UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 17-15470

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

CORRINE BROWN
Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

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Brown, Corrine – Defendant/Appellant

Brown, Shantrel – Movant

CA Florida Holdings, Inc. - Movant

Conner, Timothy J. – Counsel for CA Florida Holdings, Inc. & Multimedia Holdings Corporation

Coolican, Michael – Assistant United States Attorney

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Corrigan, Hon. Timothy J. – United States District Judge

DeMaggio, Bryan E. – Counsel for Brown, terminated

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Kent, William Mallory – Appellate Counsel for Brown

Klindt, Hon. James R. – United States Magistrate Judge

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Suarez, Anthony – Counsel for Co-defendant

Walker, Samuel A. – Trial Counsel for Brown

White, Elizabeth Louise – Counsel for Brown, terminated

Wilkison, Jesse B. – Counsel for Brown, terminated

STATEMENT REGARDING ORAL ARGUMENT

Brown requests oral argument. This appeal presents a question of first impression in this Circuit, whether a juror may be disqualified in a criminal case because the juror prays to God and asks for guidance from the Holy Spirit and feels that he has received such guidance.

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STATEMENT OF JURISDICTION

This court has jurisdiction over the appeal in this cause under 28 U.S.C. § 1291, which provides for an appeal from a final order of a district court. The appeal was timely filed within fourteen days of entry of judgment.

STATEMENT OF THE ISSUE

WHETHER THE COURT ERRED IN DISMISSING A JUROR WHO AGREED TO FOLLOW THE COURT'S INSTRUCTIONS AND IN FACT WAS FOLLOWING THE COURT'S INSTRUCTIONS, WHO WAS NOT INTERFERING WITH OR DISRUPTING THE DELIBERATIONS OF THE OTHER JURORS, BUT WHO ON TWO OCCASIONS OVER THE COURSE OF TWO DAYS OF JURY DELIBERATIONS STATED TO THE OTHER JURORS THAT HE FELT THAT THE HOLY SPIRIT HAD TOLD HIM THAT CONGRESSWOMAN BROWN WAS NOT GUILTY AND WHO VOTED TO ACQUIT CONGRESSWOMAN BROWN WHEN THE JURY FIRST DEADLOCKED?

STATEMENT OF THE CASE

Congresswoman Brown was first elected to Congress in 1992 and was re-elected continually until 2016 when her Congressional district was gerrymandered in such a way that she faced great difficulty in being re-elected. Then less than two months before the 2016 election, contrary to established Department of Justice policy disfavoring any action that might be viewed as an attempt to influence the outcome of an election, the Government unsealed an indictment which charged Congresswoman Brown with a conspiracy to commit mail and wire fraud in connection with her promotion of a charity called One Door for Education. The indictment also included charges of tax evasion related to overstated charitable contributions and charges related to alleged false Congressional financial disclosure forms. [Doc. 1; Doc. 271-4] The indictment, new district lines plus the press coverage of the indictment led to the loss of the Congressional position she had held for twenty-four years. [Doc. 271-5]

Congresswoman Brown proceeded to trial by jury. [Doc. 117] After two full days of deliberations, the jury appeared to be deadlocked, with two jurors, juror number 13 and juror number 3 holding out for not guilty. [Doc. 271-5; Doc. 182-5] The jury was ready to report itself deadlocked that evening, but juror number 8 suggested that the jury retire for the evening and return the next morning and then

report the deadlock to the court. Instead of doing this, after retiring for the evening, juror number 8 reported to a member of the court staff that she had concerns about juror number 13. This was reported to United States District Court Judge Timothy Corrigan, who reported it to counsel for Congresswoman Brown and the Government. [Doc. 182-5; Doc. 271-5]

Juror number 8 was called before the court the next morning at the beginning of what would have been the third day of deliberations, May 10, 2017, and questioned about her concern about juror number 13. [Doc. 182-5-15] Juror number 8 had prepared a short written note which was provided to the court and marked as Sealed Court Exhibit 1 for this hearing. [Doc. 182-22] The note stated:

> 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 law of the United States court. Other member of the Jury share my concern.

The following dialogue then took place with juror number 8:

> THE COURT: All right. Counsel, we're having copies made, but -- but let me -- so, ma'am, let me just ask you this before -- before we -- before I -- what you wrote in the letter, is that the sum and substance of what the issue is that you wanted to bring to our attention?
>
> JUROR: Yes. It was -- I was just concerned about those comments.

THE COURT: Are you -- and when in point of time were those comments made? When were those comments made?

JUROR: The first one was when we first went into deliberation.

THE COURT: Okay.

JUROR: And the second one, shortly after, maybe within a few hours after.

THE COURT: Has this juror expressed that view again?

JUROR: No, sir.

THE COURT: To your observation, has that juror been deliberating?

JUROR: Yes.

THE COURT: Is there anything about the situation as it stands right now that's interfering with your ability to deliberate in the way that the court has directed in the instructions?

JUROR: No, sir. Not at all. I was more concerned that it was going to interfere in his ability to do that.
. . .

THE COURT: Okay. Ma'am, you said that this comment was made twice. Was the comment similar both times?

JUROR: Yes. And it was -- yes.

THE COURT: Okay. All right. And when was the -- the first comment you said was shortly after deliberations began; is that correct?

JUROR: The first comment is basically right when deliberation began.

THE COURT: And then when in point of time was the second comment?

JUROR: That same day, just maybe a couple of hours after.

THE COURT: And has that comment -- and I think I've asked you this. But has this juror repeated that comment or anything similar to that since then?

JUROR: No, sir, but other jurors have.

THE COURT: I don't know what you mean by that.

JUROR: Some of the jurors are concerned that that's affecting his -- his decision.

THE COURT: Okay.

[Doc. 182-23-25]

When asked for response of counsel the Government promptly called for the removal of the juror who believed Congresswoman Brown was not guilty even before juror number 13 was ever questioned. [Doc. 182-30]

The defense took the position that based on what was before the court there was no indication that juror number 13 was not fulfilling his duties - he was deliberating and not interfering with the deliberations of the other jurors - and that there was nothing further that needed to be done. [Doc. 182-30]

> I think based on the limited information that we have right now, I don't see that there is any indication that this juror is not fulfilling his responsibilities for deliberating. . . . [M]y reading of the cases is, unless there is some evidence that the juror is going to disregard the instructions of the court and is going to abide by some other rules or consider things outside of the evidence introduced in the court, I don't see that there's a basis, really, for us to move beyond what we have at this point.

[Doc. 182-30-31]

Despite the defense objection, the court decided to inquire of juror number 13. The court decided to start the juror inquiry with a reiteration of the voir dire question whether the juror had any political, religious, or moral beliefs that would preclude you serving as a fair juror in the case.

> THE COURT: And then -- and then take it from there. Have you expressed any religious or moral beliefs that are precluding you or hindering you in arriving at a fair decision based on the evidence and the law, and then, depending on those answers, maybe getting more specific: Have you expressed to any other jurors any religious beliefs that might interfere? And see where it goes from there. I think that's how I'm going to handle it.

[Doc. 182-38]

Juror number 13 was called in and the following dialogue took place:

> THE COURT: Do you remember back when you were selected for the jury that one of the questions that Judge Klindt asked you was whether you had any political, religious, or moral beliefs that would preclude you from serving as a fair and impartial juror in this case?
> Do you remember that question?

JUROR: I do.

THE COURT: Okay. And I assume at that time you answered that question no, is that right, that you did not --

JUROR: That is correct.

THE COURT: Okay. And is that -- is that still the case? Are you having any difficulties with any religious or moral beliefs that are, at this point, bearing on or interfering with your ability to decide the case on the facts presented and on the law as I gave it to you in the instructions?

JUROR: No, sir.

THE COURT: Okay. Do you consider yourself to have been deliberating with your other jurors according to the law and the instructions that the court gave to you before you went in to deliberate?

JUROR: We have been going over all the individual numbers, as far as --

THE COURT: Yeah, I don't want to hear anything about the deliberations.

JUROR: Yes, sir.

THE COURT: But I'm just asking you: Are you -- do you consider yourself to be following the court's instructions, in terms of the law and how you go about what you're doing, free from any influence of religion or political or moral beliefs?

Are you able to do that? Have you been doing that?

JUROR: I've been following -- I've been following and listening to what has been presented and making a determination from that, as to what I think and believe.

THE COURT: Okay. That's fine. So let me get a little more specific with you. Have you expressed to any of your fellow jurors any religious sentiment, to the effect that a higher being is telling you how -- is guiding you on these -- on these decisions, or that you are trusting in your religion to -- to base your decisions on?
Have you made any -- can you think of any kind of statements that you may have made to any of your fellow jurors along those lines?

JUROR: I did, yes.

THE COURT: Okay. Can you tell me, as best you can, what you said?

JUROR: Absolutely. I told them that in all of this, in listening to all the information, taking it all down, I listen for the truth, and I know the truth when the truth is spoken. So I expressed that to them, and how I came to that conclusion.

THE COURT: Okay. And in doing so, have you invoked a higher power or a higher being? I mean, have you used those terms to them in expressing yourself?

JUROR: Absolutely. I told -- I told them that -- that I prayed about this, I have looked at the information, and that I received information as to what I was told to do in relation to what I heard here today -- or this past two weeks.

THE COURT: Sure. When you say you received information, from what source? I mean, are you saying you received information from --

JUROR: My Father in Heaven.

THE COURT: Okay. Is it a fair statement -- I don't want to put words in your mouth. But are you saying that you have prayed about this and that you have received guidance from the Father in Heaven about how you should proceed?

JUROR: Since we've been here, sir.

