No. 17-15470-EE

In the
United States Court of Appeals
for the Eleventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CORRINE BROWN,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
NO. 3:16-CR-93-J-32JRK-1

BRIEF OF THE UNITED STATES

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May 9, 2018

Certificate of Interested Persons and Corporate Disclosure Statement

In addition to the persons and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement in Corrine Brown's principal brief, the following persons and entities have an interest in the outcome of this case:

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

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

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

16. Finker, Lonya, victim;

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

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

19. Geraghty, Pat, victim;

20. Greenpointe Holdings, LLC, victim;

21. Greenspoon Marder, victim;

22. Hall, Loretta, victim;

23. Halverson, Steven T., victim;

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

25. Lazzara, Gaspar, victim;

26. Lipsky, Richard, victim;

27. Lopez, Maria Chapa, United States Attorney;

28. Ludwig Family Foundation, victim;

29. Marta Employees Charity Club, victim;

30. McFarland, Ryan E., Esq.;

31. Mills, Harry, victim;

32. Mills, Rosa, victim;

33. Muldrow, W. Stephen, former Acting United States Attorney;

34. Orange Park Mitsubishi, victim;

35. Pajcic & Pajcic, victim;

36. Picerne Developmental Corporation, victim;

37. Picerne, John G., victim;

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

39. Simply Heathcare Plans, Inc., victim;

40. Simpson, Allison Kirkwood, Esq.;

41. Smith, Daniel Austin, Esq.;

42. Smith, James Wesley, III, Esq.;

43. Stafftime, LLC, victim;

44. Stermon, Kent, victim;

45. Tirol, AnnaLou, Acting Chief, Public Integrity Section, United States Department of Justice;

46. USSC, LLC, victim;

47. Ward, Michael, victim;

48. Wiggins, Janet, victim; and

49. Wiggins, Sidney, victim.

Statement Regarding Oral Argument

The United States does not request oral argument.

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Statement of Jurisdiction

This is an appeal from a final judgment of the United States District Court for the Middle District of Florida in a criminal case. That court had jurisdiction. *See* 18 U.S.C. § 3231. The district court entered the judgment against Corrine Brown on December 6, 2017, Doc. 246, and Brown timely filed a notice of appeal five days later, Doc. 251. *See* Fed. R. App. P. 4(b). This Court has jurisdiction over this appeal. *See* 28 U.S.C. § 1291.

Statement of the Issue

Did the district court clearly err in finding that Juror No. 13 was not following the court's instructions, and did it abuse its discretion in excusing that juror as a result.

Statement of the Case

Corrine Brown was found guilty at trial of 18 fraud and tax offenses. Most of the offenses related to Brown's supposed charity—One Door for Education—which raised hundreds of thousands of dollars, purportedly to help students further their education, but which provided only a total of $1200 to two students. Brown and her codefendants, meanwhile, pocketed hundreds of thousands of dollars from One Door's coffers. *See generally* Doc. 235.

Brown now asks this Court to grant her a new trial because, she argues, the district court abused its discretion when it removed and replaced a juror during deliberations.

Course of Proceedings

A federal grand jury indicted Corrine Brown on charges of conspiracy to commit wire and mail fraud, in violation of 18 U.S.C. §§ 1341 and 1343 (count 1); mail fraud, in violation of 18 U.S.C. §§ 1341 and 2 (counts 2–8); wire fraud, in violation of 18 U.S.C. §§ 1343 and 2 (counts 9–17); concealment of material facts, in violation of 18 U.S.C. § 1001(a)(1) (count 19); interference with the

internal revenue laws, in violation of 26 U.S.C. § 7212(a) (count 21); and filing false tax returns, in violation of 26 U.S.C. § 7206(a) (counts 22–24). Doc. 1.

The case went to trial. During deliberations, an issue arose as to one of the jurors, who had announced both at the outset of deliberations and again later that the Holy Spirit had told him that Brown was not guilty of all charges. *See*, *e.g.*, Doc. 182 at 50. (The facts of the juror-removal issue are set out in detail in the Statement of the Facts below.) After an inquiry, the court removed that juror and replaced him with another. *Id*. at 62, 66–67, 74.

The jury found Brown guilty of 14 fraud offenses (counts 1, 2, 4, 6–13, 15, 17, and 19) and 4 tax offenses (counts 21–24). Doc. 133. It found her not guilty of 4 fraud offenses (counts 3, 5, 14, and 16). *Id*. Brown's codefendant, Elias "Ronnie" Simmons, pleaded guilty to count 1 (conspiracy) and count 18 (theft of government funds). Doc. 202. Their coconspirator Carla Wiley, who was charged separately, pleaded guilty to conspiracy to commit wire fraud. *See* Brown's PSR at 3. Neither Simmons nor Wiley has appealed.

The district court sentenced Brown to serve a total of 60 months' imprisonment: 60 months on counts 1, 2, 4, 6–13, 15, 17, and 19, and 36 months on counts 21–24, all to run concurrently. Doc. 246. This appeal followed.

Statement of the Facts[1]

A. Brown and her cohorts raise hundreds of thousands of dollars for underprivileged students but keep it for themselves.

In 2011, Carla Wiley started One Door for Education, a charity whose goal was to provide "scholarships and opportunities to students pursuing a degree in Education as well as opening doors in the community." Doc. 235 at 4, 8. She created the charity to honor her mother, a retired schoolteacher. *Id*. at 3, 8. One Door's slogan was "We make your education dreams a reality." *Id*. But Wiley raised very little money, and, in 2012, she turned One Door's finances over to Ronnie Simmons, with whom she was in a relationship. *Id*. at 4, 8.

Simmons was Chief of Staff to Corrine Brown, a long-time United States Congresswoman from Florida. *Id*. at 6. Almost immediately, Brown began using her clout as a Congresswoman to solicit donations to One Door. *Id*. at 4, 16. "And as quickly as the money flowed in, Simmons withdrew it at Brown's direction, forging Wiley's signature when necessary." *Id.* at 4. Sometimes Simmons went to an ATM, withdrew from One Door's account the maximum amount allowed, and delivered the cash to Brown in her House office. *Id.*

[1]We describe Brown's crimes primarily by reference to the district court's findings at sentencing, which Brown has not challenged on appeal. Nor has Brown challenged the sufficiency of the evidence of her guilt as found by the jury. The single issue on appeal is not dependent on the details of her crimes.

Sometimes he withdrew the money from One Door's account and deposited it into Brown's account at another bank. *Id.* at 4–5. Simmons also kept One Door money for himself. *Id.* at 5. One Door also issued checks to third parties who then wrote corresponding checks back to Brown. *Id.* And sometimes the defendants would simply use One Door's money to pay for purchases that benefitted Brown personally. *Id.*

The fraud scheme lasted for four years. *Id.* at 13. Brown and Simmons solicited and obtained more than $833,000 in donations for One Door, which they falsely told donors was a section 501(c)(3) charity (it wasn't) that provided educational opportunities to children (it didn't). *Id.* at 5, 12, 16. And Brown and Simmons never intended for the bulk of the money raised to be used for charitable purposes. *Id.* at 16. Instead, $330,000 of that money went to events attended by Brown or held in her honor—such as skybox seats at a Washington Redskins/Jacksonville Jaguars game, a luxury box at a Beyoncé concert, and ritzy events at D.C. hotels—none of which had anything to do with charitable fundraising for One Door. *Id.* at 5, 15. Another $93,536 of One Door's money was withdrawn from ATMs and given to Brown and Simmons. *Id.* at 5, 12–13. $16,641 of One Door's money was transferred to third parties who then funneled it back to Brown or her daughter. *Id.* at 5. Brown kept another $13,292 of One Door's money to pay for her and her daughter's

personal expenses, while Simmons kept another $15,156 to pay for his. *Id.* And Wiley herself stole $182,730 from One Door, and she and Simmons spent another $2,936 of One Door's money on a Miami Beach vacation. *Id.* at 5, 9.

