

Tennessee Association of Criminal Defense Lawyers

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October 7, 2024

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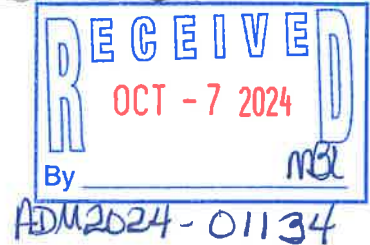
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VIA US MAIL AND EMAIL: appellatecourtelerk@tncourts.gov

James Hivner, Clerk
Re: 2025 Rules Package
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407



RE: Order No. ADM2024-01134
Comment on Proposed Amendment to Rule 24(f),
Tennessee Rules of Criminal Procedure regarding trial jurors

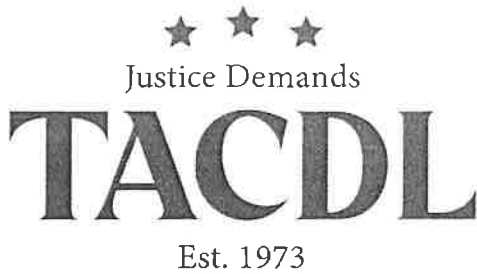
Dear Mr. Hivner:

On behalf of the Tennessee Association of Criminal Defense Lawyers, we are providing commentary on the proposed Amendment to Rule 47.02, which changes the procedure for alternate jurors in criminal cases.

The current procedure for alternate jurors has remained unaltered since the criminal rules were promulgated in 1978. Specifically, alternates are discharged when the jury of 12 retires to consider its verdict. There is no procedure for "holding back" alternate jurors to substitute for a juror who becomes legally unavailable during the deliberation. The consequence for that, of course, is a mistrial.

A.

As the Court is probably aware, the Attorney General has found that, absent some direct authority, a criminal court judge in Tennessee does not have inherent authority to retain alternate jurors after deliberations have started. See attached Opinion No. 21-08, dated May 18, 2021. It would appear, then, that the proposed rule is because of that Opinion.



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The federal rule was altered in 1999 to permit alternates to be segregated and then to replace a deliberating juror should a vacancy occur. The federal committee comments state that this “might be especially appropriate in a long, costly and complicated case.” Most other jurisdictions also allow for alternate jurors to be retained in the event a deliberating juror must be replaced.

The Tennessee Association of Criminal Defense Lawyers agrees it is inevitable that our rule will be altered in line with the federal rule and comparable provisions in other jurisdictions. Our concern is that the proposed rule contains no language as to the special care which must be given to removing a deliberating juror since this involves vastly different considerations than when merely replacing a sick juror during the middle of a trial. We believe the rule should contain specific language to avoid the pernicious practice in other jurisdictions of removing a deliberating juror under the guise of some “incapacity” where the juror is holding out for a verdict of acquittal. *United States v. Hernandez*, 862 F.2d 17, 23 (2d Cir.1988) (“That a juror may not be removed because he or she disagrees with the other jurors as to the merits of the case requires no citation.”).

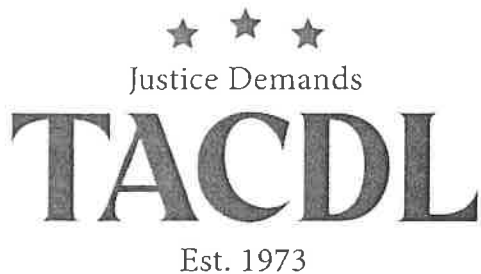
B.

*“So how come you vote not guilty?”*

*“Well, there were 11 votes for guilty. It's not easy to raise my hand and send a boy off to die without talking about it first.”*

-Henry Fonda in 12 Angry Men

Removing a “holdout juror” on the grounds of some alleged incapacity is not uncommon. For example, in *Delgado v. State*, 848 S.E.2d 665 (Ga. App. 2020), the jury sent a note to the judge during deliberations that one of the jurors was “refusing to deliberate” and, eventually, that juror was replaced with an alternate and the defendant was convicted. The Georgia appellate court reversed, finding that a holdout juror is not subject to dismissal for failing to acquiesce to the other juror’s conclusions. The court concluded that the “holdout juror was not required to continue deliberating in perpetuity once he reached his opinion.” The trial judge should have just declared a mistrial.



