UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 17-15470-EE

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

REPLY BRIEF OF APPELLANT BROWN

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ARGUMENT

I. 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?

Dismissal of a juror after deliberations have begun is governed by Rule 23(b) of the Federal Rules of Criminal Procedure and requires "just cause." Rule 23 does not define just cause. As this Court noted in *United States v. Spence*, 163 F.3d 1280, n. 4 (11th Cir. 1998), and in *United States v. Wilson*, 894 F.2d 1245 (11th Cir. 1990), a factor which the Court must consider in determining whether the trial court abused its discretion in dismissing a juror is whether the juror was a hold out juror. The record clearly establishes that the discharged juror in Brown's case was holding out for not guilty and indeed the jury had agreed to inform the court that the jury was deadlocked and that deadlock report would have occurred but for the trial judge's dismissal of this juror. This factor alone weighs heavily in Brown's favor, yet was disregarded by the district court in its analysis of the need to discharge the juror.

The district court based its decision to discharge Juror No. 13 on a clear error of fact and law - its factual-legal conclusion that Juror No. 13 was "[was] using external forces" to reach his decision rather than basing his decision on the evidence and law as given by the court. [Answer Brief ("AB"), p. 20, and Doc. 200 at 14.] This is simple and readily determined. The question is whether a federal court can find that the Holy Spirit is an external force that has intruded into the jury room and directed a juror to disregard the evidence and law. It is not a matter of credibility or judging the demeanor or honesty of the juror. This district judge found the Holy Spirit to be an external force that was improperly influencing the juror's decision making akin to non-record evidence coming into the jury room. An ecclesiastical court might be called upon and be competent to make such a finding but not an Article III judge and not a court under the Judiciary Act. Article III judges and Judiciary Act courts are required to make fact findings based on fact, not on religious beliefs. This juror had an honest religious belief that the Holy Spirit was assisting and guiding his understanding of the evidence and law. His sincere religious belief - and the district court found that the juror was sincere - is not and cannot be a basis to discharge him from serving as a juror in this case.

Had the district court found that the juror's answers were insincere, dishonest, not credible, and therefore concluded that the juror was cloaking an intention to

nullify the law and refuse to properly deliberate follow the court's instructions under a guise of religious belief, then the district court could have properly discharged the juror finding that the refusal to follow the court's instruction was deliberate and wilful. But that is not what happened here. Brown's case was nothing more than a juror praying for guidance and believing that he was receiving prayerful guidance in his consideration of the evidence and law. This simply is not misconduct of any sort, much less deliberate misconduct, and the juror's consideration of prayer and his religious belief that he was receiving divine guidance in response to his prayers was not the intrusion of an improper external force upon the juror's deliberations.

This is why Brown argues that the district court's conclusion was both factually and legally wrong. Factually - at least in the sense that courts must understand facts as tangible and real objects in the physical world - there was no fact at issue. There was no Holy Spirit in the factual sense to be found to have intruded into the jury room, hence the fact finding is clearly erroneous because it is not based on any *fact* in the record.

It is wrong as a matter of law, and hence the district court has automatically abused whatever discretion it had to discharge this juror, because the law upon which the district court relied - the body of jurisprudence relating to external influences on jurors - requires a tangible, real, influence, not a matter of nothing more than religious

faith and belief. Neither the lower court nor the Government cited a single case to support the district court's decision that seeking prayerful guidance is forbidden.

The Government argues that this Court must review for clear error a factual finding that "a juror was refusing to follow the law." AB, p. 19. At no point did this juror refuse to follow the law. There is nothing in the record to support a finding that this juror was refusing to follow the law just as there was no basis to find that there was some external force influencing this juror. This is not a credibility question. The district court found that the juror was honest and sincere. The question is a pure question of law: whether praying for guidance and believing that God offers guidance in the conduct of one's decisions constitutes a refusal to follow the law. Of course to do so does not constitute a refusal to follow the law.

The Government argues (A.B., p. 21) that the district court found 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 to not follow those instructions*." That is exactly Brown's point when Brown argues that the Court failed to find that the juror was engaging in deliberate misconduct - the standard which applies to a discharge such as this - and at the Government's request, refused to ask the juror if he would follow the court's instructions if told that he must not rely upon prayer guidance in reaching his verdict.