All told, Brown's fraud scheme cost One Door $664,292.55. *Id.* at 15.

B. Brown cheats on her taxes and on her financial-disclosure forms.

Between 2009 and 2015, Brown filed tax returns that did not include the income that she had received from One Door. PSR ¶ 70. (She likewise omitted that income from her congressional financial-disclosure forms. *Id.* ¶¶ 64, 65.) During the same timeframe, she also over-reported her charitable donations. Doc. 235 at 6. She used her clout as a Congresswoman to convince charities to inflate the value of her donations so that she could fraudulently claim deductions on her tax returns. *Id.* And, beyond that, after "[h]aving routinely converted One Door money for her own personal use, [Brown] turned around and falsely stated on her tax returns that she had actually *donated* money to One Door for which she claimed a substantial charitable deduction." *Id.* at 19 (emphasis the court's). "Brazen barely describes it," as the district court aptly put it. *Id.*

Brown's tax crimes caused a loss to the IRS of $62,650.99. *Id.* at 15 n.6.

C. A juror announces at the outset of deliberations that the Holy Spirit has told him that Brown is not guilty of each and every charge, and, after an inquiry, the district court removes and replaces that juror.

During jury selection, the magistrate judge instructed the potential jurors—including Juror No. 13—that "the jurors who are selected for this case will have to decide this case solely on the evidence that is presented in the courtroom, and they will not be allowed to consider anything other than the testimony of the witnesses and the exhibits and other evidence that's admitted at trial. And so there can be absolutely no outside influence whatsoever." Doc. 168 at 60. As the jury-selection process continued, he reminded the potential jurors that "[i]t would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case." Doc. 169 at 191.

Once a jury had been selected, the district court gave its preliminary instructions, including that the jury's "job is to decide this case based solely on the evidence you hear in this courtroom." Doc. 171 at 50. The court then emphasized that point twice more: "If you didn't get it in this courtroom, you shouldn't have it. If you didn't get it in this courtroom, you shouldn't have it." *Id.* The court reiterated that "our whole system depends on the fact that the case is decided in this courtroom upon the evidence in this courtroom and nothing else." *Id.* at 51.

The trial then began, and, after the parties had presented their evidence and given closing arguments, the district court gave its final instructions, which included this: "Your decision must be based only on the evidence presented during the trial. … You must follow the law as I explain it—even if you do not agree with the law—and you must follow all of my instructions as a whole." Doc. 180 at 124.

The jury then began its deliberations. *See* Doc. 180 at 158. At the very beginning of deliberations on the first of the 24 counts, Juror No. 13 informed the other jurors that the Holy Spirit had told him that Corrine Brown was not guilty of every count. Doc. 182 at 50. He repeated that statement a few hours later. Doc. 182 at 50.

The following evening, Juror No. 8 called the courtroom deputy and told her that, since the beginning of deliberations, Juror No. 13 had mentioned "higher beings" with respect to Brown. Doc. 182 at 7, 13. That night, the district court notified the parties about Juror No. 8's stated concern and convened a hearing for the following morning to address what action, if any, the court should take.[2] *Id.* at 7–8.

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[2]In her brief, Brown states that at that time, "[a]fter 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." Brown's brief at 2, 18. The record, though, says nothing about where Juror No. 3 stood. (Brown cites her earlier, similarly unsupported assertion. *See* Doc. 182 at 5.) Also, the

The following morning, both parties requested that the court conduct some inquiry and both agreed that merely re-instructing the jury to follow the court's instructions would be inadequate. *Id.* at 12–14. The court recognized that it should be reticent about asking questions of deliberating jurors but agreed with the parties that the circumstances called for a limited inquiry, at least of Juror No. 8, and the court had her brought into the courtroom. *Id.* at 15–16.

Juror No. 8 began by providing the court with a short letter that she had written:

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

Doc. 139 (Court Ex. 1). She explained that Juror No. 13 had made the first comment "when we first went into deliberation," "basically right when deliberation began," and had made the second "within a few hours later." Doc. 182 at 23–24, 25. Juror No. 8 was "concerned that it was going to

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jury had not deliberated for "two full days." On the first day, May 8, 2017, it had deliberated for less than four hours, including lunch. *See* Doc. 180 at 157, 163 (jury retires for lunch at 1:13 p.m. and then stops for the day by 5:00).

interfere in [Juror No. 13's] ability to" deliberate, and some of the other jurors were concerned, too. *Id.* at 24, 25.

The district court discussed the issue with the parties, and Brown proposed that nothing more needed to be done. *Id.* at 31. The court then asked whether Brown would have the same view if the juror had stated that the Holy Spirit had told him that Brown was *guilty* of all counts. *Id.* at 31–32. Brown replied that, if the court were going to question the juror, it should determine whether the juror could follow the court's instructions. *Id.* at 32–33. The court asked the parties how it should inquire of the juror, and both parties agreed that the court should first ask generally whether the juror had expressed a religious viewpoint that was guiding his ability to deliberate, and then more specifically whether he had said that a higher power had told him that Brown was not guilty on all counts. *Id.* at 36–38.

Juror No. 13 was brought in. He initially denied that he was having difficulties with any religious or moral belief that would interfere with "his ability to decide the case on the facts presented and on the law as [the court] gave it to [him] in the instructions." *Id.* at 39. He then began to speak about what the jurors had done, but the court immediately cut him off, explaining that it did not "want to hear anything about the deliberations." *Id.* at 39–40. When the court asked him whether he had expressed any religious sentiment

to other jurors, he admitted that he had told the other jurors, "I prayed about this, I have looked at the information, and ... I have received information as to what I was told to do in relation to what I heard here ... this past two weeks." *Id.* at 41. When asked for the source of the information, Juror No. 13 stated that he had received the information "[s]ince we've been here" from his "Father in Heaven." *Id.* He said, though, that he thought he was making his decision based on the evidence at trial. *Id.* at 42.

The district court excused Juror No. 13 from the courtroom and asked counsel for their views on its asking "the direct question: Did you ever make the statement that a higher being told me that Corrine Brown was not guilty on all charges?" *Id.* at 46. The court also proposed asking the juror whether he had been following the court's instructions about fully considering the evidence with the other jurors. *Id.* at 47. Brown's lawyer "d[id]n't have any objection to those questions." *Id.* at 48.

