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So Help Me, God, Decide This Case: The Eleventh Circuit's New Standard for Dismissing Religious Jurors During Deliberations

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I. INTRODUCTION

You are on trial for a crime. Maybe you did precisely what the government claims, though perhaps not. However, a judge will not decide your fate because you exercised your constitutional right to a jury trial. During deliberations, you hear that a juror practices a religion condemning those who commit the crime you are accused of. You feel the juror would unfairly prejudice your chances of walking away freely. To your dismay, the judge refuses to dismiss the juror. You ask whether allowing this prejudicial juror to determine your fate is legal. After *United States v. Brown*,[1] it is.

The Eleventh Circuit Court of Appeals addressed a similar situation in *Brown*.[2] There, the court dismissed a juror who stated during deliberations that the Holy Spirit told him the defendant was not guilty.[3] This *en banc* decision will likely preclude district courts in the future from removing jurors who express religious prejudice yet convince the court that their religious views are unprejudicial.

Jurors should not participate in jury service if their beliefs keep them from deliberating using the facts presented. Contrastingly, courts should

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1. United States v. Brown, 996 F.3d 1171 (11th Cir. 2021).
2. *Id.*
3. *Id.* at 1175.

not discourage religion by dismissing jurors who merely practice constitutionally granted religious freedoms. Thus, when does religious freedom become legal persecution?

II. FACTUAL BACKGROUND

Corrine Brown, a former House of Representatives member, was indicted with twenty-four counts relating to defrauding donors of a charity in over $800,000.[4] The charity, One Door for Education—Amy Anderson Scholarship Fund, grants scholarships to underprivileged children.[5] Brown demanded a trial by jury.[6] Brown and her co-conspirators were prosecuted in the Middle District of Florida.[7]

During *voir dire*,[8] the judge asked potential jurors specifically about prejudice: "[d]o any of you have any religious or moral beliefs that you believe would preclude you from serving as a juror because . . . it would involve sitting in judgment of another person?"[9] Juror 13 did not respond or otherwise express any religious, moral, or political concerns that would hinder his job as a juror.[10]

After the trial, the district court judge instructed the jury and reminded the jurors that they must "follow the law as [he] explain[ed] it—even if [the juror did] not agree with the law."[11] Further, the judge emphasized that every juror must "decide the case for [himself] . . . but only after fully considering the evidence with . . . the other jurors."[12]

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4. United States v. Brown, No. 3:16-cr-93-J-32JRK, 2017 U.S. Dist. LEXIS 130217, at *2 (M.D. Fla. Aug. 16, 2017); *Brown*, 996 F.3d at 1175.

5. *Brown*, 2017 U.S. Dist. LEXIS 130217 at *5. The charity raises funds for scholarships and computers for disadvantaged students. Allegedly, Brown and her co-conspirators collected over $800,000 for the charity, but only distributed $1,200. The remaining money purportedly was used by Brown and her co-conspirators for personal and professional enjoyment, such as luxurious vacations and extravagant sporting events and concerts. United States v. Brown, 947 F.3d 655, 662 (11th Cir. 2020), *vacated, reh'g en banc granted*, 976 F.3d 1233 (11th Cir. 2020).

6. *Brown*, 996 F.3d at 1175.

7. *Id.*

8. Courts attempt to eliminate sources of religious prejudice through *voir dire* before the trial begins. The process of *voir dire* eliminates jurors who are unable to follow the court's instructions or deliberate using the evidence presented. 76 AM. JUR. TRIALS 127 (Originally published in 2000).

9. *Brown*, 996 F.3d at 1175. The venire was chosen in three days. *Id.*

10. *Id.* Each member of the venire is assigned an identification number. The juror numbers are intended both for organizational and secrecy purposes. In many jurisdictions, the juror number directly corresponds to the location in which the juror sits in the jury box. *Juror Number,* BOUVIER LAW DICTIONARY (Desk ed. 2012).

11. *Brown*, 996 F.3d at 1176.

12. *Id.*

The judge perceived that the first day of deliberations "progress[ed] smoothly."[13] However, during the evening on the second day of deliberations, Juror 8 communicated to the courtroom deputy that another juror discussed "higher beings."[14] On the third day of deliberations, the judge consulted the parties, and all parties agreed to interview Juror 8 after determining they needed more information to dismiss the juror.[15]

In a sealed courtroom, Juror 8 gave the judge a letter expressing concerns about Juror 13's ability to deliberate.[16] Juror 8 alleged that Juror 13 stated, "A Higher Being told me Corrine Brown was Not Guilty on all charges[,]" and he "trusted the Holy Ghost."[17] Juror 13 avowed that he only made the remarks at the beginning of deliberations, then again "shortly after, maybe within a few hours after."[18]

After Juror 8's interrogation, the judge questioned Juror 13 to decide whether he "had simply 'pray[ed] for guidance,'" or was "raising some religious view that would prevent him from ever determining . . . that Ms. Brown was guilty on charges[.]"[19] While praying for guidance is allowed, raising fixed religious views is problematic.[20] Brown argued that Juror 13 deliberated on the evidence presented.[21]

Juror 13 confirmed that he "prayed about this [and] . . . looked at the information, and . . . received information as to what I was told to do in relation to what I heard here today—or this past two weeks."[22] When asked where the divine guidance came from, Juror 13 stated, "My Father in Heaven."[23] During later questioning, the judge asked Juror 13 if he said the exact phrase, "A higher being told me that Corrine Brown was

13. *Id.*

14. *Id.*

15. *Id.* When a question of misconduct or an issue arises, district courts respect the jury's secrecy and "err on the side of too little inquiry as opposed to too much." United States v. Augustin, 661 F.3d 1105, 1133 (11th Cir. 2011) (quoting United States v. Abbell, 271 F.3d 1286, 1304 n.20 (11th Cir. 2001)).