The Government incorrectly and mistakenly argues (A.B., p. 24) that "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."

No. What Brown argued was that the court never informed the juror that seeking and relying upon guidance from the Holy Spirit was contrary to the court's instructions and not permitted and never asked the juror if he would abide by such instructions if so informed. This is why the district court could only state that the juror would "likely" continue to not follow its instructions because the court - *at the insistence of the Government* - did not inform the juror that his sincere attendance to what he perceived to be prayerful guidance from the Holy Spirit was not permitted. The juror was never told this. The juror was never asked if he would stop if so instructed to do so. Instead we were left with Juror No. 13 never being told that what he was doing was - in the opinion of the district court - wrong, and never instructed to not do it, and therefore never refusing to follow the instructions of the court on this point.

Instead, as the Government notes, the district court made a fact finding that this juror was "very earnest and sincere, and . . . likely believed that he was trying to

follow the court's instructions." (A.B., pp. 24-25, Doc. 200 at 20-23). On this record, and this is the record, there is no basis to sustain the district court's discharge of this juror and the district court's decision to discharge the juror was an abuse of discretion.

As both *Wilson* and *Spence* instruct, this decision must be viewed in the context of the juror at issue being a hold out juror, who was holding out for not guilty.

The Government agrees (A.B., p. 22) that "this Court has never addressed a factual situation like this one." The facts of this case are unique in federal jurisprudence.[1] None of the cases cited by the Government in its Answer Brief addressed a situation remotely similar to this case. None of the cases cited by the Government offer any authority whatsoever for the discharge of this juror.

The Government incorrectly argues that deliberate misconduct is not the standard for dismissal of a juror on the basis of refusal to follow the court's instructions. In support of its position the Government cites to a legal hornbook on criminal procedure, A.B., p. 25, and cases relating to jurors being unable for one reason or another to participate in jury deliberations, such as illness on the part of the juror, jurors fighting in the jury room, jurors who were mentally ill, etc. None of the

[1] We argue that *State v. DeMille*, 756 P.2d 81 (Utah 1981), a *state* case, clearly holds in Brown's favor.

cited cases were on point, which in Brown's case, is whether the juror would follow the court's instructions on the law. For that point, the case law is clear that to justify discharge of the juror the misconduct must be deliberate. *See United States v. Thomas*, 116 F.3d 606 (2nd Cir. 1997):

> For the reasons stated above, we conclude that:
>
> (1) The district court properly determined that a juror's purposeful disregard of the law as set forth in the court's instruction may constitute "just cause" for that juror's removal under Rule 23(b).
>
> (2) *A court must not, however, remove a juror for an alleged refusal to follow the law as instructed unless the record leaves no doubt that the juror was in fact engaged in deliberate misconduct*--that he was not simply unpersuaded by the Government's case against the defendants.
>
> (3) The court in the instant case thus erred by dismissing Juror No. 5, and permitting the jury of eleven to continue its deliberations, based largely on Juror No. 5's alleged refusal to follow the court's instructions on the law, where the record evidence raises the possibility that the juror was attempting to follow the law as instructed, but that he simply remained unpersuaded of the defendants' guilt.
>
> Accordingly, we vacate the judgments of the district court and remand for a new trial.

United States v. Thomas, 116 F.3d 606, 625 (2d Cir. 1997).

> The Eleventh Circuit adopted this standard:
>
> Good cause exists to dismiss a juror "when that juror refuses to apply the law or to follow the court's instructions." Id.; *United States v. Thomas*, 116 F.3d 606, 613 (2d Cir. 1997) ("[Federal Rule of Criminal Procedure] Rule 23(b) dismissals have been upheld repeatedly in cases

> where the trial court found that a juror was no longer capable of rendering an impartial verdict."). Ultimately, the district court should excuse the juror "only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence." *Abbell*, 271 F.3d at 1302 (describing this as a "beyond a reasonable doubt" standard).

United States v. Oscar, 877 F.3d 1270, 1287 (11th Cir. 2017).