The district court brought Juror No. 13 back in and asked him whether he had said something like, "A higher being told me that Corrine Brown was not guilty on all charges?" *Id.* at 50. The juror responded, "When we were giving why we were—insight, as far as not guilty or whatever for the first charge, yes." *Id.* at 51. The court then asked, "Did you say the words, 'A higher being told me that Corrine Brown was not guilty on all charges?'" *Id.*

Juror No. 13 responded, "No. I said the Holy Spirit told me that." *Id.* And he confirmed that he had "mentioned it in the very beginning when we were on the first charge." *Id.*

After hearing argument from the parties (the United States for the juror's removal, Brown against), *id.* at 52–56, the district court found that Juror No. 13 believed he had received from a higher source information that Brown was innocent of all counts, which, the court concluded, was "essentially a violation … of the court's instructions to base the decision only on the law and the facts that were adduced at trial, and in accordance with the court's instructions." *Id.* at 59–61. (As mentioned above, the court had instructed the jurors, both preliminarily and at the close of the evidence, that they must base their verdict solely on the evidence at trial and the court's instructions. *See, e.g.*, Doc. 171 at 50; Doc. 131 at 2.)

The district court further found "beyond a reasonable doubt" that there was "no substantial possibility" that Juror No. 13 was capable of basing his decision on only the evidence and the court's instructions. Doc. 182 at 61. As a result, the court excused Juror No. 13, over Brown's objection, and replaced him with an alternate juror. *Id.* at 62, 66–67, 74. The reconstituted jury deliberated for an additional day and a half before finding Brown guilty of 18 of the 24 counts against her. Doc. 133.

Brown moved for a new trial, arguing that the district court had erred by excusing Juror No. 13. Doc. 187. The court denied the motion in a lengthy order. Doc. 200. The court acknowledged that Juror No. 13 was "very earnest and sincere, and ... likely believed that he was trying to follow the Court's instructions." *Id.* at 13. But "by making statements to his fellow jurors at the beginning of deliberations that he was receiving information from a higher authority who was directing him as to what verdict he should reach, he was acting inconsistently with the court's instruction that the case be decided solely on the law and the evidence in the case." *Id.* Furthermore, Juror No. 13 had admitted to the court that he "had expressed a conclusion from the beginning of the deliberations and without discussion with his fellow jurors, in violation of the Court's instructions." *Id.* at 22. The court explained its assessment of Juror No. 13's credibility, noting that the juror had been "initially 'hesitant' to explain how his religious views came to the fore during deliberations, but as questioning continued, he eventually confirmed the actual statement brought to the Court's attention by Juror No. 8—that being that the Holy Spirit 'told him' that the defendant was not guilty on all charges." *Id.* at 13–14. Moreover, the court found, Juror No. 13 "appeared to continue to believe that a higher power was telling him how he ought to proceed in the deliberations," and "his religious beliefs compelled him to disregard [the court's] instructions and

instead follow direction from the 'Holy Spirit' to find the defendant 'not guilty on all charges.'" *Id.* at 14, 20. The court found that Juror No. 13 "seemed unaware of the inconsistency" between his beliefs and the court's instructions, rendering him "unable to follow the Court's instructions," *id.* at 20–21, and leaving him positioned to "continue in the same vein if permitted to remain" on the jury, *id.* at 22–23.

Ultimately, the court found Juror No. 13's "expressed views to be inconsistent with the duties of a sworn juror because he was not able to deliberate in a way that reaches decision based only on the evidence adduced at trial and the law and instructions given by the Court." *Id.* at 14.

The district court "carefully drew a distinction between a juror who is praying for guidance or seeking inspiration, from this situation where the juror actually stated that an outside source 'told him' that the defendant was not guilty of all charges." *Id.* And finally, the court reiterated its finding—"beyond a reasonable doubt" and "based on the evidence before it"—that there was "no substantial possibility that Juror No. 13 was able to base his decision only on the evidence and the law as the court gave it to him in the instructions and that he was using external forces to bring to bear on his decision-making in a way that's inconsistent with his jury service and his oath." *Id.*

This appeal followed.

Standard of Review

The juror-removal issue. This Court reviews for abuse of discretion the district court's decision to remove a juror. *United States v. Register*, 182 F.3d 820, 839–40 (11th Cir. 1999). The "district court's discretion … is at its zenith when the alleged [juror] misconduct relates to statements made by the jurors themselves," as is the case here. *United States v. Bradley*, 644 F.3d 1213, 1277 (11th Cir. 2011) (internal quotation marks omitted). Thus, this Court "will reverse the district court only if … it discharged the juror 'without factual support, or for a legally irrelevant reason.'" *Register*, 182 F.3d at 840 (quoting *United States v. Smith*, 918 F.2d 1501, 1512 (11th Cir. 1990)).

This Court will review a factual finding that a juror is refusing to follow the law only for clear error, bearing in mind that "the district court is uniquely situated to make the credibility determinations that must be made" whenever "a juror's motivations and intentions are at issue." *United States* v. *Godwin*, 765 F.3d 1306, 1316 (11th Cir. 2014).

Brown, though, seems to be arguing that the district court's findings may be subject to de novo review. Brown's brief at 15–16. According to her, "the district court made what it styled findings of fact but which were legal assumptions, based on an incorrect application of the controlling law." *Id.* at 16. She is incorrect. As explained above, the district court's findings—

including that there was "no substantial possibility that Juror No. 13 was able to base his decision only on the evidence and the law as the court gave it to him in the instructions and that he was using external forces to bring to bear on his decision-making in a way that's inconsistent with his jury service and his oath"—are factual ones reviewable for clear error. *See Godwin*, 765 F.3d at 1316 (court's determination whether juror was willing or able to follow court's instruction is fact finding reviewable for clear error).

The Rule 606(b) issue. Brown also argues that the district court violated Federal Rule of Evidence 606(b) by inquiring into the "mental processes" of Juror No. 13. Brown's brief at 29–36. This issue, though, should be reviewed for plain error because Brown did not make this argument below, either when the issue arose or in her later motion for a new trial, Doc. 139 at 28–31, 34–36; Doc. 187. *See United States v. Toll*, 804 F.3d 1344, 1354 (11th Cir. 2015) (reviewing argument for plain error when appellant failed to object on that "particular ground" below). Brown never mentioned Rule 606(b), let alone suggested that the court's inquiry violated it. And she agreed with the district court that it should ask the juror both whether he had expressed a religious viewpoint that was guiding his ability to deliberate and whether he had said that a higher power had told him that Brown was not guilty on all counts. Doc. 187 at 34–35; *see also id.* at 46 (Brown "d[id]n't have any objection to those

questions"). Therefore, Brown may obtain relief based on Rule 606(b) only if she demonstrates an error that is plain and that affected her substantial rights, and, even then, this Court may remedy the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano,* 507 U.S. 725, 732–34 (1993).

The First Amendment and RFRA issues. This Court should also review for plain error Brown's arguments that the juror's removal violated the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA), Brown's brief at 39–50, because she did not assert them in the district court.[3] *See Nguyen v. United States*, 539 U.S. 69, 88 (2003) (unpreserved constitutional claims are reviewable for plain error). And this Court should deem her RFRA claim waived, as her assertion (Brown's brief at 40–41) cites no particular provision of the RFRA, includes no analysis, and cites no RFRA caselaw. *See Flanigan's Enters. v. Fulton Cnty.,* 242 F.3d 976, 987 n.16 (11th Cir. 2001) (holding that issue is waived when brief "fail[s] to elaborate or provide any citation of authority in support of ... allegation"); *Davis v. Hill Eng'g, Inc.,* 549

[3]Brown did raise a Sixth Amendment argument in her new-trial motion; she contended that the replacement of Juror No. 13 deprived her of her right to a jury of her peers and to a unanimous verdict. Doc. 187. But she did not assert a First Amendment claim. Indeed, in her reply memorandum on the new-trial issue, she acknowledged just the opposite: "In fact, the juror was not dismissed because of his religious beliefs." Doc. 196 at 3.