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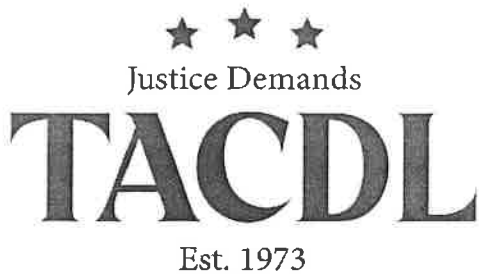
In *People v. Barton*, 270 Cal. App. 5<sup>th</sup> 496 (Cal. App. 2020), the judge replaced a deliberating juror ostensibly because the juror was not “deliberating.” Finding that the substitution of the holdout juror was inappropriate, the court addressed legitimate constitutional concerns between distinguishing between a juror who was refusing to deliberate or is instead simply disagreeing with the majority view. See also similar results in *State v. Elmore*, 90 P. 3d 1110 (Wash. App. 2004), and *State v. Depaz*, 204 P. 3d 217 (Wash. App. 2009).

This issue is the subject of articles addressing removal of “holdout” jurors under some alleged incapacity theory. See Ericka Webster, *Preserving Fundamental Rights in the Realm of Mid-Deliberation Juror Removal*, 52 U. Mem. L. Rev. 1069 (2022) and Jason D. Reichell, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U.Mich.J.L.Reform 569, 617-618 (2007) (“In a competition between jury secrecy, the existence of a holdout, and the potential for the technical existence of some form of juror misconduct, the holdout's interests and the secrecy of the deliberations must win every time.”).

Our colleagues in other states alerted us to this issue after we asked about possible collateral problems when we solicited comments that the Tennessee rule might change. Indeed, one of our members advised his client suffered from this precise problem in a case in federal court in which the only Black juror in a trial was removed after the foreperson stated he was not deliberating. The removed juror stated that, in reality, the other members had become upset with him for voting not guilty.

The Tennessee Association of Criminal Defense Lawyers firmly believes “alternate jurors do not serve to substitute for minority jurors who cannot agree with the majority.” *Semega v. State*, 691 S.E. 2d 923 (Ga. App. 2010). Certainly, if a deliberating juror is involved in a serious car accident on their way back to the courthouse, the hospitalization of that juror could well justify replacement with an alternate juror. It is that sort of catastrophe which may justify replacement instead of declaring a mistrial.

We also believe that an “abuse of discretion” standard is too lax in reviewing the removal of a deliberating juror. Moreover, this is not an issue which can be “taken care of” in a comment.



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It is unnecessary to wait for a case to decide the issue; there is abundant precedent which can assist in formulation of a rule. *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999):

We hold that if the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror. Under such circumstances, the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial.

The Tennessee Association of Criminal Defense Lawyers believes that an additional section should be added to the amendment:

Removal of a juror during deliberations may be appropriate only where the juror is severely incapacitated from further deliberations. Removal is never proper based on a juror's views of the case, ability to reach a verdict, or other factors related to the deliberation process. The propriety of removal of a deliberating juror shall be reviewed de novo without a presumption of correctness. Doubts about the removal of a deliberating juror should be resolved by a presumption of prejudice and declaration of a mistrial.

We believe that, while strong, such language is imperative to avoid the prospect of removing a juror who may have a view different from other jurors. We wish to thank the Court for considering our request.

Very truly yours,

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STATE OF TENNESSEE  
OFFICE OF THE ATTORNEY GENERAL

May 18, 2021

Opinion No. 21-08

Substitution of Alternate Jurors in Non-Bifurcated Criminal Trials

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QUESTION

Rule 24(f) of the Tennessee Rules of Criminal Procedure requires that alternate jurors “be discharged when the jury retires to consider its verdict.” However, Rule 24(c) of the Federal Rules of Criminal Procedure allows a court to retain alternate jurors to substitute for regular jurors after deliberations have begun. Does a Tennessee criminal court judge have inherent authority, in a non-bifurcated trial, to follow the Federal Rules of Criminal Procedure for the purposes of retaining alternate jurors after deliberations have started?

OPINION

No. Pursuant to Tenn. R. Crim. P. 24(f)(2), alternate jurors in a non-bifurcated trial must be dismissed once the jury retires to deliberate. Additionally, replacing a juror with an alternate juror after deliberations have begun may be structural constitutional error.