THE COURT: Do you view that in any way -- as you know, when I instructed you, I, as I do for -- for all juries -- you had told Judge Klindt that you had no religious or any -- you did not have any religious or moral beliefs that would preclude you from serving as a fair and impartial juror, nor did you have any religious or moral beliefs that would preclude you from sitting in judgment of another person. So you told Judge Klindt that.
And then you also -- of course, you heard my instruction, where you have to base your decision only on the evidence presented during the trial and follow the law as I explained it.
Do you feel that you have been doing that?

JUROR: Yes, sir, I do.

THE COURT: Do you feel that there is any inconsistency in the prayer that you've had or the guidance you're receiving and your duty to base your decision on the evidence and the law?

JUROR: You said a few -- you said a few things.
Repeat, please.

THE COURT: Do you feel that there's any religious tension, or is your religion and your obvious sincere religious beliefs -- do you believe it at all to be interfering with or impeding your ability to base your decision solely on the

evidence in the case and following the law that I've explained to you?

JUROR: No, sir. I followed all the things that you presented. My religious beliefs are going by the testimonies of people given here, which I believe that's what we're supposed to do, and then render a decision on those testimonies, and the evidence presented in the room.

[Doc. 182-39-42]

After the juror was excused the defense argued:

I can understand the concern that the court would have here with the statement about receiving guidance. I did not hear this juror say, however, that he was going to disregard the court's instructions, that he was receiving evidence, or a directive what to do. I think a fair reading here -- what may have happened is that, as a person of deep faith, and perhaps like many people with deep faith, has prayed for clarity, the ability to be fair, the ability to be calm, but I did not hear this juror say, I came in with a view given to me by God, and I'm going to go with that, I'm going to follow God no matter what.

My concern would be that -- and I'm not in any way, shape, form, or fashion suggesting that the court would do this. I want to be clear when I say this. But I think someone who has a deeply held religious belief of faith sometimes expresses a request for guidance from God to do the right thing under the rules, whatever they may be.

That's why we have witnesses who are sworn to tell the truth. That's why jurors take an oath to fulfill their duty. And so I think it would be an easy case if you had someone come in here and say, Yes, the evidence is overwhelming for one particular verdict, but, because God gave me a duty and a task beforehand, I'm going to do that regardless of what the evidence shows.

I don't think a fair reading of what this juror said shows that, and that

you have someone whose faith guides him when he has to make certain decisions. He has said the most important, I think, relevant thing, which is that his decision is based upon what he has heard, the testimony, and the deliberations. And I think when you combine that with the fact that the juror, who initially brought it to the attention of the court, has said that deliberations are progressing, it's not affecting her -- I think what you have is perhaps a juror who just, in an abundance of caution, brought this to the attention of the court. And it could be -- and I know I'm speculating now and getting out here on a limb.

Sometimes people who are not of faith have some concern and skepticism about statements that are made by people who are deeply faith-driven. So I would just be concerned about any potential action that might remove this juror simply because he is a man of faith.

I think it is possible to be a fair and impartial juror and also be someone who believes that God expects you to be just and fair and follow the laws as instructed by the judge.

That's all I have, Your Honor.

[Doc. 182-44-46]

The court brought juror number 13 back in and asked the following:

THE COURT: So what I want to ask you is a fairly direct question, and that is this: Did you ever say to your fellow jurors or to a fellow juror during your -- during the time that y'all worked together, when the 12 started, something to this effect, A higher being told me that Corrine Brown was not guilty on all charges? Did you say something like that? Did you say that or something like that to any of your fellow jurors?

JUROR: When we were giving why we were -- insight, as far as not guilty or whatever for the first charge, yes.

THE COURT: Did you say the words, A higher being told me that Corrine Brown was not guilty on all charges?

> JUROR: No. I said the Holy Spirit told me that.
>
> THE COURT: Okay. And you -- and I don't want to get into your deliberations. But at what point in the deliberations was that? Was it at the beginning? Was it early in the deliberations? When was it?
>
> JUROR: I mentioned it in the very beginning when we were on the first charge.

[Doc. 182-50-51]

Over defense objection the court removed the hold out juror explaining why he did so as follows:

> In this case, Juror No. 13, very earnest, very sincere, I'm sure believes that he is trying to follow the court's instructions, I'm sure believes that he is rendering proper jury service, but, upon inquiry and observing Juror No. 13, there is no question that he has made statements that he is, quote, receiving information from a higher authority as part of his deliberative process, and in response to the court's direct inquiry as to whether he had said to other jurors, quote, A higher being told me Corrine Brown was not guilty on all charges, closed quote, Juror No. 13 said that he -- what he actually said was that the Holy Ghost or the Holy Spirit told me Corrine Brown was not guilty on all charges.
>
> And a juror who makes that statement to other jurors and introduces that concept into the deliberations, especially -- anytime, but this happened to be very early in the deliberations, is a juror that is injecting religious beliefs that are inconsistent with the instructions of the court, that this case be decided solely on the law as the court gave it to the jury and the evidence in the case.
>
> Because, by definition, it's not that the person is praying for guidance so that the person can be enlightened, it's that the higher being -- or the Holy Spirit is directing or telling the person what disposition of the charges should be made.

And based upon my reading of the case law in other cases where religious beliefs have caused a juror to be struck, this statement by the juror, which he forthrightly admitted to, and which was accurately, apparently, recounted by Juror No. 8, who brought this to our attention, is a disqualifying statement.

And -- and it appears to the court, looking and judging the credibility of Juror No. 13, that he was hesitant at first to explain to me how his religious views have come to the fore during deliberations.

But as we progressed and as he told me he received information from a higher source, and then as he later confirmed the actual statement that the Holy Spirit told him that Ms. Brown was not guilty on all charges, that -- that he has expressed views and holds views that I think are inconsistent with his sworn duty as a juror in this case, because he's not able to deliberate in a way that follows the law and the instructions that the court gave to him.

I want to be very clear that I am drawing a distinction between someone who's on a jury who is religious and who is praying for guidance or seeking inspiration, or whatever mode that person uses to try to come to a proper decision, from this situation, where the juror is actually saying that an outside force, that is, a higher being, a Holy Spirit, told him that Ms. Brown was not guilty on those charges. And I think that's just an expression that's a bridge too far, consistent with jury service as we know it.

I recognize that whenever you're in the area of religious belief, and -- and people who have different ways of expressing their religious beliefs, that you're in territory that's difficult to navigate.

But in my view, the record is clear, and that not only did Juror No. 13 make this statement, but it appears that he continues to believe that he is being told by a higher power how he ought to proceed in these deliberations, and he has shared that with the other jurors, which, again, is essentially a violation, not a -- not a willful violation by Juror No. 13, but 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.
>
> Therefore, it is the court's decision that Juror No. 13 will be excused for good cause under Rule 23(b)(3) and the authority of *U.S. versus Godwin*, 765 F.3d 1306; *U.S. versus Abbell*, 271 F.3d 1286.
>
> I am making a finding -- and let me make the proper finding here so that there's no doubt about it -- that this juror is being excused because the court is finding no substantial possibility that he is 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 is using external forces to bring to bear on his decision-making in a way that's inconsistent with his jury service and his oath.
>
> And I find that -- I make that finding that -- based on the evidence before me, that that finding is made beyond a reasonable doubt.
>
> And I'm relying -- of course, that's the standard given to me in *U.S. versus Abbell*, 271 F.3d 1286, at page 1302. And it's stated in other Eleventh Circuit cases that we've been relying on as well. So the court does make that finding. I will be excusing Juror No. 13 for cause.

[Doc. 182-58-62]

The court succinctly summarized his finding to the juror himself as follows:

> THE COURT: Sir, I am -- I'm going to relieve you of your duties as a juror in this case. And I am doing so because of the expressions you made regarding your receiving guidance from a higher power as to how you ought to proceed in this matter.

[Doc. 182-87]

An alternate juror was substituted and the reconstituted jury later returned a guilty verdict on all but four counts. Congresswoman Brown filed a motion for new

trial raising this single issue, argument was heard, and it was denied. [Doc. 187; Doc. 198; Doc. 200 Congresswoman Brown was sentenced to five years imprisonment. [Doc. 245; Doc. 246] A timely notice of appeal was filed followed [Doc. 251; Doc. 260] by a motion for release pending appeal raising the single issue presented herein, whether the trial court denied Congresswoman Brown a fair trial in dismissing juror number 13. [Doc. 250]

SUMMARY OF ARGUMENT

WHETHER THE COURT ERRED IN DISMISSING A JUROR WHO AGREED TO FOLLOW THE COURT'S INSTRUCTIONS AND IN FACT WAS FOLLOWING THE COURT'S INSTRUCTIONS, WHO WAS NOT INTERFERING WITH OR DISRUPTING THE DELIBERATIONS OF THE OTHER JURORS, BUT WHO ON TWO OCCASIONS OVER THE COURSE OF TWO DAYS OF JURY DELIBERATIONS STATED TO THE OTHER JURORS THAT HE FELT THAT THE HOLY SPIRIT HAD TOLD HIM THAT CONGRESSWOMAN BROWN WAS NOT GUILTY AND WHO VOTED TO ACQUIT CONGRESSWOMAN BROWN WHEN THE JURY FIRST DEADLOCKED?

The district court reversibly erred when it questioned a juror who had voted to acquit Congresswoman Brown and then dismissed the juror over defense objection based on nothing more that the juror having prayed for guidance and believed that he received guidance from the Holy Spirit that Congresswoman Brown was not guilty. The juror had not interfered in the deliberations of the other jurors, had not relied upon Bible verses as authority for his judgment, but instead had considered the testimony and evidence in the case and engaged in the deliberative process with the other jurors over the course of two days doing nothing more than twice mentioning to the other jurors that the Holy Spirit had told him that Congresswoman Brown was not guilty.