F.2d 314, 324 (5th Cir. 1977) (holding that merely mentioning in brief that district court erred, absent any specific argument as to how court erred, waives issue on appeal).

Summary of the Argument

The district court did not abuse its discretion in removing Juror No. 13 and replacing him with another juror. Juror No. 13 had stated at the outset of deliberations that he had been told by the Holy Spirit that Brown was not guilty of all 24 charged counts. Based on his explanation, the district court did not err, clearly or otherwise, in finding that the juror would not be able to decide the case based on evidence at trial or in accordance with the court's instructions. In light of that finding, the court acted within its discretion in dismissing that juror.

Nor did the court engage in an improper inquiry. The information provided by Juror No. 8—which indicated that Juror No. 13 had reached a decision based on information outside of the evidence and contrary to the court's instructions—was sufficient to warrant the court's limited questioning of Juror No. 13.

The district court did not inquire into Juror No. 13's mental processes; it inquired into the presence of outside sources of information and the juror's compliance with the court's jury instructions. But regardless, Federal Rule of

Evidence 606(b) does not apply to pre-verdict inquiries, like this one.

Finally, the district court did not violate Juror No. 13's constitutional rights or his rights under the Religious Freedom Restoration Act (RFRA), plainly or otherwise. The court did not remove the juror because of his religion; it removed him because he was not complying with his obligations as a juror. There's a long line of support for juror removal in that circumstance, notwithstanding a religious component to the juror's disqualification. Brown, on the other hand, does not identify even a single decision holding that the removal of a juror violated the juror's constitutional right to the free exercise of religion, let alone any binding precedent that plainly applies here. As for the RFRA, Brown has waived that argument by not adequately addressing it, but, in any event, she has not demonstrated a plain violation of that statute.

Argument and Citations of Authority

The district court did not clearly err in finding that Juror No. 13 was not following the court's instructions, nor did it abuse its discretion in excusing that juror as a result.

A. The district court acted within its discretion in inquiring into the juror issue, and it did not clearly err in finding that Juror No. 13 was not following the court's instructions and was basing his decision on something other than the evidence at trial.

"Once deliberations have begun, a district court may excuse a juror for good cause, which includes that juror's refusal to apply the law or to follow the

court's instructions." *United States v. Godwin*, 765 F.3d 1306, 1316 (11th Cir. 2014). But a district court should excuse a juror during deliberations only when no substantial possibility exists that [he] is basing [his] decision on the sufficiency of the evidence." *Id.* (quoting *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001), and citing Fed. R. Crim. P. 23(b)(3); internal quotation marks omitted).

This Court reviews a decision to remove a juror only for abuse of discretion. *United States v. Register*, 182 F.3d 820, 839 (11th Cir. 1999). That discretion "is at its zenith when the alleged [juror] misconduct relates to statements made by the jurors themselves," as is the case here. *United States v. Bradley*, 644 F.3d 1213, 1277 (11th Cir. 2011) (internal quotation marks omitted). Thus, this Court "will reverse the district court only if … it discharged the juror 'without factual support, or for a legally irrelevant reason.'" *Register*, 182 F.3d at 840 (quoting *United States v. Smith*, 918 F.2d 1501, 1512 (11th Cir. 1990)). So long as the district court applied the "no substantial possibility" standard, this Court will review only for clear error a factual finding that a juror was refusing to follow the law, bearing in mind that "the district court is uniquely situated to make the credibility determinations that must be made" whenever "a juror's motivations and intentions are at issue." *Godwin*, 765 F.3d at 1316.

Here, the district court set out the correct legal standard and made meticulous findings of fact that comported with that standard. It found "beyond a reasonable doubt," "based on the evidence before [it]," that there was "no substantial possibility that [Juror No. 13 was] able to base his decision only on the evidence and the law as the court gave it to him in the instructions and that he [was] using external forces to bring to bear on his decision-making in a way that's inconsistent with his jury service and his oath." Doc. 200 at 14. So "the only question" for this Court on appeal is whether the district court "clearly erred in finding that the juror was refusing to follow [its] instructions." *Godwin*, 765 F.3d at 1318.

Clear error, in this context especially, "is seldom easy to establish." *Id.* As this Court recognized in *Godwin*, the district court, which "was on the scene [and] viewed the jurors as they described the problem, … was uniquely situated to make the credibility determinations that must be made whenever a juror's motivations and intentions are at issue." *Id.* (internal quotation marks omitted); *see also United States v. Fajardo*, 787 F.2d 1523, 1525–26 (11th Cir. 1986) (declining to second-guess district court's finding that juror's removal during trial was warranted, despite underwhelming evidence, because this Court's "review is limited to an antiseptic record and is ordinarily an inferior substitute for the first-hand observations of the trial court").

As discussed below, the district court did not clearly err. The record amply supports the court's findings that Juror No. 13 was not following the court's instructions, did not understand that he was not following those instructions, and, if left on the jury, would likely continue not to follow those instructions.

Juror No. 8 was concerned enough about Juror No. 13 that she brought to the district court's attention his repeated comments that a "Higher Being" had told him that "Corrine Brown was Not Guilty on all charges" and that he "trusted the Holy Ghost." Doc. 139 (Court Ex. 1); Doc. 182 at 24–25. And she explained that other jurors were concerned too. *Id.* at 24, 25. The court, meanwhile, personally observed Juror No. 13's responses to its questions and also his demeanor. When the court asked direct questions, the juror was initially hesitant to provide direct answers. *See id.* at 39–41. He eventually admitted that he had told the other jurors that he had "prayed about this, [that he had] looked at the information, and that [he had] received information as to what [he] was told to do" from his "Father in Heaven." *Id.* at 41.

Notwithstanding his acknowledgment that he had received information telling him the appropriate verdict as to each of the 24 charged counts, Juror No. 13 persisted that he was following the court's instructions to decide the case solely on the evidence at trial and the court's instructions. *Id.* at 42.

During follow-up questioning, though, he confirmed that he had told his fellow jurors right at the beginning of deliberations that the "Holy Spirit" had told him that Brown was not guilty of all charges. *Id.* at 51. The court did not clearly err in finding that Juror No. 13's view was based on something other than his evaluation of the evidence and that he would not be able to follow the court's instructions, and the court did not abuse its discretion in deciding that removal was warranted.

The decision to remove a sitting juror is a significant one that justifiably warrants careful, albeit deferential, review by this Court. The district court's decision here handily withstands that review. The court took this issue very seriously and removed the juror only after having carefully considered whether that juror would be able to follow the court's instructions and decide the case based on the evidence. And the court did so only after having concluded that the juror's decision—that he had been told by the Holy Spirit, before deliberations had even begun, that Brown was not guilty of all 24 charged crimes—was not based on the juror's evaluation of the sufficiency of the evidence.