ANALYSIS

The Tennessee Rules of Criminal Procedure allow alternate jurors to replace regular jurors any time before the jury retires to deliberate. Tenn. R. Crim. P. 24(f)(2). However, alternate jurors “shall be discharged when the jury retires to consider its verdict.” *Id.* Retention of alternate jurors after the jury retires to deliberate violates the rule in non-bifurcated trials. *State v. Rayfield*, 507 S.W.3d 682, 701 (Tenn. 2015); *State v. Bobo*, 814 S.W.2d 353, 355-56 (Tenn. 1991); *c.f. State v. Hester*, 324 S.W.3d 1, 64, 67 (Tenn. 2010) (finding no error in a bifurcated capital trial when an alternate juror did not participate in guilt phase deliberations but replaced a juror before penalty phase deliberations).

We have found no cases or statutes that provide inherent authority to trial courts to apply a different rule. On the contrary, the Tennessee Supreme Court has indicated that trial courts do not have authority to adopt procedures different than those set out in the Tennessee Rules of Criminal Procedure. *See State v. Soller*, 181 S.W.3d 645, 648 (Tenn. 2005) (trial court did not have authority under Tenn. R. Crim. P. 11 to alter the terms of a plea agreement); *see also State v. Gonsales*, No. E2002-02687-CCA-R3-CD, 2003 WL 22697299, at \*5-6 (Tenn. Crim. App. Nov. 14, 2003) (trial court exceeded its authority under Tenn. R. Crim. P. 35 when it modified the defendant’s sentence without a request from either party for modification) (no perm. app. filed). Indeed, the Tennessee Supreme Court has explicitly held that failure to timely dismiss alternate jurors under Tenn. R. Crim. App. 24 is error. *Rayfield*, 507 S.W.3d at 682.

Additionally, substituting an alternate juror for a regular juror after deliberations begin may violate the state constitution. The Tennessee Constitution guarantees criminals defendants the right to a trial by jury and a unanimous jury verdict. Tenn. Const. art. I, § 6; *State v. Shelton*, 851 S.W.2d 134, 137 (Tenn. 1993). That right includes “the constitutional right to have all issues of fact submitted to the same jury at the same time.” *Bobo*, 814 S.W.2d at 356. In *Bobo*, the Tennessee Supreme Court concluded that substitution of an alternate juror after deliberations had begun coupled with failure to instruct the jury to begin deliberations anew constituted structural constitutional error. *Bobo*, 814 S.W.2d at 356-58; *see also State v. Harvey*, No. E2008-01081-CCA-R3-CD, 2010 WL 5550655, at \*26 (Tenn. Crim. App Dec. 30. 2010) (observing that the *Bobo* court’s analysis “counsels against finding [juror] substitution errors can ever be merely procedural”) (no perm. app. filed).

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## 52 U. Mem. L. Rev. 1069

University of Memphis Law Review  
 Summer, 2022

Symposium Edition: Featuring *the University of Memphis Law Review* Student Note

Note

Ericka Webster<sup>a1</sup>

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## PRESERVING FUNDAMENTAL RIGHTS IN THE REALM OF MID-DELIBERATION JUROR REMOVAL

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### \*1070 I. INTRODUCTION

Imagine being chosen as a juror in a murder case where the defendant faces life imprisonment with or without parole, or, in over half of the United States, the death penalty.<sup>1</sup> After three weeks of trial and only seven hours of deliberations, you are the only juror who does not agree that the prosecution has proven the defendant's guilt *beyond a \*1071* reasonable doubt.<sup>2</sup> Feeling uncomfortable and verbally harassed in the deliberation room, you believe it is necessary to seek counsel to appear in court and speak to the tribunal on your behalf.<sup>3</sup> This scenario happened in *Wofford v. Woods*, where the trial court dismissed a juror, reasoning that the action of seeking help was “a flagrant violation of the Court's instructions” and noting that cause existed to remove the juror for simply discussing the “climate of the jury room.”<sup>4</sup> The juror was removed despite evidence in the record of the juror's holdout status<sup>5</sup> and the jury returned a guilty verdict only one and a half hours after the replacement.<sup>6</sup>

*Wofford v. Woods* not only illustrates the issues inherent in juror removal that affect a criminal defendant's constitutional right to a unanimous verdict, but it also demonstrates the almost impenetrable decision-making of a trial court exercising discretion to remove a juror \*1072 during the deliberation process.<sup>7</sup> The importance of the holdout juror and the defendant's right to a unanimous verdict lies in the requirement that the prosecution has the ultimate burden of proving a defendant's guilt beyond a reasonable doubt. In cases like *Wofford*, trial courts interfere in a way that effectively removes the prosecution's burden, allowing a conviction where reasonable doubt remains regarding a defendant's guilt. The role of the American jury is so important in criminal trials that the United States Supreme Court has described it as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."<sup>8</sup>