16. *Brown*, 996 F.3d at 1176. Juror 8 alleged that she and other jurors were wary of Juror 13's ability to deliberate. The judge did not question any jurors other than Juror 8 and Juror 13. *Brown*, 947 F.3d at 664.

17. *Brown*, 996 F.3d at 1177.

18. *Id.*

19. *Id.* at 1178.

20. *Id.*

21. *Id.*

22. *Id.* at 1179.

23. *Id.*

not guilty on all charges[,]" to which Juror 13 replied, "No. I said the Holy Spirit told me that."[24]

Still, when the judge asked Juror 13 if he was struggling morally or religiously in ways that may obstruct his ability to deliberate using the evidence presented, Juror 13 insisted that he was not.[25] Juror 13 asserted that he was "following and listening to what has been presented and making a determination from that . . . ."[26] Specifically, he "had been listening to the evidence and 'for the truth.'"[27] Juror 13 stated, "I followed all the things that you presented. My religious beliefs are going by the testimonies . . .which I believe that's what we're supposed to do, and then render a decision on those testimonies, and the evidence presented in the room."[28]

The government moved to dismiss Juror 13.[29] While he seemed "very earnest," "very sincere," and it was apparent that "he [was] trying to follow the court's instructions . . . [and render] proper jury service,"[30] Juror 13 was "'direct[ed] . . . what disposition of the charges should be made' by 'the higher being' or 'Holy Spirit.'"[31] The court also noted that "a juror who makes that statement to other jurors" at the initiation of deliberation is "injecting religious beliefs that are inconsistent with the instructions of the court."[32]

Ultimately, the judge dismissed and replaced Juror 13 because he decidedly could not weigh the evidence and formulate a lawful decision.[33] Subsequently, the jury found Brown guilty of eighteen counts and not guilty of four counts.[34]

Brown moved for a new trial because of Juror 13's removal.[35] The judge denied the motion because the juror "seemed unaware of the

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24. *Id.* at 1180.

25. *Id.* at 1178–80.

26. *Id.* at 1179.

27. *Id.*

28. *Id.* at 1180. Jurors should draw reasonable conclusions according to the evidence presented during the trial. To allow a jury to deliberate without invading its privacy, "[d]istrict courts are subject to very stringent limitations on their authority to question jurors about their deliberations . . . ." *Augustin*, 661 F.3d at 1132 (quoting United States v. Siegelman, 640 F.3d 1159, 1185 (11th Cir. 2011)).

29. As expected, Brown objected the dismissal because she claimed the "threshold to discharge the juror" was not met. *Brown*, 996 F.3d at 1181.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

inconsistency" between his alleged ability to follow the instructions and his religious beliefs, which "compelled him to disregard those instructions . . . ."[36] Brown appealed, then the court of appeals vacated a panel decision affirming her conviction. The court reheard this appeal *en banc*.[37]

On appeal, the issue was whether a substantial possibility existed that Juror 13 based his decision on the evidence and the law.[38] Specifically, the court analyzed whether, beyond a reasonable doubt, the juror's religious statements precluded him from rendering a lawful verdict and fulfilling his duty as a juror—this court held that the statements did not preclude Juror 13 from rendering a lawful verdict.[39]

III. LEGAL BACKGROUND

A. Sixth Amendment Right to a Unanimous Guilty Verdict

Jurors must determine factual issues using common sense, while defendants seek a fair, unprejudiced verdict. The Sixth Amendment[40] protects a criminal defendant's interests by granting the right to a "speedy and public" trial by an impartial jury in federal and state

36. *Id.* at 1182. If Juror 13 merely prayed for guidance during the jury deliberations, there would be no problem; however, "following instructions from an outside source" is not allowed, even if the "source derives from one's own religious beliefs." *Id.*

37. *Id.*; *see Brown*, 947 F.3d at 655.

38. *Brown*, 947 F.3d at 1182. The majority maintained that Juror 13's credibility was not at issue. *Id.* at 1186. Judge Rosenbaum also commented on the issue of credibility in a dissenting opinion: "[t]o the extent that . . . this Court views religious jurors as inherently trustworthy or more trustworthy than nonreligious jurors, it's important to state plainly that this is not the case . . . . [J]udges should not have preconceived notions about any juror's credibility—whether the juror is religiously devout or not." *Id.* at 1214–15.

39. *Id.* at 1194.

40. U.S. CONST. amend. XI. The Sixth Amendment states in part that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

jurisdictions.[41] The Supreme Court of the United States interpreted "impartial jury" to mean a unanimous verdict.[42]

In some instances, a jury of fewer than twelve members is constitutional. For example, with approval from the court, parties may stipulate to a jury of fewer than twelve jurors.[43] A court may also dismiss a juror for "good cause" after the trial and during deliberations.[44] Even in those instances of juror dismissal, the court still requires a unanimous verdict of the remaining jurors.[45] Alternatively, a court may replace a dismissed juror rather than continue deliberations with a partial jury.[46] The court will use a factors test to decide whether a juror substitute

41. Ramos v. Louisiana, 140 S. Ct. 1390, 1392 (2020). Before the Supreme Court decided *Ramos*, ten guilty votes could convict criminal defendants in Louisiana and Oregon state courts. *Id.* at 1391. In *Ramos*, the Supreme Court questioned whether the Due Process Clause of the Fourteenth Amendment incorporated the Sixth Amendment's guarantee of a unanimous guilty verdict in a criminal proceeding. The court held that, yes, the Sixth Amendment does require a unanimous verdict when the defendant is on trial for a crime. *Id.* at 1397; *see also* Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (holding that the Sixth Amendment right to a jury trial must result in a unanimous verdict to convict a criminal defendant for a serious offense).