Although this Court has never addressed a factual situation like this one, it has upheld the district court's exercise of its discretion to remove a juror during deliberations every time it has faced the issue, save one. *See United States*

v. Oscar, 877 F.3d 1270, 1287–88 (11th Cir. 2017) (juror who said she was biased, was too emotional to follow the law, and felt the need to "defend [her] people"); *Godwin*, 765 F.3d at 1316 (juror who refused to follow court's instructions or to apply instructions to evidence presented at trial); *United States v. Augustin*, 661 F.3d 1105, 1129–34 (11th Cir. 2011) (juror who "evasively" responded to court's questions on whether she would follow the law and apply it to evidence); *Abbell*, 271 F.3d at 1302 (juror who thought she did not have to follow the law and considered court's instructions merely advisory); *Register*, 182 F.3d at 840 (juror who had indirectly received extrinsic information from defendants); *United States v. Geffrard*, 87 F.3d 448, 450–52 (11th Cir. 1996) (juror whose religious beliefs rendered her unable to "live with a verdict of guilty for any of the accused on any of the charges); *United States v. Smith*, 918 F.2d 1501, 1512 (11th Cir. 1990) (juror who was upset that jury deliberations would interfere with family's holiday plans); *United States v. Wilson,* 894 F.2d 1245, 1249–51 (11th Cir. 1990) (pregnant juror who had repeatedly gotten ill during trial); *United States v. Barker*, 735 F.2d 1280, 1283 (11th Cir. 1984) (juror who had been seen putting her hand on defendant's shoulder and smiling); *United States v. Martinez*, 481 F. App'x 604, 608 (11th Cir. 2012) (juror who said she was unable to reach verdict because she had not personally observed defendant commit offenses); *United States v. Vega*, 450 F. App'x 844, 849–50

(11th Cir. 2012) (juror who repeatedly told court that, because of his past experience, he could not be unbiased). The sole exception is *United States v. Spence*, 163 F.3d 1280, 1283–84 (11th Cir. 1998), which is nothing like this case (or any of the other ones, for that matter). There, this Court held that the district court had abused its discretion by dismissing a juror at 3:00 p.m. due to her reaction to some medication, even though nothing even suggested that she could not have returned the following morning to continue deliberating. *Id.*

Brown responds to the district court's findings here by asserting that the court did not ask Juror No. 13 whether he was following the court's instructions and that the court therefore could not find the "deliberate misconduct" that's required before a juror may be dismissed. Brown's brief at 27. But both of those assertions are incorrect, the first factually and the second legally. As to the former, the court did ask the juror whether he was following the court's instructions, and specifically whether any religious or moral issues were "bearing on or interfering with [his] ability to decide the case on the facts presented and on the law as I gave it to you in the instructions." Doc. 182 at 39; *see also id*. at 42. The juror denied that anything was keeping him from following the court's instructions, *id.* at 39, 42, so the court was well aware that the juror may have believed that he was following the court's instructions, *see* Doc. 200 at 13 (court's acknowledgment that Juror No. 13 was "very earnest

and sincere, and ... likely believed that he was trying to follow the Court's instructions"). Indeed, the juror's lack of awareness lends credence to the district court's other finding: that the juror was not able to set that belief aside and decide the case based on the evidence at trial. *See* Doc. 200 at 20–23.

Juror No. 13's good faith, though, is beside the point because, contrary to Brown's second assertion, a juror need not engage in deliberate misconduct in order to be removed. If a juror is not following the court's instructions—whether deliberately, inadvertently, or otherwise—that juror may be removed. *See* 6 Wayne R. LaFave et al., *Criminal Procedure* § 24.9(f) (4th ed. 2004) ("In the end, *whether motivated by good faith or bad*, any action by an outsider or by a juror himself that has the potential for interfering with juror decision-making in accordance with the juror's responsibilities constitutes misconduct.") (emphasis added). That is precisely what the district court found had happened here.

A multitude of decisions illustrate that the removal of a juror need not be based on deliberate misconduct. *See*, *e.g.*, *Wilson,* 894 F.2d at 1249–51 (removal of pregnant juror who had repeatedly gotten ill during trial); *Barker*, 735 F.2d at 1282 (removal of juror who, in a sympathetic gesture, placed her hand on defendant's shoulder, smiled, and moved on); *United States v. Beard*, 161 F.3d 1190, 1193–94 (9th Cir. 1998) (dismissal of two jurors proper after they became

involved in ongoing, bitter argument leaving them emotionally unstable and unable to deliberate); *United States v. Walsh,* 75 F.3d 1, 4–5 (1st Cir. 1996) (dismissal proper where juror was mentally unstable and unable to engage in rational discussion); *United States v. Egbuniwe,* 969 F.2d 757, 758–61 (9th Cir. 1992) (dismissal proper where juror's impartiality was in doubt after his girlfriend had been arrested by police); *United States v. Huntress,* 956 F.2d 1309, 1311–13 (5th Cir. 1992) (dismissal proper where juror diagnosed by doctor as suicidal and paranoid); *Sullivan v. Fogg*, 613 F.2d 465, 467–68 (2d Cir. 1980) (dismissal proper for juror who heard voices during trial, notwithstanding his statement that he could remain impartial and was not influenced by voices he heard).

To support her claim that Juror No. 13 could not be removed unless he was "*engaging in deliberate misconduct*," Brown's brief at 27 (her emphasis), Brown relies on *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997), which she says "held that before a juror may be dismissed, there must be no doubt that the juror is engaging in *deliberate misconduct*," Brown's brief at 44 (again, her emphasis). But *Thomas* did not hold that. It correctly held that "a presiding judge has a duty to dismiss a juror who purposefully disregards the court's instructions on the law." *Id*. at 612. That, of course, doesn't mean that only jurors who purposefully disregard the court's instructions may be dismissed.

Cf. Edwards v. Prime, Inc., 602 F.3d 1276, 1298 (11th Cir. 2010) ("A holding that *X* + *Y* is enough to violate a provision does not mean that *X* alone is not enough.").[4]

Juror No. 13's announcement at the outset of deliberations that Brown was not guilty of all 24 counts because the Holy Spirit had told him so violated the court's instructions that the jury was to decide the case based solely on the evidence at trial and on the court's instructions and "only after fully considering the evidence with the other jurors." *See* Doc. 131 at 2, 29. Just as he would have violated those instructions if he had announced, at the outset of deliberations, that he was ready to vote because he had received word from the Holy Spirit that Brown was *guilty* of all 24 counts.

Thus, in *United States v. Snarr*, 704 F.3d 368, 380 (5th Cir. 2013), the Fifth Circuit held that the district court had not abused its discretion in excusing a potential juror because the district court could not ascertain whether the juror would be able to faithfully and impartially apply the law, even though the juror had stated that she could vote for capital punishment "if the Holy Spirit was guiding her" to do so. And, in *State v. Taylor*, 774 S.W.2d 163, 166

[4] *Thomas* held, ultimately, that the district court had erred in dismissing the juror, because "the record evidence raised the possibility that the juror's view on the merits of the case was motivated by doubts about the defendants' guilt, rather than by an intent to nullify the law." *Id.* at 608–09.

(Tenn. 1989), the Tennessee Supreme Court held that the trial court had not erred in excusing a potential juror who had said that, although she "opposed the death penalty on religious, philosophical and moral grounds," she would consider imposing the death penalty "if the Holy Spirit directed [her] to go that direction." *Id.* The Court explained that the juror's answers "clearly show that she was both unwilling and unable to follow the law as instructed by the trial judge and would only follow the dictates of the Holy Spirit, according to her own reading thereof." *Id.* Thus, "she could not perform her duty as a juror." *Id.* So too here.