> Juror Alfonso was dismissed after other members of the jury alleged, in a note to the district court judge, that Juror Alfonso was not applying the law as directed. A risk exists, however, that ten or eleven members of a jury that have collectively reached agreement on a case's outcome may thereafter collectively agree that the one or two hold-outs - instead of honestly disagreeing about the merits - are actually refusing to apply the law as instructed by the court in an impermissible attempt to nullify the verdict. The jury's majority may very well further agree to request the court's intervention with regard to those one or two dissenting jurors who are, according to the majority, refusing to apply the law. Thus, judges must be careful not to dismiss jurors too lightly, even in the face of complaints from a majority of the jury. Federal defendants have some right (be it statutory or perhaps constitutional) to a unanimous verdict by, normally, twelve jurors.
>
> Because of the danger that a dissenting juror might be excused under the mistaken view that the juror is engaging in impermissible nullification, we must apply a tough legal standard. In these kind of circumstances, a juror should be excused only when no "substantial possibility" exists that she is basing her decision on the sufficiency of the evidence. See *United States v. Thomas*, 116 F.3d 606, 621-22 (2d Cir. 1997); *United States v. Brown*, 262 U.S. App. D.C. 183, 823 F.2d 591, 596 (D.C. Cir. 1987).

United States v. Abbell, 271 F.3d 1286, 1302 (11th Cir. 2001).

Thus there is no question, despite the Government's argument to the contrary, that for this type of discharge the standard is deliberate misconduct. It is because of

this that it is so important to look closely at what the district court did and did not do in its so-called fact finding process. As we noted above, this was *not* a case where the "fact finding" depended on the district court's ability to observe the demeanor of the juror and determine the credibility of the juror's responses. The district court found the juror to be sincere and earnest and believing that he was following the court's instructions. Whether the juror would or would not follow the court's instructions with respect to attending to the guidance from the Holy Spirit, however, was never determined because the decision was made, at the behest of the Government, to not instruct the juror that he was not permitted to listen to the guidance of the Holy Spirit, and the juror was never asked if he would agree to follow such instructions. There was never any determination made that this juror was wilfully disregarding the court's instructions on this point and no basis to conclude that he was so doing. Instead, we have a case in which a dissenting juror was being struck from the jury without a record to determine whether he would or would not abstain from considering the guidance of the Holy Spirit if instructed to do so.

This was in the context not only of this juror being a dissenting juror but also in the context of the complaining juror herself acknowledging that this juror *was participating in the deliberation process* and *was not interfering with the deliberations of the other jurors* and in the context of this juror, having been found

to be sincere and earnest, having told the district court that he had considered the evidence in the case - that is, there was a substantial possibility that his verdict was based on the evidence.

Instead, the district court wrongly found the juror's religious belief that the Holy Spirit could guide him in his deliberations to be equivalent to an improper external force. As argued above, this conclusion was wrong both factually and legally.

The Government complains this juror expressed a view about the defendant's guilt early in the deliberations as if there were something wrong with a juror expressing an opinion about the verdict at the start of deliberations. A.B., p. 27. It is common knowledge that it is customary to take a preliminary vote before commencing deliberations. The most famous jury movie in American history, *Twelve Angry Men*, begins with the jury foreman asking the jurors if they want to discuss the case first and then take a vote or "take a vote right now. " E. G. Marshall, playing one of the twelve jurors, replies, "*I think it's customary to take a preliminary vote*." Then the foreman says, "Okay, anyone who doesn't want to vote?" There was no objection and the jury proceeded to take a preliminary vote. The initial vote was 11-1 with only Henry Fonda dissenting. Ed Begley said, "Boy, oh boy, there's always one." By the end of the movie though, as we know, Henry Fonda turns the jury around until it is

11-1 for not guilty with only Lee J. Cobb, dissenting, who at the end, agrees to vote not guilty.

There was nothing inappropriate about Juror No. 13 expressing a preliminary opinion at the commencement of deliberations and no doubt the other eleven jurors likewise expressed their preliminary opinions as well. This highlights the fact that this juror was participating in the jury deliberation process and was following the court's instructions, because it was only after another day of deliberations which included a review of the evidence - exhibits and witness testimony - that this juror, in voting for not guilty, expressed his belief that the Holy Spirit had guided him in his deliberations. There was nothing wrong with this and the district court's determination to discharge this dissenting juror for this reason alone was an abuse of discretion.