42. *Ramos*, 140 S. Ct. at 1397. Today, in all states and in the federal system, a unanimous guilty verdict is required to convict a criminal defendant. *Id.* at 1418. Despite precedent mandating otherwise, Louisiana and Oregon state courts previously allowed ten of twelve guilty verdicts to convict. Before *Ramos*, there were arguably no constitutionally-grounded arguments that supported non-unanimous juries; instead, weak precedent and dicta dating back to the Jim Crow-era avoided unanimous guilty verdict mandates. This precedent effectively annulled the votes and voices of minority jury members, undermining the evenhandedness of the criminal justice system. However, Justice Gorsuch explained in a plurality opinion in *Ramos* that, even before the American legal system was established, common law required a unanimous jury to convict. Justice Gorsuch referenced Blackstone who explained that an individual is innocent until "the truth of every accusation . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion." Louisiana only began endorsing nonunanimous verdicts in 1898 during a constitutional convention which resulted in a slew of Jim Crow laws, including a poll tax and literacy tests. *Id.* at 1394–95. "We met here to establish the supremacy of the white race, and the white race constitutes the Democratic party of this State." *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana* 374 (H. Hearsey ed. 1898).

43. FED. R. CRIM. P. 23(b)(2) (2021).

44. *Id.*

45. FED. R. CRIM. P. 23(b)(3) (2021).

46. FED. R. CRIM. P. 24(c)(1) (2021).

would prejudice the defendant.[47] Replacing a dismissed juror is a reversible error when the alternation prejudices the defendant.[48]

B. Freedom of Speech and Religion

While the Sixth Amendment protects the defendants during a trial, the First Amendment[49] protects jurors' interests by guaranteeing all individuals the freedom of expression, religion, assembly, and petition against the state. Congress shall not promote or devalue any religion by passing prejudicial laws or restricting the press or individuals from speaking freely.[50]

However, courts may dismiss jurors whose religious beliefs preclude them from pronouncing individuals guilty or whose religious beliefs expressly conflict with substantive law.[51] For example, in *United States v. Geffrard,*[52] the dismissed juror sent a "lengthy, combative letter" to the

47. United States v. Oscar, 877 F.3d 1270 (11th Cir. 2017). Those factors include the trial's length and complexity, the time the jury spent deliberating, the steps taken to separate the alternate juror from extrinsic evidence, and whether the jury began their deliberations afresh after the court substituted the juror. *Id.* at 1289.

48. *See* United States v. Kopituk, 690 F.2d 1289, 1308–09 (11th Cir. 1982); United States v. Phillips, 664 F.2d 971, 993 (5th Cir. 1981).

49. U.S. CONST. amend. I. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

50. *Id*. The Free Exercise Clause of the First Amendment grants the absolute freedom to believe, but the freedom to act on that belief is limited. Thus, government regulations of religious beliefs are strictly prohibited, but indirect regulation of religious conduct is permitted. If a law that seems neutral on its face merely incidentally burdens a religious group, then the law will not be barred by the Free Exercise Clause. Alternatively, if a law intentionally discriminates against a religious group, then a strict scrutiny standard will determine whether the law is constitutional under the First Amendment Free Exercise Clause. *See* Employment Division v. Smith, 494 U.S. 872 (1990) (asserting that an individual's religious freedom does not grant the ability to ignore neutral laws); *but see* Sch. Dist. of Abington Twp. v. Schempp*,* 374 U.S. 203 (1963) (noting that the separation of Church and State should be complete and unequivocal).

51. Establishment Clause issues arise when jurors are given free-reign to say whatever they please during jury duty. Legal scholars have argued that jurors are private citizens "for purposes other than their jury service" so they have rights under the First Amendment; however, while serving on a jury, jurors function as state actors because "they are acting pursuant to a delegation of authority from the state . . . . [T]hey are paid employees of the state and comprise what the Supreme Court has called 'a governmental body.'" Thus, a juror's freedom of speech is not wholly unlimited. Gary J. Simson and Stephen P. Garvey, *Knockin' on Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases* 25, SSRN (Jan. 16, 2001), https://ssrn.com/abstract=250920. *See* Miles v. United States, 103 U.S. 304, 310 (1880); United States v. Whitfield, 590 F.3d 325, 360 (5th Cir. 2009).

52. 87 F.3d 448 (11th Cir. 1996).

district court judge.[53] The juror's letter explained that, because she believed in Swedenborgianism,[54] she "could not live with a verdict of guilty for any of the accused on any of the charges . . . ."[55] The juror stated that her religious beliefs "made it impossible for her to deliberate"[56] because discoursing "the teachings of Emanuel Swedenborg with the other jurors in relation to this case . . . would be like discussing the theory of relativity with my cocker spaniel dog."[57] Thus, the juror's dismissal was warranted because the religion was inharmonious with jury duty.[58]

C. Jury Deliberations

1. Judgment by Ordinary Peers

During a jury trial, a judge instructs the jury on the applicable law, and the jury applies the law to the facts presented.[59] The right to a jury trial "protects parties" from judgment by a "special class of trained professionals who . . . may not understand or appreciate the way

53. *Brown*, 996 F.3d at 1189 (explaining the factual background of *Geffrard*, 87 F.3d at 451).