The fact that the prosecution must prove a defendant's guilt beyond a reasonable doubt is a touchstone to the criminal justice system; thus, one juror's vote to acquit is enough to prevent a conviction.<sup>9</sup> Juror misconduct can take various forms, and judges have had mixed success in dealing with the occurrence of juror misconduct.<sup>10</sup> Judges are required to address juror misconduct when it occurs because of its implication on a defendant's right to a fair trial by an impartial jury.<sup>11</sup> This authority, while meant to protect against impartiality, can also have a disparate effect on a defendant's right to a unanimous verdict.

This Note argues that a judge's unfettered authority to remove a deliberating juror under the Federal Rule of Criminal Procedure 23(b)(3) (Rule 23(b)(3)) violates defendants' Sixth Amendment right \*1073 to a fair trial.<sup>12</sup> Part II of this Note will discuss defendants' constitutional rights as they apply to removal of a juror for "good cause" in federal courts and the implication of such when dealing with a possible holdout juror. Part III will analyze a federal district court's determination of misconduct. While some readily definable misconduct necessitates removal during deliberations, courts have not adequately considered a defendant's constitutional rights when dealing with these issues. Part IV proposes that to preserve an accused's fundamental rights, Rule 23(b)(3) must be amended to limit a trial judge's ability to remove a juror for "good cause," during deliberations. Part V briefly concludes that amending Rule 23(b)(3) is necessary to guide trial courts in deciding when a juror should or should not be removed during deliberations.

## II. INTERPRETING GOOD CAUSE & IDENTIFYING CONSTITUTIONAL RIGHTS IMPLICATED BY ITS USE DURING JUROR DELIBERATIONS

Though the practice of removing or punishing jurors for their substantive opinions has long been considered unlawful, early English common law is riddled with judges formulating ways to discharge a juror for having an unfavorable opinion.<sup>13</sup> Still, when situations arose where removal was necessary courts sought to strike a careful balance.<sup>14</sup> This balance became known as one of "good reason," allowing courts to base removal on conduct ranging from illness or family \*1074 emergency to jurors leaving the jury without permission.<sup>15</sup> The thorn in the side of U.S. courts striking this balance is the Sixth Amendment. This is because removing a juror during deliberations implicates a defendant's two fundamental requirements: the right to a unanimous verdict and the right to an impartial jury panel.<sup>16</sup>

### A. Origins of Juror Removal & Its Implication on Fundamental Rights

State and federal courts alike recognize that a juror may not be dismissed when such a dismissal stems from the juror's views on the merits of the prosecution's case, as dismissal in this instance has the possibility of overriding the Sixth Amendment's unanimous verdict requirement.<sup>17</sup> This recognition demands caution because if a court can remove a juror who harbors doubt about the prosecution's case, then the government can obtain a conviction without proving its case beyond a reasonable doubt.<sup>18</sup> Thus, in the presence of a potential holdout juror, a court's decision to exercise removal for "good reason" implicates a defendant's Sixth Amendment right to a unanimous verdict.

#### 1. The Sixth Amendment Right to a Jury Trial Requires Unanimity

Though most states have traditionally acknowledged defendants' right to a unanimous verdict, the Supreme Court has only recently incorporated this constitutional right against the states under the Fourteenth Amendment.<sup>19</sup> The right to a unanimous verdict, however, has not always been regarded as essential to the requirement of the Sixth \*1075 Amendment trial by jury.<sup>20</sup>



Fortunately, the Supreme Court has declined to allow cost-benefit concerns,<sup>21</sup> such as reducing the occurrence of hung juries, to override the right to a unanimous verdict.<sup>22</sup> In *Ramos v. Louisiana*, the Court overruled *Apodaca v. Oregon* and a four-justice plurality decision concluded that the cost of unanimity outweighed its benefits.<sup>23</sup> According to the Court, the Constitution sought to establish and highlight a defendant's right to trial by jury, appearing in Article III and the Sixth Amendment of the Constitution.<sup>24</sup> Commenting on the potential importance of hung juries, the Court asked, "who can say whether any particular hung jury is a waste, rather than an example of a jury doing exactly what the plurality said it should--deliberating carefully and safeguarding against overzealous prosecutions?"<sup>25</sup>