The Government cites two death penalty cases, one federal the other state, in which potential jurors were excused based on their having given vacillating responses on their willingness to impose a death penalty. *United States v. Snarr*, 704 F.3d 368, 380 (5th Cir. 2013) and *State v. Taylor*, 774 S.W.2d 163, 166 (Tenn. 1989). A.B., pp. 27-28. These cases are not on point. Death qualification of jurors is a body of law unto itself under which potential jurors may be excused if there is ambiguity in their response to the question whether they would impose a death penalty:

> [A]s this Court made clear in *Uttecht*, "when there is ambiguity in the prospective juror's statements," the trial court is "'entitled to resolve it in favor of the State.'" Id., at 7, 127 S. Ct. 2218, 167 L. Ed. 2d 1014 (quoting *Witt*, supra, at 434, 105 S. Ct. 844, 83 L. Ed. 2d 841).

White v. Wheeler, 136 S. Ct. 456, 461 (2015).

Although the Government argues that the district court did not remove Juror No. 13 based on his religious beliefs as Brown argued in her initial brief (A.B., p. 29) the Government's own record citation immediately preceding this argument demonstrates its error. In the preceding paragraph the Government quotes the district court's order in which the district court wrote:

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

A.B., pp. 27-28 quoting the district court at Doc. 200, pp. 23-24 (emphasis supplied).

Thus either way the district court gets it wrong. Either we are to ignore the fact that what is truly at issue is that the juror problem is one of the juror's religious belief, not some "outside source," in which case the Government cannot point to any physical fact to uphold this order because there was no "outside source" or external influence that can be demonstrated by human physics, or we are left with discharging

a juror solely because of his religious beliefs - not beliefs that prejudged the case, but nothing more than a religious belief that goes back to the foundation of our nation and is continued solemnly in the very oath all jurors are required to swear, that they will do their duty, "so help me, God," meaning, surely, as demonstrated by Benjamin Franklin during the Constitutional debates that one may pray for guidance and follow such guidance as our conscience leads us to believe that God has directed.

Nothing about the interchange between this juror and the district court supports a finding that the juror's religious beliefs prevented him from following the court's instructions. Cf. A.B., p. 29.

Oddly the Government misreads the one case directly on point cited by Brown in her initial brief, *State v. DeMille*, 756 P.2d 81 (Utah 1988). The Government mistakenly argues that *DeMille* held that the juror was properly removed who followed divine guidance in deciding her verdict. A.B., p. 30. It was just the opposite. In *DeMille* the defense argued that the faithful juror should have been removed and the verdict should have been set aside based on her reliance upon divine guidance. But the *DeMille* court disagreed, and held that it would have been error to have removed the juror. *DeMille* is right on point.

The Government wrongly argues that Juror No. 13 had decided the case on what he had been told by the Holy Spirit "even before deliberations had begun."

A.B., p. 31. This false claim is repeated at A.B., p. 32. The Government gives no record citation for these assertions and they are simply incorrect. Nothing in the record supports these assertions. The district court did not make any such finding nor is there anything in the record itself to support the claims. Similarly the Government takes liberty with the record when it asserts at A.B. p. 33 that Juror No. 13 "received information *from the Holy Spirit directing him to vote "not guilty" across the board*." (Italics in the Government's brief, underlining added by Brown). The Government again provides no record citation for this claim that Juror No. 13 had decided "across the board" to vote not guilty. Indeed it was never clarified whether the juror considered Brown not guilty independent of any guidance from the Holy Spirit and never clarified how Juror No. 13 would have voted without consideration of the promptings of the Holy Spirit. Certainly it is untrue to claim that Juror No. 13 somehow had predetermined his verdict "across the board," implying, presumably, without regard for the evidence. Instead, the opposite is true. Juror No. 13 explained as best he could that he asked the Holy Spirit for guidance in *understanding the evidence and credibility of the witnesses*. This was proper for him to do.