The district court erred initially in even questioning the juror over defense

objection based on nothing more than the report of another juror that this juror had twice over the course of two days mentioned that a higher power had told him that Congresswoman Brown was not guilty. This was an insufficient basis to question the juror and as such it was improper to rely upon the results of the inquiry to discharge the juror.

Once the juror was questioned, it was improper and impermissible to inquire into the juror's deliberative mental process, which is what the district court did in questioning the juror about his reason for voting not guilty. Rule 606(b) of the Federal Rules of Evidence clearly prohibited this inquiry and prohibited the district court from considering and relying upon the results of this impermissible inquiry in discharging the juror.

The district court erred as a matter of law in concluding that the juror's belief that his prayers for divine guidance had been answered constituted the intrusion of an external or outside force into the deliberative process. The juror's reliance upon his religious faith in considering the evidence and reaching a conclusion whether the defendant was guilty or not guilty was a mental process and not an intrusion of an impermissible external force or influence. None of the cases cited by the Government nor relied upon by the district court in dismissing this juror supported the district court's action. Indeed, the only case addressing this issue in the entire body of

American jurisprudence - a case decided by the Utah Supreme Court in reliance in part upon the Utah version of Rule 606(b) - held that it was improper to vacate a criminal verdict on this basis.

Even if it were improper for a juror to seek guidance from the Holy Spirit, a juror may only be dismissed for wilful misconduct. That was not established in this case. Indeed, the Government has conceded that the juror "did not understand that he was not following [the court's] instructions . . . " The juror was never told that by seeking guidance of the Holy Spirit that he was violating the court's instructions, and not being told that the court considered such prayerful guidance to be in violation of the court's instruction, he was never asked if he would cease to do so if told that by doing so he was violating the court's instructions. That is, there was no attempt made to determine whether the juror's conduct was a wilful violation of the court's instructions.

The district court's action in dismissing the juror violated the juror's First Amendment right to freedom of religion and violated the Religious Freedom Restoration Act of 1993. The defendant was entitled to a jury empaneled without such Constitutionally invidious discrimination.

The district court's action in dismissing this juror over the defendant's objection denied the defendant her Sixth Amendment right to a unanimous jury

verdict and entitles her to a new trial.

STANDARDS OF REVIEW

A district court's dismissal of a juror under Rule 23 of the Federal Rules of Criminal Procedure is subject to abuse of discretion. But such dismissal may only be made upon "just cause" and after sufficient inquiry. *United States v. Spence*, 163 F.3d 1280, 1283 (11th Cir. 1998), citing *United States v. Wilson*, 894 F.2d 1245, 1251 (11th Cir. 1990). Because a district court's determination of the reason for a juror's dismissal may be based upon a finding of fact, the decision will not be overturned "unless it is clearly erroneous or appears to have been guided by improper principles of law." *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1039 (11th Cir. 2005), cited in *United States v. Walthour*, 202 F. App'x 367, 370 (11th Cir. 2006).

But as Judge Carnes wrote for the majority *en banc* in *United States v. Irey*, 612 F.3d 1160, 1165 (11th Cir. 2010) (*en banc*), the deferential abuse of discretion standard does not mean that deference amounts to an abdication of appellate review nor does it mean discretion is unbridled.

Indeed, it is *per se* an abuse of discretion if a district court misapplies the law, as was done in this case. "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . ." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

Cooter & Gell noted the difficulty in separating legal from factual conclusions. "The Court has long noted the difficulty of distinguishing between legal and factual issues. See *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) ("Rule 52(a) does not furnish particular guidance with respect to distinguishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion")." *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 401 (1990). This is especially so in this case in which the district court made what it styled findings of fact but which were legal assumptions, based on an incorrect application of the controlling law.

The United States Attorneys' Manual is instructive on this:

> However, keep in mind that "the proper characterization of a question as one of fact or law is sometimes slippery." *Thompson v. Keohane*, 116 S. Ct. 457, 464 (1995). The Third Circuit offers this criteria: "[T]he beginning place of inquiry involves the status to be accorded each determination by the trial court, and whether that determination involves basic facts, inferred facts or ultimate facts. ... Basic facts are the 'historical and narrative events elicited from the evidence presented at trial, admitted by stipulation, or not denied, where required, in responsive pleadings. ... Inferred facts are 'drawn' from the basic facts and may be found 'only when, and to the extent that, logic and human experience indicate a probability that certain consequences can and do follow from the basic facts.' ... Both basic and inferred factual determinations involve no legal conclusions and thus should be disturbed only when clearly erroneous. ... An ultimate fact, however, 'is usually expressed in the language of a standard enunciated by case-law rule or by statute, e.g., an actor's conduct was negligent; the injury occurred in the course of employment; the rate is reasonable; the

> company has refused to bargain collectively. The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact.'" Ultimate facts are subject to *de novo* review. *In re Cohen*, 191 B.R. 599, 603-04 (D.N.J. 1996) (quoting *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981)).

United States Attorneys' Manual, Civil Resource Manual, § 97.

Conclusions of law are reviewed *de novo*. *United States v. Johns*, 984 F.2d 1162 (11th Cir. 1993). Mixed questions of law and fact are also reviewed *de novo*. *United States v. Merrill*, 513 F.d 1293 (11th Cir. 2008).

ARGUMENT

WHETHER THE COURT ERRED IN DISMISSING A JUROR WHO AGREED TO FOLLOW THE COURT'S INSTRUCTIONS AND IN FACT WAS FOLLOWING THE COURT'S INSTRUCTIONS, WHO WAS NOT INTERFERING WITH OR DISRUPTING THE DELIBERATIONS OF THE OTHER JURORS, BUT WHO ON TWO OCCASIONS OVER THE COURSE OF TWO DAYS OF JURY DELIBERATIONS STATED TO THE OTHER JURORS THAT HE FELT THAT THE HOLY SPIRIT HAD TOLD HIM THAT CONGRESSWOMAN BROWN WAS NOT GUILTY AND WHO VOTED TO ACQUIT CONGRESSWOMAN BROWN WHEN THE JURY FIRST DEADLOCKED?

This appeal presents an issue of first impression in this or any circuit. Over defense objection during juror deliberations the trial judge brought in juror number 13 for individual questioning based on nothing more than the report of juror number 8 that juror number 13 had said that a higher power had told him that the defendant was not guilty. After questioning juror number 13 the trial judge found that juror number 13 was *not* wilfully refusing to follow the court's instructions on the law and in fact was properly deliberating with the other jurors and was reviewing in those deliberations the evidence presented in court at trial. However, solely because juror number 13 honestly told the court that he sought prayerful guidance in assessing the truthfulness of the witnesses and the verdict to be reached, and *in his mind* believed he had received such guidance from the Holy Spirit, the trial judge dismissed the juror

over defense objection.

The district court's decision was reversible error.

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After two full days of deliberations, the jury appeared to be deadlocked, with two jurors, juror number 13 and juror number 3 holding out for not guilty. [Doc. 271-5; Doc. 182-5] The jury was ready to report itself deadlocked that evening, but juror number 8 suggested that the jury retire for the evening and return the next morning and then report the deadlock to the court. Instead of doing this, after retiring for the evening, juror number 8 reported to a member of the court staff that she had concerns about juror number 13. This was reported to United States District Court Judge Timothy Corrigan, who reported it to counsel for Congresswoman Brown and the Government. [Doc. 182-5; Doc. 271-5]

Juror number 8 was called before the court the next morning at the beginning of what would have been the third day of deliberations, May 10, 2017, and questioned about her concern about juror number 13. [Doc. 182-5-15] Juror number 8 had prepared a short written note which was provided to the court and marked as Sealed Court Exhibit 1 for this hearing. [Doc. 182-22] The note stated:

> 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 law of the United States court. Other member of the Jury share my concern.

The following dialogue then took place with juror number 8:

THE COURT: All right. Counsel, we're having copies made, but -- but let me -- so, ma'am, let me just ask you this before -- before we -- before I -- what you wrote in the letter, is that the sum and substance of what the issue is that you wanted to bring to our attention?

JUROR: Yes. It was -- I was just concerned about those comments.

THE COURT: Are you -- and when in point of time were those comments made? When were those comments made?

JUROR: The first one was when we first went into deliberation.

THE COURT: Okay.

JUROR: And the second one, shortly after, maybe within a few hours after.

THE COURT: Has this juror expressed that view again?

JUROR: No, sir.

THE COURT: To your observation, has that juror been deliberating?

JUROR: Yes.

THE COURT: Is there anything about the situation as it stands right now that's interfering with your ability to

deliberate in the way that the court has directed in the instructions?

JUROR: No, sir. Not at all. I was more concerned that it was going to interfere in his ability to do that.
. . .

THE COURT: Okay. Ma'am, you said that this comment was made twice. Was the comment similar both times?

JUROR: Yes. And it was -- yes.

THE COURT: Okay. All right. And when was the -- the first comment you said was shortly after deliberations began; is that correct?

JUROR: The first comment is basically right when deliberation began.

THE COURT: And then when in point of time was the second comment?

JUROR: That same day, just maybe a couple of hours after.

THE COURT: And has that comment -- and I think I've asked you this. But has this juror repeated that comment or anything similar to that since then?

JUROR: No, sir, but other jurors have.

THE COURT: I don't know what you mean by that.

JUROR: Some of the jurors are concerned that that's affecting his -- his decision.

THE COURT: Okay.