54. Swedenborgianism is a theological belief in which Emanuel Swedenborg outlines his spiritual experiences and religious ideology. The religion features a god who is incapable of anger, judgment, and punishment. Followers of Swedenborgianism believe that "Hell is not a punishment but a reflection of our own states of selfishness; we are not cast into hell but choose it freely." *Beliefs—The Swedenborgian Church of North America*, SWEDENBORG.ORG (2022), https://swedenborg.org/explore/beliefs/ (last visited Jan. 3, 2022).

55. *Geffrard*, 87 F.3d at 451.

56. *Brown*, 996 F.3d at 1190.

57. *Geffrard*, 87 F.3d at 451.

58. *Id.*; *see also Miles*, 103 U.S. at 310; *Whitfield*, 590 F.3d at 360.

59. United States v. Gaudin, 515 U.S. 506 (1995). Separate duties of jury and judge ensure that a defendant's verdict derives from a group of ordinary peers. 2 JAMES WILSON, LECTURES ON LAW, THE WORKS OF THE HONOURABLE JAMES WILSON 219–20 (Bird Wilson ed., Phila., Lorenzo Press 1804); *see also* Powers v. Ohio, 499 U.S. 400, 407 (1991) (explained that jury service "affords ordinary citizens a valuable opportunity to participate in a process of government . . . .") (quoting Duncan v. Louisiana, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting)).

ordinary people live their lives."[60] Judges belong to that class of professionals which may interfere with the jury's fact-finding task.[61]

2. Removal of a Juror

To protect the trial's integrity and the defendant's Sixth Amendment right to a unanimous verdict, a district court may dismiss a juror for "good cause" during deliberations.[62] Just cause exists when the juror refuses to follow the law or the jury instructions.[63] The dismissal of a juror is within the trial judge's discretion.[64] The judge must determine that a juror refused to formulate a verdict using the evidence presented during the trial.[65] Removing a juror because the prosecution's evidence is unconvincing will violate the defendant's constitutional right to a unanimous verdict.[66]

In contrast, when a juror admits that they are too biased, too unfair, or too emotional to follow the law, there is likely just cause to dismiss the juror.[67] For example, in *United States v. Oscar*,[68] a juror was dismissed during deliberations after expressing that she did not believe in the justice system, could not act fairly, and needed to "defend [her] people."[69] If the juror were not removed, the verdict likely would have been unlawful. Therefore, in *Oscar*, the court did not abuse its discretion by dismissing the juror because refusing to follow the law constituted just cause.[70]

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60. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 874–75 (2017). The Sixth Amendment requires that a defendant receive a jury selected from a cross-section of the community; this does not mean that a jury will consist of a fair cross-section of the community. Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 157 (2012); *see also* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 334 (Henry Reeve trans., Schocken 1st ed. 1961) (observing that the separation of classes in America's democratic government: "Societies . . . follow certain rules in their formation that they cannot evade . . . . It is evident that each of these classes will bring its own distinctive instincts to the handling of the finances [and policies] of the State.")

61. *Peña-Rodriguez*, 137 S. Ct. at 874.

62. FED. R. CRIM. P. 23(b) (2021).

63. *Geffrard*, 87 F.3d at 452.

64. *Abbell*, 271 F.3d at 1302.

65. *See* In re Winship, 397 U.S. 358, 364 (1970).

66. United States v. Thomas, 116 F.3d 606, 621–22 (1997).

67. *Oscar*, 877 F.3d at 1288.

68. *Id.*

69. *Id.* The juror also started to cry when discussing the defendant's possibility of prison. *Id.*

70. *Id.*

3. Confidentiality and Questioning

Rule 606(b) of the Federal Rules of Evidence[71] intends to preserve the legitimacy and finality of the judicial process and the defendant's verdict; it also protects the jurors' interests, allowing them to speak freely without persecution.[72] Jurors may not testify as a witness for cases on which they serve.[73] While jurors may talk about deliberations after the trial, their statements have no legal weight.[74] Likewise, judges may not admit testimony or affidavits from jurors that reflect their decision-making process.[75]

There are a few exceptions to this rule. For instance, a juror may testify about extraneous prejudicial information, outside influences, or a clerical mistake on the verdict form.[76] Jurors are also allowed to testify about extraneous influences, but judges may not question jurors about the subjective effect of that information.[77] Simply, the court may ask about the existence of the extrinsic evidence, but not how that evidence swayed the juror's perception of the verdict.[78] The judge determines whether the extraneous information contaminated the verdict using an objective standard.[79]

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71. FED. R. EVID. 606(b) (2021).

72. *Id.*; DEBORAH J. MERRITT & RIC SIMMONS, MERRITT AND SIMMONS'S LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 962 (4th ed. 2018).

73. FED. R. EVID. 606(b)(1) (2021). Jurors shall not testify about (1) any statement made or any incident that occurred during deliberations, (2) the effect of anything on a juror's vote, or (3) any juror's mental process concerning a verdict or indictment. *Id.* Mental processes include a juror's feelings, pressures from other jurors, and whether the juror would have decided the verdict differently if either party presented alternate evidence during the trial. United States v. Burns, 495 F.3d 873, 875–76 (8th Cir. 2007).

74. MERRITT & SIMMONS, *supra* note 72, at 963–64.

75. FED. R. EVID. 606(b).

76. FED. R. EVID. 606(b)(2) (2021). The Supreme Court decided in *Peña-Rodriguez* that when a criminal defendant is found guilty, the Sixth Amendment will override Rule 606(b) in one scenario, which is when a juror acts according to racial stereotypes. *Peña-Rodriguez,* 137 S.Ct. at 868–69. Courts are reluctant to broaden the scope of this exception to include sexism, religion, and other forms of discrimination. The court's reluctance to broaden the scope of Rule 606(b) protects jurors' religious interests but strains the interests of defendants. MERRITT & SIMMONS, *supra* note 72, at 971.