Rather than addressing what Juror No. 13 did and said, and what the district court found, Brown attempts to recast the issue—the facts, really—by repeatedly asking whether the district court may remove a juror for "having prayed for guidance" or based on his "personal prayer life" or the like. *E.g.*, Brown's brief at 12, 13, 14, 17, 40.[5] But that's not what the district court did; nor, for that matter, is it what Juror No. 13 did. The district court made that vividly clear:

> Had Juror No. 13 simply stated to his fellow jurors that he was praying for guidance during the deliberations, that would not have been problematic (and I doubt Juror No. 8 would have brought it to the Court's attention). But that is not what happened here. Juror

[5]Amicus argues similarly that"[s]eeking guidance from God does not amount to jury misconduct and is not a basis to remove a juror who is otherwise qualified to serve." Amicus brief at 4.

> No. 13 announced at the beginning of deliberations that he was following instructions from an outside source, which is not permitted, even when that source derives from one's own religious beliefs.

Doc. 200 at 23–24.

Nor did the district court remove Juror No. 13 "based on his religious beliefs" or for his "reliance on his religious faith," as Brown also suggests. *E.g.*, Brown's brief at 13, 14, 40, 41, 49. The court made this clear as well: "I am not at all suggesting that persons of religious faith are unsuitable to serve as jurors." Doc. 200 at 23. In sum, the district court's ruling comports with this Court's principle in *Geffrard* that a "juror is fully entitled to [his] religious beliefs and may espouse them," but, in the end, "the court's rules—not [his]—apply." 87 F.3d at 452.

Brown's reliance on *State v. DeMille*, 756 P.2d 81 (Utah 1988), is misplaced. For one thing, *DeMille* conflicts with this Court's reasoning in *Geffrard* that a juror whose religious beliefs prevent him or her from following the court's instructions may be removed. For another, it concerns a post-verdict inquiry; in that situation, the court's inquiry is much more constrained, as we discuss below. But even *DeMille* recognizes that removal might be warranted for a juror who "so abandon[s] his or her judgment to what he or she perceives to be oracular signs as to be unable to fairly consider the evidence

and properly apply the law." 756 P.2d at 84. That is what the district court found with respect to Juror No. 13.

As the *DeMille* dissent explains, "Of course, a juror may seek divine guidance through prayer in reaching a decision." *Id.* at 85 (Stewart, J., dissenting). But the juror in *DeMille* went much further. She—like Juror No. 13 here—had "received a divine indication of the right result, not divine guidance in assessing the evidence." *Id.* In that situation, removal was justified. *See id.* Here too, the removal of the juror was justified, and the district court did not abuse its discretion in doing so.

Similarly unavailing is Amicus's reliance on *Allen v. State*, 21 S.W.2d 527, 528–29 (Tex. Crim. App. 1929), *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1579 (9th Cir. 1989), and *North v. State*, 65 So. 2d 77 (Fla. 1952), none of which call into question the district court's decision here. *Allen* involved only a "prayer ... for divine guidance." 21 S.W.2d at 528. In *Hernandez-Escarsega*, a juror said that she had received a sign from God that another juror would change his vote to guilty; nothing in the opinion suggests that any juror based his or her vote on a sign from God. *See* 886 F.2d at 1579. And in *North*, a preacher who had been allowed to speak briefly with the jurors had asked for divine guidance, but he "did not mention the case or the jurors, or discuss the duties of the jurors." 65 So. 2d at 84–85.

None of these cases is even remotely similar to the situation here. As explained above, and contrary to Brown's and Amicus's suggestion, this was not a case of a juror looking inward or looking for guidance; this was a case of a juror who, by his own admission, *received information* as to what to do and *was told* by the Holy Spirit what to do: find Brown not guilty on all 24 charges, and all before deliberations had even begun.[6] *See* Doc. 139 at 39, 48–49.

Brown also asserts that the district court should not even have questioned Juror No. 13 because there was "no substantial evidence of jury misconduct, jury nullification, or refusal to deliberat[e]." Brown's brief at 29 (citing *United States v. Kemp*, 500 F.3d 257, 301 (3d Cir. 2007)). But, as explained above, "jury misconduct" consists of any action by jurors "that has the potential for interfering with juror decision-making in accordance with the juror's responsibilities." LaFave, *Criminal Procedure* § 24.9(f). That is precisely what the district court faced here: evidence that Juror No. 13 was deciding the case based not on the evidence or the legal standards as instructed by the court, but on what he had been told by the Holy Spirit. And he had done that even before deliberations had begun. *Cf. United States v. Baker*, 262 F.3d 124, 132 (2d

[6]In any event, that the trial courts in those other cases had acted within their discretion in declining to remove those jurors does not mean that they would have lacked the discretion to remove those jurors if they had deemed removal warranted.

Cir. 2001) (affirming district court's removal of juror based on "her refusal to engage in the process of jury deliberation"). Faced with that evidence, the court correctly exercised its substantial discretion by inquiring as it did. *See Register,* 182 F.3d at 840 ("[T]he court also enjoys substantial discretion in choosing the investigative procedure to be used in checking for juror misconduct.") (internal quotation marks omitted).

Indeed, in *Kemp*, on which Brown relies, the Third Circuit upheld the district court's juror inquiry, which it had initiated as a result of "two notes: one accused a juror of being biased, while another accused a juror of refusing to consider evidence and deliberate." *Kemp*, 500 F.3d at 301. The district court in the present case faced a situation at least as deserving of a juror-misconduct inquiry, given Juror No. 8's statement that Juror No. 13 had decided Brown's fate before deliberations had begun, based on what he had been told by the Holy Spirit. Given the district court's "unique perspective at the scene," it was "in a far superior position than a court of appeals to appropriately consider allegations of juror misconduct." *United States v. McGill*, 815 F.3d 846, 867 (D.C. Cir. 2016) (quoting *United States v. Boone,* 458 F.3d 321, 329 (3d Cir. 2006); alterations omitted), *cert. denied*, 138 S. Ct. 57 (2017).

In *United States v. Venske*, 296 F.3d 1284, 1291 (11th Cir. 2002), this Court held that a bailiff's statement to jurors that they would not have any

trouble convicting the defendant if they knew what he knew "clearly involve[s] extrinsic communications that, if properly presented to the district court, necessitate further inquiry." If the district court *must* inquire further when a juror states that he has received information *from a bailiff relating to the case*, then the court surely *may* inquire further when a juror states that a juror has received information *from the Holy Spirit directing him to vote "not guilty" across-the-board*.

For these reasons, and those discussed below with respect to Rule 606(b), the district court did not abuse its discretion in inquiring into the juror issue. Nor did it abuse its discretion in removing Juror No. 13 as a result of that limited inquiry. Brown is not entitled to relief on this ground.

B. The district court did not violate Federal Rule of Evidence 606(b).

Brown also argues that the district court "clearly violated" Federal Rule of Evidence 606(b) by inquiring into the "mental processes" of Juror No. 13. Brown's brief at 29. This issue is reviewable only for plain error because Brown did not assert this argument below. *See* Doc. 182 at 30–33, 36–38. She never mentioned Rule 606(b) and instead agreed with the court that it should ask the juror both (1) whether he had expressed a religious viewpoint that was guiding his ability to deliberate and (2) whether he had said that a higher power had told him that Brown was not guilty on all counts. *Id.* at 36–37; *see also id.* at 48

(Brown "d[id]n't have any objection to those questions."). Nor did Brown assert Rule 606(b) later, when she moved for a new trial based on the juror-removal issue. *See* Doc. 187.