[Doc. 182-23-25]

When asked for response of counsel the Government promptly called for the removal of the juror who believed Congresswoman Brown was not guilty even before juror number 13 was ever questioned. [Doc. 182-30]

The defense took the position that based on what was before the court there was no indication that juror number 13 was not fulfilling his duties - he was deliberating and not interfering with the deliberations of the other jurors - and that there was nothing further that needed to be done. [Doc. 182-30]

> I think based on the limited information that we have right now, I don't see that there is any indication that this juror is not fulfilling his responsibilities for deliberating. . . . [M]y reading of the cases is, unless there is some evidence that the juror is going to disregard the instructions of the court and is going to abide by some other rules or consider things outside of the evidence introduced in the court, I don't see that there's a basis, really, for us to move beyond what we have at this point.

[Doc. 182-30-31]

Despite the defense objection, the court decided to inquire of juror number 13. Juror number 13 was brought in and asked if he considered himself to be "following the court's instructions, in terms of the law and how you go about what you're doing, free from any influence of religion[1] or political or moral beliefs?" Juror number 13

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[1] There is no requirement in the law, despite the district court's question, that

told the district court "We [the jury] have been going over all the individual numbers, as far as - - " [then the district court interrupted and said it did not want to hear that and the juror continued] "I've been following - - - I've been following and listening to what has been presented and making a determination from that, as to what I think and believe."

The district court told the juror "Okay. That's fine. So let me get a little more specific with you. Have you expressed to any of your fellow jurors any religious sentiment, to the effect that a higher being is telling you how - - - is guiding you on these - - - on these decisions, or that you are trusting in your religion to - - - to base your decisions on?"

Juror number 13 answered "Absolutely. I told them that in all of this, in listening to all the information, taking it all down, I listen for the truth, and I know the truth when the truth is spoken. So I expressed that to the, and how I came to that conclusion."

The district court asked "Okay. And in doing so, have you invoked a higher power or a higher being? I mean, have you used those terms to them in expressing yourself?"

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a juror be free from any religious influence in deciding a verdict. This was a fundamental foundational error in the district court's reasoning.

Juror number 13 answered "Absolutely. I told - - - I told them that - - - that I prayed about this. I have looked at the information, and that I received information as to what I was told to do in relation to what I heard here today - - of this past two weeks."

The district court then said "Sure. When you say you received information, from what source? I mean, are you saying you received information from - - -" and the juror replied "My Father in Heaven." There then followed the following colloquy:

> THE COURT: Okay. Is it a fair statement -- I don't want to put words in your mouth. But are you saying that you have prayed about this and that you have received guidance from the Father in Heaven about how you should proceed?
>
> JUROR: Since we've been here, sir.
>
> THE COURT: Do you view that in any way -- as you know, when I instructed you, I, as I do for -- for all juries -- you had told Judge Klindt that you had no religious or any -- you did not have any religious or moral beliefs that would preclude you from serving as a fair and impartial juror, nor did you have any religious or moral beliefs that would preclude you from sitting in judgment of another person. So you told Judge Klindt that. And then you also -- of course, you heard my instruction, where you have to base your decision only on the evidence presented during the trial and follow the law as I explained it. Do you feel that you have been doing that?
>
> JUROR: Yes, sir, I do.
>
> THE COURT: Do you feel that there is any inconsistency in the prayer

> that you've had or the guidance you're receiving and your duty to base your decision on the evidence and the law?
>
> JUROR: You said a few -- you said a few things. Repeat, please.
>
> THE COURT: Do you feel that there's any religious tension, or is your religion and your obvious sincere religious beliefs -- do you believe it at all to be interfering with or impeding your ability to base your decision solely on the evidence in the case and following the law that I've explained to you?
>
> JUROR: No, sir. I followed all the things that you presented. My religious beliefs are going by the testimonies of people given here, which I believe that's what we're supposed to do, and then render a decision on those testimonies, and the evidence presented in the room.

[Doc. 182-39-42]

Based on this testimony the Government again asserted that the juror had to be dismissed. The Government boldly stated "This is a juror who is guided by what he believes a deity[2] told him to do . . . At no point is that part of this court process or

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[2] This is not "a deity," this is God, our Creator. Congress has adopted the pledge of allegiance in which we recite: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4. But have our courts now become so politically correct that we cannot acknowledge the source of our rights and liberties? When the Constitutional Convention was at a seeming impasse, Benjamin Franklin gave this speech June 28, 1787:

> In this situation of this Assembly, groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our

deliberative process whatsoever." [Doc. 182-43-44]

The defense was equally clear and concise:

> understandings? In the beginning of the Contest with G. Britain, when we were sensible of danger we had daily prayer in this room for the divine protection.-Our prayers, Sir, were heard, & they were graciously answered. All of us who were engaged in the struggle must have observed frequent instances of a superintending providence in our favor. To that kind providence we owe this happy opportunity of consulting in peace on the means of establishing our future national felicity. And have we now forgotten that powerful friend? or do we imagine that we no longer need his assistance?
>
> I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth that God Governs in the affairs of men. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, Sir, in the sacred writings, that "except the Lord build the House they labour in vain that build it." I firmly believe this; and I also believe that without his concurring aid we shall succeed in this political building no better, than the Builders of Babel: We shall be divided by our little partial local interests; our projects will be confounded, and we ourselves shall become a reproach and bye word down to future ages. And what is worse, mankind may hereafter from this unfortunate instance, despair of establishing Governments by Human wisdom and leave it to chance, war and conquest.
>
> I therefore beg leave to move-that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that Service.

Notes of Debates in the Federal Convention of 1787, Introduction, Bicentennial Edition, June 28, 1787, Reported by James Madison, With an introduction by Adrienne Koch. W. W. Norton & Company, N Y. London. (1987) pp. 209-210.

> I think what -- the most important thing the juror said was that he was following the court's instructions. I can understand the concern that the court would have here with the statement about receiving guidance. I did not hear this juror say, however, that he was going to disregard the court's instructions, that he was receiving evidence, or a directive what to do. I think a fair reading here -- what may have happened is that, as a person of deep faith, and perhaps like many people with deep faith, has prayed for clarity, the ability to be fair, the ability to be calm, but I did not hear this juror say, I came in with a view given to me by God, and I'm going to go with that, I'm going to follow God no matter what. My concern would be that -- and I'm not in any way, shape, form, or fashion suggesting that the court would do this. I want to be clear when I say this. But I think someone who has a deeply held religious belief of faith sometimes expresses a request for guidance from God to do the right thing under the rules, whatever they may be. That's why we have witnesses who are sworn to tell the truth. That's why jurors take an oath to fulfill their duty. And so I think it would be an easy case if you had someone come in here and say, Yes, the evidence is overwhelming for one particular verdict, but, because God gave me a duty and a task beforehand, I'm going to do that regardless of what the evidence shows. I don't think a fair reading of what this juror said shows that, and that you have someone whose faith guides him when he has to make certain decisions. He has said the most important, I think, relevant thing, which is that his decision is based upon what he has heard, the testimony, and the deliberations.

[Doc. 182-44-45]

At that point the district court proposed bringing juror number 13 back in and asking two more questions, (1) did he make a statement to the other jurors that a higher being told him Corrine Brown was not guilty, and (2) "I think I would also want to ask this juror whether he's been following the court's instructions about fully considering the evidence with the other jurors and discussing the case, to try to reach

an agreement to see if he is -- what he says about that. As Mr. Duva said, it's easy for him to say yes. But I still would like to inquire about it." [Doc. 182-46-47]

The *Government objected to asking juror number 13 the second question*. [Doc. 182-47] The court was persuaded by the Government *to not even ask the juror if he was following the court's instructions*. No inquiry was made on the only matter that could possible be legally relevant, much less no record was made to establish by any standard, much less a beyond a reasonable doubt standard, that this juror was *engaging in deliberate misconduct*, which is what the law requires before a juror may be dismissed.

The district court itself found that the juror was being sincere and earnest "and likely believed that he was trying to follow the court's instructions." [Doc. 200-13] This very finding invalidates the district court's disqualification of the juror. This finding is at odds with the requirement that the juror engage in deliberate misconduct before he may be disqualified. Even if, and we do not concede this point, but even if a juror could be disqualified for refusing a court's express instruction to disregard any guidance the juror felt he or she received in answer to prayer, before such a juror could be legally disqualified the court would have to instruct the juror that he or she must disregard such prayer guidance in reaching his or her verdict and then only if the juror refused to obey such an instruction would there be a basis for a finding of

deliberate misconduct. But on this record, even if the Government's view that God has no place in the jury room were sustainable under the First Amendment, the district court failed to make the inquiry or instruct the juror as required so as to make a record upon which such a determination could be made. And the court's failure to do so was done at the insistence of the Government, who objected to the court asking the juror any question about his willingness to follow the court's instructions.

The defense had objected to any questioning of the juror. The defense was correct to object. Juror number 8's information that juror number 13 had stated that a higher power told him the defendant was not guilty, was supplemented by her testimony that juror number 13 was participating in the deliberations and not interfering with the deliberations of the other jurors and that he had remarked about the guidance of the higher power only two times over two full days of deliberations. This was an insufficient basis to question juror number 13.[3]

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[3] The Third Circuit set forth the appropriate standard for determining the propriety of juror interviews:

> We have recently had occasion to set forth the applicable legal standard governing the district courts' latitude to question jurors during deliberations about allegations of misconduct. In *Boone*, we recognized that "[i]t is beyond question that the secrecy of deliberations is critical to the success of the jury system." Id. at 329. At the same time, we emphasized that "[i]t is also manifest, however, that a juror who refuses to deliberate or who commits jury nullification violates the sworn jury

Second, the inquiry that the district court then undertook clearly violated Rule 606(b) of the Federal Rules of Evidence, in that the inquiry went directly to the mental processes of juror number 13: how he was arriving at his opinion that the defendant was not guilty.

Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

The *only exception* the Supreme Court has permitted to this rule of no inquiry of a juror about the mental processes of a juror is for racial bias. *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017). Even this narrow *Constitutionally based* racial bias

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> oath and prevents the jury from fulfilling its constitutional role." Id. Attempting to reconcile these disparate values, we held that "where substantial evidence of jury misconduct -- including credible allegations of jury nullification or of a refusal to deliberate -- arises during deliberations, a district court may, within its sound discretion, investigate the allegations through juror questioning or other appropriate means." Id.

United States v. Kemp, 500 F.3d 257, 301 (3rd Cir. 2007).

exception drew strong disagreement and written dissent from Justices Thomas, Alito and Chief Justice Roberts.

> The Sixth Amendment's protection of the right, "[i]n all criminal prosecutions," to a "trial, by an impartial jury," is limited to the protections that existed at common law when the Amendment was ratified. See, e.g., *Apprendi v. New Jersey*, 530 U. S. 466, 500, 120 S. Ct. 2348, 147 L. Ed. 2d 435, and n. 1 (2000) (Thomas, J., concurring); 3 J. Story, Commentaries on the Constitution of the United States §1773, pp. 652-653 (1833) (Story) (explaining that "the trial by jury in criminal cases" protected by the Constitution is the same "great privilege" that was "a part of that admirable common law" of England); *cf*. 5 St. G. Tucker, Blackstone's Commentaries 349, n. 2 (1803). It is therefore "entirely proper to look to the common law" to ascertain whether the Sixth Amendment requires the result the Court today reaches. *Apprendi*, supra, at 500, n. 1, 120 S. Ct. 2348, 147 L. Ed. 2d 435.The Sixth Amendment's specific guarantee of impartiality incorporates the common-law understanding of that term. See, e.g., 3 W. Blackstone, Commentaries on the Laws of England 365 (1769) (Blackstone) (describing English trials as "impartially just" because of their "caution against all partiality and bias" in the jury). The common law required a juror to have "freedome of mind" and to be "indifferent as hee stands unsworne." 1 E. Coke, First Part of the Institutes of the Laws of England §234, p. 155a (16th ed. 1809); accord, 3 M. Bacon, A New Abridgment of the Law 258 (3d ed. 1768); cf. T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 319 (1868) ("The jury must be indifferent between the prisoner and the commonwealth"). Impartial jurors could "have no interest of their own affected, and no personal bias, or pre-possession, in favor [of] or against either party." *Pettis v. Warren*, 1 Kirby 426, 427 (Conn. Super. 1788).
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> II
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> The common-law right to a jury trial did not, however, guarantee a defendant the right to impeach a jury verdict with juror testimony about

juror misconduct, including "a principal species of [juror] misbehaviour"—"notorious partiality." 3 Blackstone 388. Although partiality was a ground for setting aside a jury verdict, ibid., the English common-law rule at the time the Sixth Amendment was ratified did not allow jurors to supply evidence of that misconduct. In 1770, Lord Mansfield refused to receive a juror's affidavit to impeach a verdict, declaring that such an affidavit "can't be read." *Rex v. Almon*, 5 Burr. 2687, 98 Eng. Rep. 411 (K. B.). And in 1785, Lord Mansfield solidified the doctrine, holding that "[t]he Court [could not] receive such an affidavit from any of the jurymen" to prove that the jury had cast lots to reach a verdict. *Vaise v. Delaval*, 1 T. R. 11, 99 Eng. Rep. 944 (K. B.). At the time of the founding, the States took mixed approaches to this issue. See *Cluggage v. Swan*, 4 Binn. 150, 156 (Pa. 1811) (opinion of Yeates, J.) ("The opinions of American judges . . . have greatly differed on the point in question"); *Bishop v. Georgia*, 9 Ga. 121, 126 (1850) (describing the common law in 1776 on this question as "in a transition state"). Many States followed Lord Mansfield's no-impeachment rule and refused to receive juror affidavits. See, e.g., *Brewster v. Thompson*, 1 N. J. L. 32 (1790) (per curiam); *Robbins v. Windover*, 2 Tyl. 11, 14 (Vt. 1802); *Taylor v. Giger*, 3 Ky. 586, 597-598 (1808); *Price v. McIlvain*, 2 Tread. 503, 504 (S. C. 1815); *Tyler v. Stevens*, 4 N. H. 116, 117 (1827); 1 Z. Swift, A Digest of the Laws of the State of Connecticut 775 (1822) ("In England, and in the courts of the United States, jurors are not permitted to be witnesses respecting the misconduct of the jury . . . and this is, most unquestionably, the correct principle"). Some States, however, permitted juror affidavits about juror misconduct. See, e.g., *Crawford v. State*, 10 Tenn. 60, 68 (1821); *Cochran v. Street*, 1 Va. 79, 81, 1 Wash. 79 (1792). And others initially permitted such evidence but quickly reversed course. Compare, e.g., *Smith v. Cheetham*, 3 Cai. R. 57, 59-60 (N. Y. 1805) (opinion of Livingston, J.) (permitting juror testimony), with *Dana v. Tucker*, 4 Johns. 487, 488-489 (N. Y. 1809) (per curiam) (overturning *Cheetham*); compare also Bradley's *Bradley's Lessee v. Bradley*, 4 U.S. 112, 4 Dall. 112, 1 L. Ed. 763 (Pa. 1792) (permitting juror affidavits), with, e.g., *Cluggage*, *supra*, at 156-158 (opinion of Yeates, J.) (explaining that *Bradley* was incorrectly reported and rejecting affidavits); compare also *Talmadge v. Northrop*, 1 Root 522 (Conn. 1793) (admitting juror testimony), with *State v. Freeman*, 5

Conn. 348, 350-352 (1824) ("The opinion of almost the whole legal world is adverse to the reception of the testimony in question; and, in my opinion, on invincible foundations").By the time the Fourteenth Amendment was ratified, Lord Mansfield's no-impeachment rule had become firmly entrenched in American law. See Lettow, New Trial for Verdict Against Law: Judge-Jury Relations in Early-Nineteenth Century America, 71 Notre Dame L. Rev. 505, 536 (1996) ("[O]pponents of juror affidavits had largely won out by the middle of the century"); 8 J. Wigmore, Evidence in Trials at Common Law §2352, p. 697 (J. McNaughton rev. 1961) (Wigmore) (Lord Mansfield's rule "came to receive in the United States an adherence almost unquestioned"); J. Proffatt, A Treatise on Trial by Jury §408, p. 467 (1877) ("It is a well established rule of law that no affidavit shall be received from a juror to impeach his verdict"). The vast majority of States adopted the no-impeachment rule as a matter of common law. See, e.g., *Bull v. Commonwealth*, 55 Va. 613, 627-628 (1857) ("[T]he practice appears to be now generally settled, to reject the testimony of jurors when offered to impeach their verdict. The cases on the subject are too numerous to be cited"); *Tucker v. Town Council of South Kingstown*, 5 R. I. 558, 560 (1859) (collecting cases); *State v. Coupenhaver*, 39 Mo. 430 (1867) ("The law is well settled that a traverse juror cannot be a witness to prove misbehavior in the jury in regard to their verdict"); *Peck v. Brewer*, 48 Ill. 54, 63 (1868) ("So far back as . . . 1823, the doctrine was held that the affidavits of jurors cannot be heard to impeach their verdict"); *Heffron v. Gallupe*, 55 Me. 563, 566 (1868) (ruling inadmissible "depositions of . . . jurors as to what transpired in the jury room"); *Withers v. Fiscus*, 40 Ind. 131, 131-132 (1872) ("In the United States it seems to be settled, notwithstanding a few adjudications to the contrary . . ., that such affidavits cannot be received"). The Court today acknowledges that the States "adopted the Mansfield rule as a matter of common law," ante, at __, 197 L. Ed. 2d, at 118, but ascribes no significance to that fact. I would hold that it is dispositive. Our common-law history does not establish that—in either 1791 (when the Sixth Amendment was ratified) or 1868 (when the Fourteenth Amendment was ratified)—a defendant had the right to impeach a verdict with juror testimony of juror misconduct. In fact, it strongly suggests that such evidence was prohibited. In the absence of a

> definitive common-law tradition permitting impeachment by juror testimony, we have no basis to invoke a constitutional provision that merely "follow[s] out the established course of the common law in all trials for crimes," 3 Story §1785, at 662, to overturn Colorado's decision to preserve the no-impeachment rule, cf. *Boumediene v. Bush*, 553 U. S. 723, 832-833, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008) (Scalia, J., dissenting).

Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 871-874 (2017) (Thomas, J. *dissenting*).

Justice Alito in a dissent joined by Chief Justice Roberts and Justice Thomas wrote:

> Our legal system has many rules that restrict the admission of evidence of statements made under circumstances in which confidentiality is thought to be essential. Statements made to an attorney in obtaining legal advice, statements to a treating physician, and statements made to a spouse or member of the clergy are familiar examples. See *Trammel v. United States*, 445 U. S. 40, 51, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980). Even if a criminal defendant whose constitutional rights are at stake has a critical need to obtain and introduce evidence of such statements, long-established rules stand in the way. The goal of avoiding interference with confidential communications of great value has long been thought to justify the loss of important evidence and the effect on our justice system that this loss entails.
>
> The present case concerns a rule like those just mentioned, namely, the age-old rule against attempting to overturn or "impeach" a jury's verdict by offering statements made by jurors during the course of deliberations. For centuries, it has been the judgment of experienced judges, trial attorneys, scholars, and lawmakers that allowing jurors to testify after a trial about what took place in the jury room would undermine the system of trial by jury that is integral to our legal system.
>
> Juries occupy a unique place in our justice system. The other participants in a trial—the presiding judge, the attorneys, the

> witnesses—function in an arena governed by strict rules of law. Their every word is recorded and may be closely scrutinized for missteps.
>
> When jurors retire to deliberate, however, they enter a space that is not regulated in the same way. Jurors are ordinary people. They are expected to speak, debate, argue, and make decisions the way ordinary people do in their daily lives. Our Constitution places great value on this way of thinking, speaking, and deciding. The jury trial right protects parties in court cases from being judged by a special class of trained professionals who do not speak the language of ordinary people and may not understand or appreciate the way ordinary people live their lives. To protect that right, the door to the jury room has been locked, and the confidentiality of jury deliberations has been closely guarded.

Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 874-75 (2017).[4]

The Government has argued without any citation of authority that Fed. R. Evid. 606(b) does not apply to a juror inquiry as was done here. The district court itself appeared to understand that it could not inquire into the jury deliberations:

> JUROR: We have been going over all the individual numbers, as far as --
>
> THE COURT: Yeah, I don't want to hear anything about the deliberations.
>
> JUROR: Yes, sir.

[Doc. 182-39-40]

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[4] Although the arguments and supporting legal history regarding the "no inquiry" rule were presented in dissents in *Pena-Rodriguez*, they represent the still controlling rule *as it applies to every matter other than inquiry into the racial bias of a juror*.

There is no reason in policy or law to not apply Rule 606(b) to an inquiry of a juror conducted during the course of deliberations. In general all of the same policy reasons which stand behind the rule apply with equal force to an inquiry during deliberations as one conducted after deliberations. The timing of the inquiry does not affect the policy or the rule. Our mother courts in England follow the rule that judges may not inquire of jurors concerning their deliberations whether before or after the verdict. *See Jury Irregularities in the Crown Court: a Protocol issued by the President of the Queen's Bench Division*. President of the Queen's Bench, Nov. 2012.[5]

That the matter inquired into was a matter of mental process and not an external influence - the former inquiry being prohibited, the latter permitted - is clear as argued above. The Holy Spirit is not an "external influence" as understood in the law relating to challenging jury deliberations.

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[5] "The judge's inquiries should be directed towards ascertaining whether the juror(s) can remain faithful to their oath or affirmation; the trial judge should not inquire into the deliberations of the jury. The inquiry should only be to ascertain what has occurred and what steps should be taken next. It may be appropriate for the judge to ask the juror(s) whether they feel able to continue and remain faithful to their oath or affirmation." Protocol , Rule 8. Accessed at:

https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Protocols/jury_irregularities_protocol.pdf

> We have defined "extraneous information" to include "matters considered by the jury but not admitted into evidence." *United States v. Bassler*, 651 F.2d 600, 602 (8th Cir. 1981). Upon first blush, it would seem the foreperson's comments [the foreperson had focused on her own daughter's past experience with a serious traffic accident, rather than the evidence presented at trial] fall into this category. However, we have distinguished juror testimony regarding "objective events or incidents . . . from juror testimony regarding possible subjective prejudices or improper motives of individual jurors, which numerous courts and commentators have held to be within the rule rather than the exception of 606(b)." *United States v. Krall*, 835 F.2d 711, 716 (8th Cir. 1987). Jurors' personal experiences do not constitute extraneous information; it is unavoidable they will bring such innate experiences into the jury room. Rather, extraneous information includes objective events such as "publicity and extra-record evidence reaching the jury room, and communication or contact between jurors and litigants, the court, or other third parties." Id. (citing *Gov't of the Virgin Islands v. Gereau*, 523 F.2d 140, 149, 12 V.I. 212 (3d Cir. 1975)). As we have previously instructed, "Rule 606(b) establishes very strict requirements for accepting testimony from jurors about their deliberations, and trial courts should be hesitant to accept such testimony without strict compliance with the rule." *Banghart v. Origoverken, A.B.*, 49 F.3d 1302, 1306 n.6 (8th Cir. 1995). In this case, the evidence excluded by the district court concerns an alleged bias held by a jury member. It does not concern extraneous information improperly brought before the jury. Thus, the exception to the rule does not apply, and we cannot say the district court abused its discretion.

Warger v. Shauers, 721 F.3d 606, 610-11 (8th Cir. 2013), *affirmed*, *Warger v. Shauers*, 135 S. Ct. 521 (2014).

> The Notes of the Advisory Committee on Rules explain:
>
> The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. See *Grenz*

v. Werre, 129 N.W.2d 681 (N.D. 1964). The authorities are in virtually complete accord in excluding the evidence. Fryer, Note on Disqualification of Witnesses, Selected Writings on Evidence and Trial 345, 347 (Fryer ed. 1957); Maguire, Weinstein, et al., Cases on Evidence 887 (5th ed. 1965); 8 Wigmore § 2340 (McNaughton Rev. 1961). As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. 8 Wigmore § 2354 (McNaughton Rev. 1961). However, the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation. *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892).

Under the federal decisions the central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. Thus testimony or affidavits of jurors have been held incompetent to show a compromise verdict, *Hyde v. United States*, 225 U.S. 347, 382 (1912); a quotient verdict, *McDonald v. Piess*, 238 U.S. 264 (1915); speculation as to insurance coverage, *Holden v. Porter*, 495 F.2d 878 (10th Cir.1969), *Farmers Coop. Elev. Ass'n v. Strand*, 382 F.2d 224, 230 (8th Cir. 1967), cert. denied 389 U.S. 1014; misinterpretations of instructions, *Farmers Coop. Elev. Ass'n v. Strand, supra*; mistake in returning verdict, *United States v. Chereton*, 309 F.2d 197 (6th Cir. 1962); interpretation of guilty plea by one defendant as implicating others, *United States v. Crosby*, 294 F.2d 928, 949 (2d Cir. 1961). The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. Thus a juror is recognized

> as competent to testify to statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room, *Mattox v. UnitedStates*, 146 U.S. 140 (1892). See also *Parker v. Gladden*, 385 U.S. 363 (1966).

Fed. R. Evid. R. 606, Notes of Advisory Committee.

Clearly the questions asked by the court of juror number 13 and answers given related only to mental processes of the juror which were plainly out of bounds for the court to inquire. It was therefore improper and an abuse of discretion for the district court to rely upon this information to discharge the juror.

The district court mistakenly viewed its inquiry as whether an "outside source" was affecting the deliberations of juror number 13. The law does not use the concept "outside source," but refers to extrajudicial information or external influences. External influences, as understood in the law, are just that, *external* influences. A bribe (*Remmer v. United States*)[6] is an external influence, a bailiff's comment that the defendant has a bad record and should be convicted (*Parker v. Gladden*),[7] is an external influence, deliberating jurors associating with key prosecution witnesses

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[6] *Remmer v. United States*, 347 U.S. 227 (1954).

[7] *Parker v. Gladden*, 385 U.S. 363 (1966).

during sequestration of a death penalty jury (*Turner v. Louisiana*),[8] are all examples of external influences. But the *mental process* of juror number 13 is not an external influence, and that mental process should not have been inquired into. However, once inquired into and determined that the higher power the juror had spoken of (only twice, over two full days of deliberations, without in any way interfering with the deliberations of the jury) was *not* an external influence as understood by the law, the inquiry should have stopped and that should have been the end of the matter.

The only case that counsel has been able to find to address the propriety of a juror being guided by a response to prayer is *State v. De Mille*, 756 P.2d 81 (Utah 1988). In *De Mille* the court was presented with a post-verdict challenge to a conviction based on a juror's affidavit that showed that a juror relied upon prayer and the answer to the prayer to decide whether the defendant was guilty or not. The prayer and response at issue were summarized by the Utah Supreme Court as follows:

> DeMille's second basis for arguing that the affidavit should have been admitted is that it shows the jury considered factors other than the evidence presented at trial. Most prominent among the alleged improprieties is one juror's telling others during deliberations that she had prayed for a sign during closing argument as to DeMille's guilt. She claimed to have received a revelation that if defense counsel did not make eye contact with her when he presented his argument, DeMille was guilty -- defense counsel did not make the requisite eye contact.

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[8] *Turner v. Louisiana*, 379 U.S. 466 (1965).

De Mille at 83.

The court denied the challenge reasoning that a juror's prayers and answers to prayers during jury deliberations are not outside influences subject to prohibition:

> Under rule 606(b), our inquiry is limited to determining whether the proffered juror testimony tends to show that "extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Utah R. Evid. 606(b). Defendant argues that when the juror who reported to have received an answer to her prayer communicated that fact to the other jurors, an "outside influence was brought to bear on any juror," therefore making the affidavit admissible. We disagree.
>
> If we were to accept defendant's argument that supposed responses to prayer are within the meaning of the term "outside influence" in rule 606(b), we would implicitly be holding that it is improper for a juror to rely upon prayer, or supposed responses to prayer, during deliberations. Such a conclusion could well infringe upon the religious liberties of the jurors by imposing a religious test for service on a jury. See Utah Const. art. I, § 4. A juror is fit to serve if he or she can impartially weigh the evidence and apply the law to the facts as he or she finds them. *State v. Lafferty*, 749 P.2d 1239 (Utah 1988). Prayer is almost certainly a part of the personal decision-making process of many people, a process that is employed when serving on a jury. There is no necessary inconsistency between proper performance as a juror and reliance on prayer or supposed responses to prayer. So long as a juror is capable of fairly weighing the evidence and applying the law to the facts, one may not challenge that juror's decision on grounds that he or she may have reached it by aid of prayer or supposed responses to prayer. Therefore, we hold that under rule 606(b), prayer and supposed responses to prayer are not included within the meaning of the words "outside influence."