77. United States v. Lloyd, 269 F.3d 228, 237 (3d Cir. 2001).

78. *Id.*

79. *Id.* at 238. The judge shall determine whether the "probable effect of the . . . information on a hypothetical average juror" would inflict sufficient prejudice. *Id.* (quoting United States v. Gilsenan, 949 F.2d 90, 95 (3d Cir. 1991)).

4. External Influences

Jurors may testify about extraneous prejudicial information.[80] Courts do not want to undermine the jury deliberation process, but it strives to protect the defendant's right to a fair trial. So, a juror's ability to testify about extraneous prejudicial information is relevant to a finding of impartiality. Still, a mistrial or a new trial is only required when a juror's use of extrinsic evidence poses a "reasonable possibility of prejudice to the defendant."[81] The defendant must show that extrinsic evidence tainted the jury.[82] Prejudice is presumed once the defendant establishes that extrinsic evidence has contaminated the jury.[83]

Jurors may not testify on internal matters of deliberation, but they may testify about external influences. In *Tanner v. United States*,[84] the Supreme Court held that jurors' statements about sleeping, abusing alcohol, and using drugs during deliberations refer to internal matters because they occur inside the jury room.[85] Thus, the court reasoned that intoxication reflects a juror's nature and is not an influence deriving outside of the jury room.[86] The holding in *Tanner* suggests that courts are more likely to broaden the scope of internal influences rather than limit the definition of external influences.[87] While this limitation safeguards the finality and legitimacy of the justice system, it also confines the subjects on which jurors may testify.[88]

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80. FED. R. EVID. 606(b). Jury tampering, such as bribes, coercing, or other jury influencing is strictly prohibited and is grounds for overturning a verdict. *Id.*

81. United States v. Perkins, 748 F.2d 1519, 1533 (11th Cir. 1984). *See also* United States v. Ronda, 455 F.3d 1273, 1299 (11th Cir. 2006).

82. *Ronda*, 455 F.3d at 1299.

83. *Id.*

84. Tanner v. United States, 483 U.S. 107 (1987).

85. *Id.* at 117–19.

86. *Id.*

87. *Id.*; s*ee* MERRITT & SIMMONS, *supra* note 72, at 966.

88. For obvious policy reasons, allowing "postverdict investigation into juror misconduct . . ." would undermine the jury system and, consequently, the American justice system. The Supreme Court explained why postverdict juror investigations are unfavored:

> [a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussions in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

United States v. Siegelman, 799 F. Supp. 2d 1246, 1254 (M.D. Ala. 2011) (quoting *Tanner*, 483 U.S. at 120–21) (internal citations omitted by the Eleventh Circuit).

D. Standard of Proof on Appeal

Removal of a juror is reviewed for "abuse of discretion."[89] An appellate court will reverse a district court's ruling if it "discharged the juror 'without factual support, or for a legally irrelevant reason.'"[90] Whether the dismissed juror purposefully refused to follow the law is a factual issue that the appellate court will review for clear error.[91]

The district court makes a clear error when the appellate court has been "left with the definite and firm conviction that a mistake has been committed."[92] The district court judge is uniquely positioned to make credibility determinations that determine a juror's "motivations and intentions,"[93] so appellate courts generally give deference on factual findings to the district court judge who witnessed the testimony live.[94]

E. Juror Dismissal is Not Warranted if the Record is Ambiguous

An ambiguous record on appeal unclearly shows that a court lawfully dismissed a juror. When an ambiguous record is presented to the appellate court, even if considerable evidence supports the conclusion that a dismissed juror deliberated on impermissible grounds, reversal of the juror's dismissal is warranted.[95]

When jurors refuse to deliberate according to evidence, the trial court likely acts within its discretion when dismissing that juror.[96] For example, in *United States v. Abbell*,[97] multiple jurors sent a note to the court which alleged that Juror Alfonso incorrectly followed the law during deliberations and acted as though the jury instructions were "only advisory and not binding on the jury."[98] Juror Alfonso did her nails during deliberations which angered other jurors because it suggested a lax duty to uphold the law.[99] Even after additional jury instructions were given, multiple jurors alleged that Juror Alfonso refused to engage in deliberations, consider evidence, or follow the law.[100] The court dismissed

89. *Abbell*, 271 F.3d at 1302.
90. *Id.* (quoting United States v. Smith, 918 F.2d 1501, 1512 (11th Cir. 1990)).
91. *Abbell*, 271 F.3d at 1302–03.
92. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).
93. *Abbell*, 271 F.3d at 1303.
94. United States v. Gabay, 923 F.2d 1536, 1542–43 (11th Cir. 1991).
95. *Brown*, 996 F.3d at 1185.
96. *Abbell*, 271 F.3d at 1304.
97. *Id.* at 1302.
98. *Id.* at 1303.
99. *Id.* at 1304.
100. *Id.* at 1303–04.