As a result, Brown may obtain relief only if she demonstrates error, that is plain, that affected her substantial rights, and, even then, this Court may remedy the error only if it seriously affects the fairness, integrity or public reputation of judicial proceedings. *See United States v. Olano,* 507 U.S. 725, 732–34 (1993). And "there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it." *United States v. Lejarde-Rada,* 319 F.3d 1288, 1291 (11th Cir. 2003).

As we explain below, Brown has not cited any binding authority satisfying either of her two plain-error hurdles: (1) that Rule 606(b) applies to inquiries during deliberations and (2) that the district court's inquiry exceeded the scope allowed by the Rule.

There was no error here, plain or otherwise. For starters, Rule 606(b) does not even apply to inquiries—like this one—undertaken during deliberations, before a verdict has been reached. "The Rule, after all, applies '[d]uring an inquiry into the validity of a verdict.'" *Warger v. Shauers*, 135 S. Ct. 521, 525 (2014) (quoting Fed. R. Evid. 606(b)(1)).

Here, because "the problem was brought to the court's attention prior to verdict," "[Rule] 606(b) does not impact the availability of juror testimony." *United States v. Sotelo*, 97 F.3d 782, 797 (5th Cir. 1996). *Sotelo*—like the present case—concerned a challenge to the district court's handling of a juror issue during deliberations, rather than a challenge to a verdict. As a result, the Fifth Circuit explained, "[f]ocus in the briefs on Rule 606(b) is misplaced. Rule 606(b) concerns the competence of juror testimony during 'an inquiry into the validity of a verdict.'" *Id.* Brown's focus on Rule 606(b) is equally misplaced.

The Supreme Court has similarly explained that Rule 606(b) is a "no-impeachment rule" that limits the circumstances in which jurors may impeach their verdicts. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 865 (2017). "The rule gives stability and finality to verdicts." *Id.* But the Court recognized that pre-verdict inquiries are different: "[B]efore the verdict, jurors themselves can report misconduct to the court. These procedures do not undermine the stability of a verdict once rendered." *Id*. at 866 (citing *Tanner v. United States*, 483 U.S. 107, 121 (1987)).

In *Tanner*, the Court likewise indicated that Rule 606(b) applies only to post-verdict inquiries: "[Rule] 606(b) is grounded in the common-law rule against admission of jury testimony *to impeach a verdict* and the exception for juror testimony relating to extraneous influences." *Id.* (emphasis added). In

holding that Rule 606(b) precluded the post-verdict use of juror testimony about a juror's intoxication, the Court assuaged concerns about protecting defendants' right to an unimpaired jury by emphasizing that jurors still "may report inappropriate juror behavior to the court *before* they render a verdict."[7] *Id.* at 127 (emphasis the Court's). That is what Juror No. 8 did here.

As the Seventh Circuit succinctly put it, "pre-verdict voir dire is generally preferred because Federal Rule of Evidence 606(b) limits the scope of post-verdict interrogation." *United States v. Smith*, 26 F.3d 739, 759 (7th Cir. 1994). Thus, when faced with a defendant's argument that the district court should have conducted a post-verdict juror inquiry, the Seventh Circuit rejected that argument because the defendant's allegations of intra-jury misconduct "arose only after the jury returned its general verdicts as to each of the Defendants." *United States v. Morales*, 655 F.3d 608, 631 (7th Cir. 2011). The Court explained that, notwithstanding the legal authority on which the defendant relied, which allowed inquiry into "pre-verdict allegations," the availability of post-verdict inquiry is much more constrained. *Id.* The Court

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

cited both *Tanner*, which warns "against pervasive post-verdict inquiries into juror misconduct," and Rule 606(b), which "flatly prevents many inquiries of jurors intended to impeach the jury's verdict." *Id.* at 630–31; *see also United States v. Logan*, 250 F.3d 350, 378–79 (6th Cir. 2001) ("In cases involving a post-verdict investigation into alleged jury misconduct, the relevant federal law concerning the impeachment of jury verdicts is codified in Rule 606(b)."). Rule 606(b), therefore, does not apply to pre-verdict inquiries.

Brown's challenge to the scope of the district court's inquiry demonstrates the Rule's inapplicability. Brown argues that the court's inquiry "went directly to the mental processes of juror number 13: how he was arriving at his opinion that the defendant was not guilty." Brown's brief at 29. But the Rule prohibits inquiry into a "juror's mental processes *concerning the verdict*." Fed. R. Evid. 606(b)(1) (emphasis added). Here, there was no such inquiry—indeed, there couldn't have been—because Juror No. 13 was not even on the jury that returned the verdict.

In any event, given the plain-error standard, Brown bears the burden of identifying controlling authority applying Rule 606(b) to pre-verdict inquiries. Yet she does not cite a single opinion so holding—from anywhere, let alone from this Court or the Supreme Court. She relies on *Pena-Rodriguez*, 137 S. Ct. at 855; *Warger v. Shauers*, 721 F.3d 606, 610–11 (8th Cir. 2013), *aff'd*, 135 S. Ct.

521 (2014); and *DeMille*, 756 P.2d at 81. Brown's brief at 29–35. But none of those cases even involved a pre-verdict challenge to a deliberating juror, let alone held that Rule 606(b) applied to such a challenge. They all concerned challenges to verdicts, which Rule 606(b) covers.

Brown instead attempts to shift her burden, asserting that the United States has argued its view of Rule 606(b) "without any citation of authority." Brown's brief at 29–30. Her approach is both legally unsound, given the plain-error standard of review, and factually inaccurate, given the many authorities cited above.

Even if binding authority did apply Rule 606(b) to pre-verdict inquiries, Brown's argument still would not warrant relief because the district court's inquiry did not plainly violate that Rule. Brown identifies no controlling authority establishing that the district court's limited inquiry here violated Rule 606(b), so, for this reason too, she cannot satisfy her plain-error burden. *See Lejarde-Rada,* 319 F.3d at 1291.

In any event, the district court did not even err. The Rule prohibits only inquiry into a "juror's mental processes *concerning the verdict*." Fed. R. Evid. 606(b)(1) (emphasis added). As mentioned above, the court's inquiry into Juror No. 13 could not have violated this prohibition because Juror No. 13 did not render a verdict.

Beyond that, the limited inquiry here fits within the Rule's exception for inquiries into whether "extraneous prejudicial information was improperly brought to the jury's attention" or whether "an outside influence was improperly brought to bear on any juror." Fed. R. Evid. 606(b)(2). External influences "share a single, constitutionally significant characteristic: they are external to the evidence and law in the case[.]" *Oliver v. Quarterman*, 541 F.3d 329, 336 (5th Cir. 2008) (quoting *Robinson v. Polk,* 444 F.3d 225, 231 (4th Cir. 2006) (King, J., dissenting)).

The district court carefully limited its inquiry, going so far as to interrupt Juror No. 13's answer because the court "d[id]n't want to hear anything about the deliberations." Doc. 182 at 39. The court instead focused its inquiry on whether the Holy Spirit had told Juror No. 13 that Brown was not guilty on all counts—an inquiry that comported with Rule 606(b)(2)'s exceptions for inquiries into "extraneous prejudicial information" and "outside influence." Juror No. 13's responses—that "I *received information* as to what I was told to do" from my "Father in Heaven" and then, even more specifically, that "the Holy Spirit *told me* that … Corrine Brown was not guilty on all charges," Doc. 182 at 41, 50–52—also satisfied those exceptions. *Cf. McNair v. Campbell*, 416 F.3d 1291, 1301, 1307–08 (11th Cir. 2005) (Bible brought into jury room during deliberations was extrinsic evidence).