> Testimony that a juror has so acted is not admissible to challenge a verdict; the trial judge properly refused to consider the proffered affidavit.

De Mille at 84 (footnote omitted).[9]

The district court in Brown's case found that juror number 13 was using "external forces" in his decision making "in a way that is inconsistent with his jury service and his oath." [Doc. 200-14] But neither the Government in any of its pleadings nor the district court cited any authority whatsoever for this legal conclusion. Indeed the conclusion is so plainly contrary to the entire history of this great Republic that one would not expect to find any authority. The question is novel because the answer is so obvious that there is no authority on it.

It is well settled that if the court misapplies the law then it has abused its discretion. "It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990)." cited in *Schlup v. Delo*, 513 U.S. 298, 333, 115 S. Ct. 851, 870 (1995). The law in question that the district court

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[9] A juror may seek divine guidance through prayer in reaching a decision, and courts have so recognized. See *State v. Rocco*, 119 Ariz. 27, 579 P.2d 65 (Ariz. Ct. App. 1978); *State v. Graham*, 422 So. 2d 123 (La. 1982), appeal dismissed, 461 U.S. 950, 77 L. Ed. 2d 1309, 103 S. Ct. 2419 (1983) (cited in *De Mille*, Stewart, J., *dissenting*, at p. 85.

misapplied is the question whether a juror's mental process that he believes God or the Holy Spirit has given him guidance is by itself standing alone sufficient to discharge the juror. That is the legal question that the lower court got wrong, therefore paradigmatically abusing its discretion in removing this juror.[10]

No case in the history of American jurisprudence has ever held that a juror's personal prayer life before or during deliberations could be the basis of a finding of good cause to dismiss a juror. The district court itself acknowledged that it was certainly permissible for the juror to pray to seek guidance or inspiration to try to come to a proper decision - - and that is exactly what this juror had done. The juror did nothing improper and the juror's internal mental belief that the Holy Spirit had offered him guidance in understanding the evidence and truthfulness of the witnesses - witnesses, all of whom, by the way, had taken an oath "so help me God" to tell the truth - was not in any way a disqualifying mental process much less a disqualifying external influence.[11]

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[10] There was no fact finding as that term is applied when determining on appeal the deference to be given to a lower court's order. The "facts" here were only legal conclusions which the lower court inferred from its own view of the law.

[11] The oath administered to all witnesses in this case went as follows: "Do you solemnly swear that the testimony you are about to give before this court will be the truth, the whole truth, and nothing but the truth, so help you God?"

Indeed, before being permitted to serve as a juror in this case, juror number 13 and all other jurors had to swear to seek God's help to perform their duty properly:

> COURTROOM DEPUTY: Do each of you solemnly swear that you will well and truly try the case now before this court and render a true verdict, according to the law, evidence, and instructions of this court, so help you God?

[Doc. 171, pp. 44-45]

To make a finding - which the district court dressed up as a fact finding - that the Holy Spirit was an "outside source" was wrong in both law and theology. Wrong in law because as noted above, the external influences that the Supreme Court has barred from jury deliberations, finding them presumptively prejudicial to the defendant, are actual, real, physical phenomena of this material world - bribery or similar obstructive conduct or contact - and wrong as a matter of theology as well. Anyone familiar with the Bible would know that the Holy Spirit is an *indwelling* spirit, not an external force.[12]

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[12] 1 Corinthians 3:16, "Do you not know that you are a temple of God and that the Spirit of God dwells in you?" 1 Corinthians 6:19, "Or do you not know that your body is a temple of the Holy Spirit who is in you, whom you have from God, and that you are not your own?" 2 Corinthians 6:16, "Or what agreement has the temple of God with idols? For we are the temple of the living God; just as God said, "I will dwell in them and walk among them; and I will be their God, and they shall be my people." Ezekiel 36:27, "I will put My Spirit within you and cause you to walk in My

But this appeal will not and should not be decided on theological grounds - to do so would be forbidden by the First Amendment - and that is why it was improper for the district court to dismiss juror number 13 on the basis of a "fact finding" that is theological in nature, that when juror number 13 sought the very guidance and

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statutes, and you will be careful to observe My ordinances." Isaiah 63:11 "Then His people remembered the days of old, of Moses Where is He who brought them up out of the sea with the shepherds of His flock? Where is He who put His Holy Spirit in the midst of them," 2 Timothy 1:14, "Guard, through the Holy Spirit who dwells in us, the treasure which has been entrusted to you." Acts 6:5, "The statement found approval with the whole congregation; and they chose Stephen, a man full of faith and of the Holy Spirit." Ephesians 5:18, "And do not get drunk with wine, for that is dissipation, but be filled with the Spirit," Romans 8:11, "But if the Spirit of Him who raised Jesus from the dead dwells in you, He who raised Christ Jesus from the dead will also give life to your mortal bodies through His Spirit who dwells in you." Galatians 4:6, "Because you are sons, God has sent forth the Spirit of His Son into our hearts, crying, "Abba! Father!""

Judaism of course is a monotheistic religion and does not recognize the Christian division of the Trinity, nevertheless Judaism too is familiar with the term Holy Spirit, transliterated from the Hebrew as *ruach hakodesh*. and it is discussed in the Babylonian Talmud, Makkot 23b. In the book of Joel we find:

28 And it shall come to pass afterward, that I will pour out my spirit upon all flesh; and your sons and your daughters shall prophesy, your old men shall dream dreams, your young men shall see visions: 29 And also upon the servants and upon the handmaids in those days will I pour out my spirit. 30 And I will shew wonders in the heavens and in the earth, blood, and fire, and pillars of smoke. 31 The sun shall be turned into darkness, and the moon into blood, before the great and terrible day of the Lord come. 32 And it shall come to pass, that whosoever shall call on the name of the Lord shall be delivered: for in mount Zion and in Jerusalem shall be deliverance, as the Lord hath said, and in the remnant whom the Lord shall call.

Joel 2:28-32

assistance that the court rightly requires all witnesses and jurors to assent to, that the witness testify truthfully *with the help of God* and that the juror do his duty as a juror *with the help of God*, that such juror's personal belief that God or the Holy Spirit has indeed helped him reach a conclusion simply is not the sort of improper external influence that taints a jury, is not the sort of external influence that results in any presumption of prejudice, and is not the sort of external influence that constitutes just or good cause under Rule 23, Fed. R. Crim. P., to dismiss the juror. Rather the contrary. Such jurors should be commended for doing their duty as they have sworn to so do.

The district court in disqualifying juror number 13 violated the First Amendment rights of that juror and violated the defendant's right to have a jury empaneled without any Constitutionally invidious discrimination. "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either *proscribed* or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992) (emphasis supplied). The notion that the State cannot coerce religious belief or expression is as old as the Court's first Establishment Clause case, see *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can force nor influence a person . . . to

profess a belief *or disbelief* in any religion." (emphasis added)), and as current as its more recent decisions, see, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 881 (2005) ("This is no time to deny the prudence of understanding the Establishment Clause to require the government to stay neutral on religious belief, which is reserved for the *conscience of the individual*." (emphasis added). In excluding juror number 13 based on his religious beliefs, the district court violated the First Amendment establishment clauses.

Indeed, dismissing the juror based on his sincere religious belief in asking God for guidance in this most important decision infringed on the *juror*'s First Amendment freedom of religion, a Constitutional right which in no way was in tension with the defendant's right to a fair trial under the Sixth Amendment. The dismissal of the juror violated the Religious Freedom Restoration Act of 1993, 42 U.S.C.S. § 2000bb et seq., which prohibits the Government from substantially burdening religious exercise without compelling justification. Although it was the juror's First Amendment right to serve on the jury without disqualification for his religious beliefs or practice which was violated, Congresswoman Brown had a right to a jury that was empaneled without such invidious discrimination. Just as under *Batson v. Kentucky*, 476 U.S. 79 (1986), when the prosecution improperly strikes a juror based on the juror's race, and thereby deprives the juror of his right to serve on

the jury based on a ground that is Constitutionally prohibited, the defendant in the trial has the right to a jury chosen without invidious discrimination, and when the juror is struck in violation of the juror's Constitutionally protected status, the *defendant* receives a new trial.

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This case and its facts are far from any decisional authority cited by the district court or Government in support of the dismissal of the juror.[13] Instead, the authority

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[13] *United States v. Abbell*, 271 F.3d 1286 (11th Cir. 2001) (juror said she did not have to follow the law, the law was only advisory, not binding on the jury), *United States v. Geffrard*, 87 F.3d 448 (11th Cir. 1996) (juror's religious belief prohibited her from judging others; juror insisted that defendant would not be guilty because entrapped, but court had instructed the jury that entrapment was not a defense in this case), *United States v. Godwin*, 765 F.3d 1306 (11th Cir. 2014) (juror did not agree with the law and did not care what the law said), *United States v. Martinez*, 481 Fed. Appx. 604 (11th Cir. 2012) (juror refused to reach verdict because he had not personally witnessed the events and would not follow court's instruction to reach verdict based on evidence presented in court and not just on what juror had personally seen), *United States v. Augustin*, 661 F.3d 1105 (11th Cir. 2011) (all eleven jurors unanimous that dismissed juror refused to deliberate, refused to follow the court's instructions and dismissed juror was evasive when questioned), *United States v. Decoud*, 456 F.3d 996 (9th Cir. 2006) (juror herself sent court note asking to be taken off jury because her religious beliefs prohibited her from judging others), *United States v. Burrous*, 147 F.3d 111 (2nd Cir. 1998) (dismissed juror stated she could not follow the oath because she had to follow the Bible which she understood to prohibit her from judging others), *United States v. Kemp*, 2005 U.S. Dist. LEXIS 7560 (E.D.Pa. 2005), and on appeal *United States v. Kemp*, 500 F.3d 257 (3rd Cir. 2007) (juror had made statements that she was unlikely to believe FBI agent witnesses because of their occupation and expressed bias against Government and FBI). An example of a true external influence or outside source as the district court referred to

relied upon mandates the exact opposite conclusion from that reached by the district court. The district court found that the juror was *not wilfully disobeying the court's instructions*, and was being sincere in his answers to the court's questions. The juror assured the court that he was following the court's instructions, was considering the evidence and going through the charges. Given this record, the district court's