Juror Alfonso.[101] On appeal, the court held that the district court acted within its discretion by dismissing the juror.[102]

The appellate court in *Abbell* established that its standard on appellate review is "no substantial possibility," which asks whether "the juror was basing her decision on the sufficiency of the evidence."[103] The substantial possibility standard is explicitly intended to operate as a "'beyond reasonable doubt' standard."[104] In establishing this standard, the court in *Abbell* emphasized the constitutional challenge of dismissing jurors; to ensure the dismissal is constitutional, courts must distinguish jurors who reject the law from those who merely disagree.[105] The court in *Abbell* acknowledged the potential for defendants' and jurors' interests to clash and the need to balance those interests fairly.[106]

When the court dismisses jurors because of their view of the evidence, there is likely an ambiguous record. For instance, in *United States v. Thomas,*[107] multiple jurors reported another juror for invoking allegedly unrelated reasons for voting a certain way during deliberations.[108] The juror was dismissed because he allegedly refused to convict for prejudiced notions.[109] While dismissing a juror because of prejudice may be required to protect the Sixth Amendment rights of the defendant, in *Thomas*, there was no prejudice; instead, the dismissed juror "couch[ed] his opinion [of the verdict] in terms of the evidence . . . ."[110] In other words, the juror was unconvinced by the presentation of the evidence. Thus, the appellate court in *Thomas* held that the juror's dismissal was not warranted because unambiguous records do not turn on the presentation of evidence.[111]

IV. COURT'S RATIONALE

The *en banc* majority in *Brown* held that the record for dismissing Juror 13 was ambiguous because there was "more than a substantial possibility" that Juror 13 deliberated according to the law and the

101. *Id.* at 1304.
102. *Id.*
103. *Id.*
104. *Id.* at 1302.
105. *Id.*
106. *Id.*
107. *Thomas*, 116 F.3d at 611.
108. *Id.*
109. *Id.* at 612.
110. *Id.* at 611.
111. *Id.* at 618.

evidence presented.[112] Thus, the district court abused its discretion and violated the defendant's right to a unanimous jury.[113] Judge William Pryor wrote the court's majority opinion.[114] Judge Newsom and Judge Brasher each wrote a concurring opinion. Judge Wilson and Judge Rosenbaum each wrote a dissenting opinion.

A. Standard on Appeal

The majority in *Brown* adopted the *Thomas* standard for dismissing jurors, which warrants juror dismissal only for an unambiguous record, rather than using the standard established in *Abbell*, which warrants dismissal of jurors using a clear error review.[115] The Thomas standard contradicts *Abbell*'s clear error standard and limits the court's discretion and deference.[116] Now, juror dismissal is only warranted in the Eleventh Circuit if the record on appeal is unambiguous.[117]

In his concurrence, Judge Newsom disagreed with the majority's departure from precedent concerning the appellate standard of review: the change "obliterates the factfinder's role and distorts the clear error standard of review."[118] Further, Judge Newsom argued that, by making the standard for dismissal "onerous" as the majority does here, district courts are discouraged from removing a juror who convicts for reasons other than the evidence, including religion.[119] In other words, Judge Newsome maintained that allowing jurors to formulate a verdict for unlawful reasons will jeopardize the defendant's constitutional rights, especially when courts may not police issues that lead to arbitrary verdicts.[120]

Judge Wilson dissented to contend that the trial judge is particularly positioned to make factual determinations, especially for juror

112. *Brown*, 996 F.3d at 1194.

113. *Id.*

114. Judge Jill Pryor did not participate in this decision on appeal.

115. Specifically, the majority in *Brown* "reject[ed] the government's insistence that on clear error review, we [the appellate court] must defer to the district judge's decision." *Brown*, 996 F.3d at 1186. The majority in *Brown* also "effectively discard[ed] *Abbell* in favor of *Brown* and *Thomas*." *Id.* at 1198 (Wilson, dissenting). *See Abbell*, 271 F.3d at 1302–03; *Thomas*, 116 F.3d at 623–24.

116. *Brown*, 996 F.3d at 1198–99.

117. *Id.* at 1185.

118. *Id.* at 1199.

119. *Id.* at 1210.

120. *Id.* at 1211.

removal.[121] Likewise, a stricter standard of proof in the trial court can "coexist" with a less-rigorous appellate standard without infringing on constitutional rights.[122] Simply, moving to the ambiguous record standard is an unnecessary, injudicious departure from precedent.

B. Context is Relevant

Judge Newsom concurred to reiterate that context is relevant when evaluating a record on appeal.[123] He argued that this case did not turn on the statement, "[T]he Holy Spirit told me . . . that Corrine Brown was not guilty on all charges."[124] Instead, courts should always consider the entire record on appeal, as the majority did here.[125]

1. Juror 13 Understood the Assignment

According to the majority in *Brown*, Juror 13 "*never* gave any indication" that he refused to follow the law or otherwise expressed a lack of faith in the justice system; instead, he repeatedly referenced consideration of the evidence.[126] When questioned by the court, Juror 13 explained his duty as a juror: to "listen for the truth."[127] Likewise, Juror 8 never claimed that Juror 13 disregarded the evidence, repudiated deliberations, or impeded deliberations. Unlike in *Thomas* where multiple jurors reported a juror for misconduct,[128] Juror 8 in *Brown* shared a "vague" concern that Juror 13's beliefs "*might later* 'interfere in his ability' to deliberate."[129] Per the majority in *Brown*, the record did not show misconduct or ambiguous misbehavior because Juror 13 did not, beyond a reasonable doubt, deliberate with an unwillingness to apply the law.[130]

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121. *Id.* Judge Rosenbaum also values the district court's opinion because, unlike appellate judges, the district court judges directly interact with the jurors. Judge Rosenbaum painted a gloomy description of the role of appellate judges:

> We sit . . . miles away in our quiet offices, reading cold, lifeless transcripts months (or years) after the fact. We never interact with the challenged juror, never watch his demeanor as he responds to questions or listens to evidence, never hear his intonation, and never so much as observe him in person at all.

Id. at 1213.

122. *Id.* at 1201.

123. *Id.* at 1194.

124. *Id.*

125. *Id.*

126. *Id.* at 1187–88.

127. *Id.* at 1187.

128. *Thomas*, 116 F.3d at 611.

129. *Brown*, 996 F.3d at 1188.

130. *Id.* at 1188–89.