What happened here was even more deserving of inquiry than the mere presence of a Bible in *McNair*. As *Oliver* explains, the members of the jury in that case did not merely "consult the Bible for his or her own personal inspiration during the deliberation process." 541 F.3d at 339. Rather, they referred to a specific passage that guided them on how to decide the specific case before them. *Id.* at 339–40. And, "when a juror brings a Bible into the deliberations and points out to her fellow jurors specific passages that describe the very facts at issue in the case, the juror has crossed an important line." *Id.* It "amounted to an external influence on the jury's deliberations." *Id.*

The same holds true here. Juror No. 13 did not merely use the Holy Spirit for guidance during the deliberation process. He had received specific direction, before deliberations, telling him specifically what result to reach as to each count in this case. He too crossed an important line, and, as a result, the district court was entitled to inquire into what amounted to an external influence on the juror.

Brown is not entitled to relief on this ground.

C. The district court did not violate the First Amendment or the Religious Freedom Restoration Act—plainly or otherwise.

According to Brown, the district court's removal of Juror No. 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." Brown's brief at 39. This newly raised claim is reviewable only for plain error, as we discuss in the Standard of Review above. But regardless, Brown is not entitled to relief on this ground.

Brown bears the burden of establishing controlling precedent "directly resolving" her First Amendment claim. *See Lejarde-Rada,* 319 F.3d at 1291. Yet she acknowledges, in the first sentence of her argument, that there is no such precedent: "This appeal presents an issue of first impression in this or any circuit." Brown's brief at 17. The absence of controlling authority dooms at the outset Brown's newly raised First Amendment claim.

But in any event, the district court did not violate the First Amendment. According to Brown, the district court removed Juror No. 13 "based on his religious beliefs," thus violating the First Amendment's Establishment Clause. Brown's brief at 40. She relies on cases holding that religious beliefs cannot be *proscribed* by the government, that the government may not force a person to profess a *disbelief* in any religion, and that the government must stay neutral on religious belief. *Id*. (citing *Lee v. Weisman*, 505 U.S. 577, 589 (1992), *Everson v. Bd. of Educ. of Ewing* , 330 U.S. 1, 15 (1947), and *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 881 (2005)) (Brown's emphases). Those general

Establishment Clause principles, though, do not call for reversal here, plainly or otherwise.

As discussed above, the district court did not remove Juror No. 13 for his religious beliefs or for asking God for guidance. Indeed, when Brown sought a new trial based on the juror's removal, she acknowledged that, "[i]n fact, the juror was not dismissed because of his religious beliefs." Doc. 196 at 3.

The district court removed him because he had pre-decided the case—all 24 counts—before deliberations had begun, based on what the Holy Spirit had told him about how to vote. He was therefore unable to follow the court's instructions. The district court has discretion to excuse a juror for cause when the court "is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Wainwright v. Witt,* 469 U.S. 412, 425–26 (1985). That is what happened here. The district court's response to that situation did not violate the First Amendment.

In *Geffrard*, for example, this Court held that the district court had acted within its discretion in excusing for just cause a deliberating juror who, "because of religious beliefs at odds with the factual situation and the law applicable to this case, made it plain she could not follow the court's instructions." 87 F.3d at 452. This Court explained: "That juror is fully entitled to her religious beliefs and may espouse them, but in this jury context, where

the court's rules—not hers—apply, it cannot be said that the district judge abused his discretion." *Id*.

Other court have held likewise. *See*, *e.g.*, *Miles v United States*, 103 U.S. 304, 310–11 (1880) (upholding dismissal of jurors in bigamy case, whom the court characterized as biased, after they explained that they believed polygamy was ordained by God); *United States v. Whitfield*, 590 F.3d 325, 360 (5th Cir. 2009) (court did not err in excusing juror who, during voir dire, "stated that her religious beliefs prevented her from passing judgment on others"); *United States v. Decoud*, 456 F.3d 996, 1003 (9th Cir. 2006) (court did not abuse its discretion in removing deliberating juror who had strongly held religious beliefs that kept her from sitting in judgment of another person); *United States v. Burrous*, 147 F.3d 111, 115 (2d Cir. 1998) (court did not abuse its discretion in removing juror who had a "religious conviction" that prevented her from continuing deliberations because, she said, "[a]ccording to the Bible, I'm not supposed to judge and I feel that's what I'm doing, judging"); *cf. United States v. Pappas*, 639 F.2d 1, 4 (1st Cir. 1980) (court did not err in allowing strike for cause where juror had said he could not "serve in the judgment of his fellow man" because of religious belief).

Simply put, jurors may be removed if their religious faith precludes them from performing the duties of a juror. And, as mentioned above, Brown has

not cited a single authority holding, to the contrary, that the removal of a juror violated the juror's Free Exercise right. Therefore, Brown's corollary argument—that the juror's First Amendment rights were violated, thereby violating Brown's own "right to have a jury empaneled without any Constitutionally invidious discrimination," Brown's brief at 39–41—fails. The district court did not violate the Constitution, and certainly not plainly, when it removed Juror No. 13. Brown is not entitled to a new trial on this ground.

Brown also has asserted, for the first time, that the removal of Juror No. 13 violated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq*. Brown's brief at 40. But she has insufficiently raised this argument, as explained in the Standard of Review above, and this Court should consider it waived. *See Flanigan's Enters. v. Fulton Cnty.,* 242 F.3d 976, 987 n.16 (11th Cir. 2001) (holding that issue is waived when brief "fail[s] to elaborate or provide any citation of authority in support of … allegation"); *Davis v. Hill Eng'g, Inc.,* 549 F.2d 314, 324 (5th Cir. 1977) (holding that merely mentioning in brief that district court erred, absent any specific argument as to how court erred, waives issue on appeal).

Even if she had sufficiently raised an RFRA claim, it would still be meritless, particularly given the plain-error standard of review. Suffice it to say that Brown has not established that the district court plainly violated the

RFRA. The absence of controlling authority, not to mention supporting argument, resolves the issue.

The RFRA provides that the "Government shall not substantially burden a person's exercise of religion" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1(a), (b). No governing authority exists holding that the removal of a juror in this circumstance (or, to our knowledge, in any circumstance) substantially burdens anyone's exercise of religion in violation of the RFRA and is not the least restrictive means of furthering a compelling governmental interest. Therefore, Brown cannot satisfy her burden under plain-error review. *See Lejarde-Rada,* 319 F.3d at 1291.

But regardless, the district court did not violate the RFRA. *See United States v. Mitchell*, 502 F.3d 931, 954 (9th Cir. 2007) (district court did not violate RFRA by excluding potential jurors whose Navajo religion meant they opposed the death penalty; ensuring that jurors are able to follow law and apply facts in impartial way serves compelling government interest, and excluding jurors who are unable to do so is least restrictive means to achieve that end). Brown is not entitled to a new trial on this ground.

Conclusion

The United States requests that this Court affirm the judgment of the district court.

Respectfully submitted,

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