The Government cites in its support *United States v. Baker*, 262 F.3d 124, 132 (2nd Cir. 2001), but *Baker* approved the discharge of a juror for "her refusal to engage in the process of jury deliberation." A.B., pp. 31-32. In Brown's case even the

complaining juror agreed that Juror No. 13 was engaging in deliberations with the other jurors.

The Government argues that the inquiry of the juror is limited to plain error review because Brown did not object on Rule 606(b) grounds. It is true that Brown did not object specifically in reliance upon Rule 606(b), but it is also true that Brown objected *to any questioning of Juror No. 13 at all* arguing that there was an insufficient basis to question Juror No. 13 given what the complaining juror had said. In any event, the district court itself was well aware of Rule 606(b) and thought it was bound by its limitations, interrupting Juror No. 13 and instructing him that the Court did not want to hear about the jury's deliberations. The error under Rule 606(b) is plain error. The Government argues that Rule 606(b) only applies to post verdict inquiry, but that is what this was because this juror had given his verdict and that was the nub of the matter. It was this juror's verdict which was at issue. This is exactly what *Tanner v. United States*, 483 U.S. 107 (1987) prohibits - jury testimony *to impeach a verdict* and *not* the exception to that rule, which is for *juror testimony relating to extraneous influences*. The juror's religious belief at least in so far as it went to his prayer life and divine guidance from prayer simply is not the sort of extraneous influence contemplated by the Supreme Court in *Tanner* to justify an exception to the prohibition upon juror testimony to impeach a verdict. *Tanner* is the

controlling authority to satisfy the plain error rule. Cf. A.B., p. 38.

Finally, regarding controlling authority for the First Amendment plain error question, the Religious Freedom Restoration Act and the First Amendment itself are the controlling authorities.

STANDARD OF REVIEW

Because the correct application of the standard of review will be important to this case, appellant Brown asks the Court to carefully review her statement and elaboration upon the standard of review found at pages 15 and 16 of Brown's initial brief. The abuse of discretion standard which applies to a decision to remove a juror is satisfied - that is, the court's discretion has been abused - when the lower court bases its decision on a misapplication of controlling law. Brown argues that the lower court misapplied the law, therefore abused its discretion. The Government wishes to rely upon "findings of fact" which ordinarily are subject to clear error to support its argument that the court correctly applied the law. But as the Supreme Court has noted "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. See *Thompson v. Keohane*, 116 S. Ct. 457, 464 (1995).

The Government appears to concede that in this Circuit as in every Circuit which has addressed Rule 23 violations, when a juror has been wrongly discharged reversal is automatic without a showing of further prejudice other than the defendant having been denied his right to a unanimous jury of his choosing. In *Spence* for example, there is no discussion whether the error in dismissing the juror over Spence's objection was harmless or not and no consideration given to the weight of the evidence. Instead, once this Court found that the juror had been wrongly discharged it granted a new trial without further discussion.

We note this because the Government's statement of the case oddly includes a somewhat lengthy description of the charges and evidence which has no bearing on the single legal issue raised on appeal, unless the issue were subject to harmless error review. But every Circuit which has addressed Rule 23 violations (including this Circuit, implicitly in *Spence)*, has agreed that Rule 23 violations are not subject to harmless error review but mandate automatic reversal. *See United States v. Curbello*, 343 F.3d 273 (4th Cir. 2003) (collecting cases), *United States v. Essex*, 734 F.2d 832 (D.C. Cir. 1984), reaffirmed in *United States v. Patterson*, 26 F.3d 1127 (D.C. Cir. 1994), *United States v. Taylor*, 498 F.2d 390 (6th Cir. 1974), *United States v. Lane*, 479 F.2d 1134 (6th Cir. 1973), *United States v. Araujo*, 62 F.3d 930 (7th Cir. 1995), and *United States v. Tabacca*, 924 F.2d 906 (9th Cir. 1991).

CONCLUSION

Accordingly, Brown respectfully requests her conviction and sentence be vacated and the case remanded for a new trial.

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 complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This reply brief contains approximately 5,101 words.

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 a copy of the foregoing has been furnished to all counsel of record by filing the same with the CM/ECF electronic filing system this 23rd day of May, 2018.

s/ William Mallory Kent
William Mallory Kent