2. Timing of Juror 13's Statements

Juror 13's statements about higher beings occurred at the beginning of deliberations, then once more during deliberations.[131] According to the majority in *Brown*, the timing of Juror 13's statements did not warrant dismissal.[132] Undoubtedly, Juror 13 had an initial belief about the verdict. Nevertheless, both the majority and Judge Brasher (in a concurring opinion) argued that jurors' initial beliefs do not indicate whether a juror will deliberate lawfully.[133] Instead, jurors should discourse to form a verdict, so the juror's initial perspective of the case is immaterial.[134]

C. Questioning Jurors During Deliberations

The majority did not discuss the court's interrogation power in detail. Even still, Judge Brasher's concurrence maintained that probing jurors is unacceptable,[135] while Judge Wilson's dissent maintained that a narrow inquiry of jurors is tolerable.[136]

Specifically, Judge Brasher's concurring opinion maintained that asking Juror 13 about "his religious convictions, his view of the evidence, or his understanding of a juror's role" was unjustified.[137] Except for extreme cases of juror misconduct, a judge "should not question a juror about why he wants to acquit or convict."[138] There was no "stalemate; there was no holdout juror; there was no impasse; no misconduct required the judge's attention."[139] So, the court could have reinstructed the jury or spoken with—not questioned—Juror 13 to ensure he was deliberating in good faith.[140]

However, Judge Wilson iterated that when suspicion of misconduct arises, courts shall investigate; but "[i]f the door to the jury room is to be opened, it should be opened narrowly . . . [and] an intrusive investigation should be rejected."[141] After *Brown*, jurors must say the "magic words" to

131. *Id.* at 1189.
132. *Id.*
133. *Id.*
134. *Id.* at 1189, 1195.
135. *Id.* at 1195.
136. *Id.* at 1209.
137. *Id.* at 1195.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 1207.

guard themselves against removal.[142] Further, while a "hands-off approach might seem attractive as a rule going forward[,]" district courts need "latitude" to ensure that juries continue producing law-abiding verdicts.[143]

D. Religion and Jury Duty

The district court held that Juror 13's religious statements were inharmonious with jury duty.[144] Alternatively, the majority averred that Juror 13 "drew a *direct and specific connection*" between religious and legal obligations to formulate a verdict based on the law.[145] Per the majority, Juror 13's statements were permissible because his "vivid and direct religious language . . . suggests he was doing nothing more than praying for and receiving divine guidance as he evaluated the evidence or . . . provided an explanation of his internal processes—all consistent with proper jury service."[146]

The district court also ruled that Juror 13's religious statements were disqualifying because they suggested the use of an external force.[147] However, the majority insisted that Juror 13's reliance on higher beings was "no more disqualifying by itself than a secular juror's statement that his conscience or gut 'told' him the same."[148] The religious statements were not references to an outside or external force because a reference to religion is an "internal mental event, not an impermissible external

142. *Id*. at 1208–09. Judge Wilson asserted that the approach taken by the district court in *Brown* was proper. First, the court spoke with Juror 8 to determine whether an interview with Juror 13 was necessary. Then, the Judge questioned Juror 13 by clearing the courtroom. Likewise, the questions were not overly intrusive and did not involve all jurors. Judge Wilson maintained that this approach was vigilant and was not an abuse of discretion.

143. *Id.* at 1209. Judge Wilson noted that the court in *Thomas* perceived the "fundamental flaw" of requiring jurors to say the "magic words" to keep from being removed. According to Judge Wilson, dismissing that flaw is intolerable. *Id.* at 1208. *See Thomas*, 116 F.3d at 616.

144. *Brown*, 996 F.3d at 1189.

145. *Id.* at 1190.

146. *Id*. at 1191.

147. *Id.* at 1189.

148. *Id.* at 1193.

instruction."[149] The majority, relying on religious theory, decided that jurors praying for guidance is permissible.[150]

Unlike the majority in *Brown*, which heavily characterized Juror 13 as someone who innocently practices a religion, Judge Newsom concurred that this case was not about religious jurors.[151] Instead, Judge Newsom claimed that *Brown* would have the same result if the juror's motivation for a verdict were non-religious.[152] This distinction de-emphasized the religious aspect of Juror 13's statements while endorsing the standard established in *Thomas*, which the Eleventh Circuit now embraces.[153]

In a dissenting opinion, Judge Wilson argued that the majority "stirred passions" by asserting that the district court's holding invites discrimination against religious individuals.[154] In essence, affirming the district court's decision would not force jurors to "become different people in the jury room."[155] On the contrary, "many have relied on prayer" to "sit in judgment of their fellow citizens . . . and no one here has advocated anything different."[156] Therefore, Judge Wilson maintained that directing jurors to follow the law, as the Constitution necessitates, "is no attack" on religion or religious jurors.[157]

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149. *Id.* at 1192. The court relied heavily on religious experts to support the assertion that Juror 13's religious statements reflected intrinsic thought, not external influence. As noted by anthropologists, various Evangelicals in America "accept the basic idea that they can experience God directly" using "interpretive tools" to "experience what feels like inner thought as God-generated. They have to . . . learn to trust that they [the thoughts] really are God's, not their own . . . ." T.M. LUHRMANN, WHEN GOD TALKS BACK: UNDERSTANDING THE AMERICAN EVANGELICAL RELATIONSHIP WITH GOD 41 (2012).

