefs and may espouse them," but that, in the end, "the court's rules—not h[i]s—apply." 87 F.3d at 452.

Brown also argues that the district court's inquiry "clearly violated" Federal Rule of Evidence 606(b) by inquiring into the "mental processes" of Juror No. 13. Brown's motion at 19. This subsidiary issue, though, will be reviewed only for plain error because Brown did not make this argument below. *See* Doc. 139 at 28–31, 34–36. Indeed, Brown agreed with the court that it should ask the juror both whether he had expressed a religious viewpoint that was guiding his ability to deliberate, and whether he had said that a higher power had told him that Brown was not guilty on all counts. *Id*. at 34–35; *see also id*. at 46 (Brown "d[id]n't have any objection to those questions."). Nor did Brown raise this issue in his motion for a new trial premised on the juror-removal issue. Doc. 187. This plain-error standard presents an even greater

hurdle to release than the other deferential standards that Brown faces on appeal.

The district court's inquiry did not violate Rule 606(b)—clearly, plainly, or otherwise. Indeed, Rule 606(b) does not even apply to inquiries undertaken during deliberations. The Rule is directed at attempts to impeach verdicts; by its own terms it applies only to "an inquiry into the validity of a verdict or indictment." Fed. R. Evid. 606(b)(1); *see Tanner v. United States*, 483 U.S. 107, 121 (1987) ("[Rule] 606(b) is grounded in the common-law rule against admission of jury testimony *to impeach a verdict* and the exception for juror testimony relating to extraneous influences") (emphasis added). The *Tanner* Court thus held that, although Rule 606(b) precluded the use of post-verdict juror testimony about a juror's intoxication, the defendant's right to an unimpaired jury remains protected, in part, because jurors "may report inappropriate juror behavior to the court *before* they render a verdict." 483 U.S.

at 127 (emphasis the Court's).[4] That is what happened here: a juror reported Juror No. 13's inappropriate behavior to the court *before* verdict.[5]

Moreover, given the plain-error standard of review, Brown will bear the burden on appeal of showing controlling authority holding that Rule 606(b) applies to pre-verdict inquiries. *See United States v. Lejarde-Rada,* 319 F.3d 1288, 1291 (11th Cir. 2003) ("there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving" the disputed issue). The absence of any such authority dooms Brown's Rule 606(b) issue from presenting a substantial question.

But even if Rule 606(b) governed, Brown still would not have presented a substantial question that the district court plainly erred. Rule 606(b) prohibits inquiry into "any juror's mental processes concerning the verdict," as Brown notes. Brown's motion at 19–20. But the Rule allows inquiries into whether "extraneous prejudicial information was improperly brought to the jury's

---

[4]The Rule's legislative history bears this out. Although the Rule limits post-verdict inquiry, the Conferees noted "that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations." H.R. Conf. Rep. No. 93-1597 at 8 (1974), reprinted in 1974 U.S.C.C.A.N. 7098, 7102.

[5]*State v. DeMille*, 756 P.2d 81, 84 (Utah 1988), on which Brown relies, presents an attempt to impeach a verdict that is subject to Rule 606(b).

attention" or whether "an outside influence was improperly brought to bear on any juror." Fed. R. Evid. 606(b)(2).

Here, the district court carefully limited its inquiry, going so far as to interrupt Juror No. 13's answer because the court "d[id]n't want to hear anything about the deliberations." Doc. 139 at 37. The court instead focused its inquiry to whether the Holy Spirit had told Juror No. 13 that Brown was not guilty on all counts, questions that comported with Rule 606(b)(2)'s exceptions for inquiries into "extraneous prejudicial information" and "outside influence." And Juror No. 13's responses—that he had "*received information* as to what I was told to do" from his "Father in Heaven" and, more specifically, that "the Holy Spirit *told me* that ... Corinne Brown was not guilty on all charges," Doc. 139 at 39, 48–49—satisfied those exceptions. *See, e.g., McNair v. Campbell*, 416 F.3d 1291, 1301, 1307–08 (11th Cir. 2005) (Bible brought into jury room during deliberations was improper extrinsic evidence); *United States v. Venske*, 296 F.3d 1284, 1291 (11th Cir. 2002) (bailiff's statement to jurors that they would not have any trouble convicting defendant if they knew what he knew "clearly involve[s] extrinsic communications that, if properly presented to the district court, necessitate further inquiry"). If the court must inquire when a juror states that he has received information from a bailiff relating to the case, then it surely may inquire when a juror states that he has

received information from the Holy Spirit directing an *across-the-board not-guilty verdict* in the case.

Conclusion

Because Brown has failed to establish that the juror-removal issue presents a substantial question, this Court should deny her motion for release pending appeal.

Respectfully submitted,

MARIA CHAPA LOPEZ
United States Attorney

COLIN P. MCDONELL
Assistant United States Attorney
Appellate Division

By: *s/ David P. Rhodes*
DAVID P. RHODES
Assistant United States Attorney
Chief, Appellate Division
Florida Bar No. 438741
400 N. Tampa St., Ste. 3200
Tampa, FL 33602
(813) 274-6000
david.rhodes@usdoj.gov

Certificate of Compliance with Type-Volume Limitation

This response, which contains 4942 countable words, complies with Fed. R. App. P. 27(d)(2)(A) and Fed. R. App. P. 32(a)(5), (6).

Certificate of Service

I certify that a copy of this response and the notice of electronic filing was sent by CM/ECF on January 8, 2018, to:

WILLIAM MALLORY KENT
Counsel for Corrine Brown

s/ David P. Rhodes
DAVID P. RHODES
Assistant United States Attorney