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the issue, would have been the introduction of a Bible into the jury room and the juror or jurors taking instruction from Bible texts contrary to the law as instructed by the court. This problem comes up from time to time in death penalty habeas cases, where one or more jurors may refer to the Biblical injunction of an eye for an eye or in support of the death penalty for murder. Such cases present a prohibited external influence but even there, courts typically find the error harmless. *See e.g., Oliver v. Quarterman*, 541 F.3d 329 (5th Cir. 2008) and *Robinson v. Polk*, 444 F.3d 225 (4th Cir. 2006), and *McNair v. Campbell*, 416 F.3d 1291, 1301 (11th Cir. 2005). Judge Anderson, writing for this Court in *McNair* found no reversible error:

> McNair's next claimed basis for habeas relief is that jurors improperly considered extraneous evidence during their deliberations in the guilt phase of his trial. Evidence shows that Les Davis, a Christian minister who served as the foreman of McNair's jury, brought a Bible into the jury room during deliberations, read aloud from it, and led the other jurors in prayer. McNair now claims that the Bible, which had not been admitted into the record, constituted extraneous evidence and that the jurors' consideration of it violated his Sixth Amendment right to a fair trial. The Alabama Court of Criminal Appeals, applying state law, held that McNair was not entitled to relief. *McNair*, 706 So. 2d at 835-38. The district court also denied relief on this claim.

In the instant case, juror number 13 did not bring a Bible into the jury room, did not quote from the Bible or in any way purport to reach a verdict based on any Biblical injunction or law.

conclusion that the juror's belief that the Holy Spirit was offering him guidance in no way was in conflict with the juror's duty to base his verdict on the evidence and law as instructed by the court.

The district court itself cited *United States v. Thomas*, 116 F.3d 606 (2nd Cir. 1997) (albeit for a different proposition), which held that before a juror may be dismissed, there must be no doubt that the juror is engaging in *deliberate misconduct*. The district court itself found that the juror sincerely believed he was following the court's instructions. Given that, it was error even if the district court's view of the legal effect of the juror's belief in the Holy Spirit was correct (which we do not concede) to dismiss the juror without first putting the juror on notice that he must not rely upon the guidance of the Holy Spirit and if he thereafter, having been instructed to not do so, persisted, he would then be dismissed for his wilful misconduct.

This case is completely unlike the cases relied upon by the district court. For example, in *United States v. Geffrard*, the juror was not seeking divine guidance and relying upon it, instead the juror had *a fixed religious belief that she was not permitted to sit in judgment of others* and because of this religious belief, independent of any evidence and contrary to the court's instruction on the law, was unable to serve as a juror. Independent of her Swedenbourgean religious views, the juror in *Geffrard* insisted on finding the defendant had been entrapped despite the district court

instructing the jurors that entrapment was not an issue in the case. The juror was expressly and unambiguously refusing to follow the law as instructed by the court.

Similarly in *United States v. Abbell* and *United States v. Godwin*, the jurors at issue each expressly refused to follow the law as instructed by the court. In *Abbell* the juror stated that she did not have to follow the law, that the law was only advisory and not binding on the jury. In *Godwin* the juror had repeatedly said that he did not agree with the law (as instructed by the court) and didn't care what the law said. In *Godwin* all eleven jurors under oath unanimously testified to the statements of the dismissed juror. Cases of wilful refusal to follow the court's instructions on the law - jury nullification cases - are common, but are not what we have in the instant appeal.

Indeed all of the evidence in the instant appeal supports the conclusion that this juror accepted the law as given by the court and followed the court's instructions. The district court's "fact finding" that the juror was not doing so despite his uncontradicted assurances (assurances supported, not contradicted by the only evidence taken from another juror, juror number 8), was based on nothing more in fact than an unsupported *legal* conclusion that the district court inferred from the juror's candid disclosure that he believed he had received guidance from the Holy Spirit. The district court found the two statements - (1) that the juror was abiding by the court's instructions and deciding the case solely on the evidence presented in

court, and (2) the statement that the juror had received guidance from the Holy Spirit, to be in "tension" and to necessarily imply a contradiction. There is no necessary contradiction between the two statements, but if there were, it would be a legal, not a factual conclusion. This is not the sort of "fact finding" that comes clothed with any deference of correctness, nor is this Court bound to accept it, nor is it subject to clear error review, because this is simply an inference based on circular reasoning. The circular reasoning is that the conclusion only follows if one assumes the answer.

The evidence in this case was uncontradicted that juror number 13 was in fact following his oath as a juror, deliberating with the other jurors, reviewing the charges, considering the evidence presented in the courtroom at trial and nothing else. As his oath adjured him to do, he sought the help of God and felt that he received such help in understanding the truth of the witness testimony and the truth of the charges against the defendant. His conclusion, reached with the help of prayer and in his mind, the help of the Holy Spirit, was that the defendant was not guilty. On this record one must conclude that there is a more than reasonable possibility that his

verdict was based on his view of the sufficiency of the evidence, any contrary conclusion could only come in a topsy turvy world.[14]

The Government made a remarkable concession in its Opposition to Brown's motion for release pending appeal at this court when it stated that "Juror No. 13 . . . *did not understand that he was not following* [the court's] *instructions*, and *would likely continue* not to follow those instructions if left on the jury." That is one of Congresswoman Brown's points and if accepted then Brown prevails. It is not enough to discharge a juror because he does not understand that he is not following

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[14] *Topsy Turvy World*

If the butterfly courted the bee,
And the owl the porcupine;
If churches were built in the sea,
And three times one was nine;
If the pony rode his master,
If the buttercups ate the cows,
If the cats had the dire disaster
To be worried, sir, by the mouse;
If mamma, sir, sold the baby
To a gypsy for half a crown;
If a gentleman, sir, was a lady,—
The world would be Upside-down!
If any or all of these wonders
Should ever come about,
I should not consider them blunders,
For I should be Inside-out!

William Brighty Rands

the court's instructions unless and until it is explained to him that he is not following the court's instructions and then asked whether he will follow the court's instructions once they have been explained. Assuming *arguendo* that a court could properly instruct a juror that he must not listen to the guidance of God or the Holy Spirit, then that must be done and the determination then made whether or not the juror will abide by the instruction. But to do none of this, and to acknowledge that the juror does not know what the purported problem is and does not know and has not been told that he is doing anything in violation of the court's instructions and to simply assume that he will violate the court's instructions simply is not permissible.

The Government argued in its Opposition to Brown's motion for release pending appeal before this Court that Congresswoman Brown "attempts to recast the issue - the facts really - by asking whether the district court may remove a juror for 'asking God for guidance,'" [Government Opposition at p. 16], but with respect, these are the facts, and it is the district court and Government which tried to recast the facts into something fanciful - or possibly theological - in continuously referring to and concluding that by praying and finding guidance in prayer the juror somehow has utilized an "external force" (district court's language) and obtained evidence from "an outside source" (district court's language). Congresswoman Brown's counsel in this appeal, as a person of faith who has in his own life repeatedly witnessed the

providence of God, would candidly agree that God exists, that God is in some sense an external force, an outside source to whom we all may turn in prayer and supplication *and be answered*, but that religious belief of counsel and this juror, is not a legal basis upon which a federal district court judge can decide this matter. This court must treat such matters of faith as inviolable beliefs that Brown's counsel and this juror have a right to hold, and not use these beliefs as if they were objective factual predicates upon which to disqualify the juror.

Instead, for purposes of judicial decision-making this information is a matter of the mental process of the juror and nothing more from a juridical perspective than that - a mental process. That counsel personally believes and this juror believed that God does hear our prayers and may answer them, is not a "fact" that the federal court can determine to be real and external and outside the jury room that is improperly influencing the juror's deliberations.

The record in this case supports only one conclusion: that this juror was basing his verdict on his view of the sufficiency of the evidence, after prayerful consideration and as he saw it, in his mind, guidance from the Holy Spirit. Whether he should or should not have depended on any guidance from the Holy Spirit does not resolve the matter in favor of his dismissal, because the well established law in this and other circuits is that so long as there is any reasonable possibility that the juror

is basing his view on the sufficiency of the evidence, he may not be dismissed. Dismissal requires substantial evidence that the juror is engaged in wilful misconduct. Absent such evidence and only when there is no substantial possibility that the juror is basing his verdict on the evidence may the juror be dismissed. *Abbell*; *United States v. Kemp*, 500 F3d 257, 301-306 (3rd Cir. 2007). The record in this case did not permit the district court to dismiss juror number 13 and it was reversible error to do so, depriving the defendant of her Sixth Amendment right to a unanimous verdict.

CONCLUSION

Congresswoman Brown respectfully requests this Honorable Court vacate the judgment, sentence and forfeiture judgment in her case based on the arguments above and remand the case for further proceedings consistent therewith.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel certifies that this brief does not comply with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains ca. 16,352 words, which is in excess of the word count limit. A motion for permission to file the brief in excess of the permitted word count is being filed concurrently herewith.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant certifies that the size and style of type used in this brief is 14 point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2018, 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 all counsel of record.

s/ William Mallory Kent
William Mallory Kent