150. *Brown*, 996 F.3d at 1191–93. The majority in *Brown* referenced several religious theorists and texts to argue that prayer is an internal process and should not be banned from deliberations. *See, e.g.,* C. S. LEWIS, THE PROBLEM OF PAIN 81 (1944) (maintaining that God "speaks in our conscience . . ."; 1 *Corinthians* 3:16 (King James) ("Know ye not that ye are the temple of God, and that the Spirit of God dwelleth in you?"); *Americans' beliefs about the nature of God, When Americans Say They Believe in God, What Do They Mean?* PEW RESEARCH CENTER (2018), https://www.pewforum.org/2018/04/25/when-americans-say-they-believe-in-god-what-do-they-mean/ (last visited Jan. 3, 2022) (reporting data from a survey conducted in 2017 which found that 28% of respondents believe they talk to God and God talks back).

151. *Brown*, 996 F.3d at 1194.

152. *Id.*

153. *Id.*; s*ee Thomas,* 116 F.3d at 623–24.

154. *Brown*, 996 F.3d at 1209.

155. *Id.* at 1211.

156. *Id.* at 1211–12.

157. *Id.* at 1212. In response to the majority in *Brown*'s reliance on religious theorists and spiritual commentators, Judge Wilson explained, "I would not second-guess that determination [of whether jurors can base their decisions on evidence] based on claims, however accurate, about the way many people experience prayer." *Id.* at 1211.

V. IMPLICATIONS

In *Brown,* the Eleventh Circuit explored the issue of when religious freedom becomes legal persecution, particularly when jurors' and defendants' interests clash. While jurors must develop a verdict grounded in the evidence and the law, defendants seek an unbiased verdict free from religious prejudice. There is a middle-ground to the clashing interests, but it requires an equal balance of First Amendment and Sixth Amendment rights; this line can be hard to draw because religion is a multifarious issue. Nevertheless, religious freedom becomes legal persecution when the court does not equally balance a juror's First Amendment rights and a defendant's Sixth Amendment rights.

The majority in *Brown* did not use a balancing test to weigh the demands of jurors' First Amendment right to religion and defendants' Sixth Amendment right to a unanimous verdict. However, the new standard used to dismiss jurors will vindicate individuals who may use religion as a basis of deliberations. The line between religious freedom and legal persecution can be arbitrary, especially for juror dismissal. Nevertheless, the majority in *Brown* inadequately considered the defendant's Sixth Amendment rights by focusing on religious theory and jury secrecy, blatantly outshining the defendant's interests. Juror 13 used religion to decide a verdict regarding Brown's rights and freedoms. Thus, religion was imposed, not practiced.

Christianity is a dominant religion in the United States, so limiting the court's authority to question jurors about religion may not seem like an abuse of discretion. However, the same people who find *Brown* appealing because of its reverence of Christianity might have issues with the holding if the religion at issue was different. For instance, if the religion in *Brown* were Islam, the court would likely share more qualms about limiting a court's ability to question the juror.[158] Moving forward, regardless of religion imposed, courts must accept prejudiced verdicts if jurors can explain their lawful responsibility as Juror 13 did in *Brown*.

One protection to ensure a lawful verdict is the judge's ability to question jurors when there is an issue.[159] The holding in *Brown* limits a

158. Similarly, the likelihood that this decision would have the same verdict is slim. Notably, this decision comes from the Eleventh Circuit, which is located within the Bible Belt. The Bible Belt is known for its strong evangelical Protestantism and tends to be socially and politically conservative compared to Northern and Western states.

159. The majority in *Brown* did not dwell on the interrogation of jurors, but its decision limits a court's ability to question jurors without facing an appeal. Another type of protection that courts may use to ensure the validity of a verdict is jury instructions. Jury instructions are often repeated by the district court judge to remind jurors of their responsibility to deliberate using the law and the evidence presented during the trial. A court's instructions "provide guidelines for the jurors to take into account, [however] there

district court's power to interrogate jurors and intervene when religious prejudice arises.[160] While this limitation preserves jury secrecy, it allows for verdicts unconstitutionally prejudiced by religion and ungrounded in the law. However, whether deliberation remains secret is immaterial if the verdict is determined unconstitutionally. Judge Wilson's dissent stated that "while juror secrecy is of great importance, so is ensuring that juries render verdicts anchored in the facts and the law."[161] Perhaps, if the majority in *Brown* valued the Sixth Amendment as much as it valued the preservation of jurors' rights to impose their religions onto others, then judges moving forward might have a chance to dismiss biased jurors and protect defendants from unlawful verdicts.

The majority in *Brown* should have considered the defendant's interests more—and the theory of religion less—to balance the clashing Sixth Amendment and First Amendment rights. Juror 13 did not merely practice his religion; he imposed his religion on the verdict. When we say, "So help me, God," we do not mean "So help decide this case for me, God."

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remains ample room for the jurors' own values to come into play, [and] these values often depend on the jurors' religious beliefs." Simson & Garvey, *supra* note 51, at 42.

160. Jurors are not the only parties who may project religious ideologies during deliberations. Courts have recognized that "religious beliefs are an important part of many judge's deliberations and can be a useful factor in helping a judge reach a fair sentence." However, "[a]s with almost all religious references in a courtroom, judges who cite Biblical quotations or refer to other religious texts risk being challenged on the grounds of a violation of due process and the principle of separation of church and state." 73 AM. JUR. PROOF OF FACTS 3d. § 11 (Originally published in 2003).

161. *Brown*, 996 F.3d at 1209. Likewise, in the other dissenting opinion, Judge Newsom stated that "a unanimous jury's guilty verdict is worth less than nothing to a convicted defendant if the jurors who returned the verdict did not base it on the evidence." *Id.* at 1212. Judge Newsom continued to critique the majority's holding by dubbing it "a skulking serpent: it dooms the Sixth Amendment right to a unanimous jury verdict . . . when a jury returns a *guilty* verdict not unanimously based on the evidence." *Id.*