When a unanimous verdict is prevented by one juror who disagrees with the majority, the criminal justice system is functioning exactly how it was intended.<sup>26</sup> A favorable quality of the jury trial is that a defendant is not likely to be punished for conduct that the jury "do[es] not morally disapprove [of]."<sup>27</sup> This is a reflection of how a trial by jury is meant to "protect[] [defendants] ... from being judged by a special class of trained professionals who do not speak the language of ordinary people and may not understand or appreciate the way ordinary people live their lives."<sup>28</sup> Trial by jury "is no mere procedural formality"--it is realized by a defendant's right to be adjudicated based on the opinion of a cross-section of their peers and rationalized as "a fundamental reservation of power in our constitutional structure."<sup>29</sup> Such reservation of power imposes on a jury trial notions of preserving the democratic process.<sup>30</sup> While no fundamental right attaches to individual jurors, jury trials instill confidence in the "continued acceptance of the laws" and provide ordinary citizens access "to participate in a process of government ...."<sup>31</sup> It follows, then, that the unanimity requirement encompasses a jury selection representative of a cross-section of the community and enshrines the selected few with a constitutional duty to, in weighing the evidence presented against the accused, \*1077 debate freely and impartially while shielded from the sophistication of professional judgment.<sup>32</sup>

## 2. The Sixth Amendment Impartiality Requirement, Defined

The unanimity requirement derives from the Sixth Amendment's right to a speedy and public trial by an impartial jury.<sup>33</sup> While traditionally thought to require twelve members, a jury panel need only "be large enough to promote group deliberation, free from outside attempts at intimidation, and ... provide a fair possibility for obtaining a representative cross-section of the community."<sup>34</sup> Trial by jury functions to prevent government oppression,<sup>35</sup> thus where "only the jury can strip a man of his liberty or his life," impartiality serves to require a juror to be "indifferent as he stands unsworn."<sup>36</sup>

The requirement of an impartial jury relies on the fundamental principle that the jury's verdict must be based upon the evidence \*1078 developed against the defendant at trial.<sup>37</sup> Therefore, due process requires a jury panel "capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."<sup>38</sup> Impartiality is also often associated with juror misconduct as it relates to a juror's perceived bias, originating from a juror's contact with information extraneous to the trial, such as contact by a third party.<sup>39</sup> Facts indicating the presence of a juror's partiality pre-verdict can be cause for a juror's removal while post-verdict can be used as grounds to support a motion for a new trial.<sup>40</sup>

Before enactment of Rule 23(b)(3), post-trial allegations of juror bias and contact with third parties were deemed to be presumptively prejudicial, and it was the Government's burden to establish that the contact with the juror was harmless to the defendant.<sup>41</sup> The prejudice presumption was short-lived, as the Supreme Court later suggested that the presumption should not be invoked in all instances of misconduct but only in cases involving serious intrusion of "actual bias."<sup>42</sup> Courts will apply a presumption of prejudice, however, when "in a criminal case, any private communication, contact, or tampering, directly or indirectly, [occurs] with a juror during a trial about the matter pending \*1079 before the jury ...."<sup>43</sup> Still, a defendant's ability to prove juror bias is also limited by Federal Rule of Evidence 606(b), which forbids jurors from testifying at post-trial hearings about "any matter or statement" that occurred during the course of deliberations.<sup>44</sup> Generally, no one--not even a judge--is permitted to know how a jury or an individual juror has reached a decision or how an individual juror or jury deliberated to reach a decision.<sup>45</sup> The primary method used by judicial process that attempts to establish an impartial jury is the use of *voir dire*.<sup>46</sup> \*1080 When a juror is removed after a trial has begun, "it signals a breakdown in the practice of jury regulation and

voir dire.”<sup>47</sup> If voir dire is unsuccessful, Rule 23(b)(3) becomes a helpful tool for a court receiving allegations of juror bias after a trial begins.<sup>48</sup>

### ***B. Removal of Jurors Under Rule 23(b)(3)***

Under Rule 23(b)(3), trial courts may dismiss deliberating jurors for “good cause,” and, if necessary, the related Federal Rule of Criminal Procedure 24(c)(3) (Rule 24(c)(3)) allows courts to retain alternate jurors after deliberations have begun. The “good cause” provision was added to avoid a mistrial in situations where a juror has become “seriously incapacitated or otherwise found to be unable to continue service upon the jury” and the trial was one of significant length and substantial resources.<sup>49</sup> In addition, Rule 24(c)(3) was later amended to allow judges to retain alternate jurors despite acknowledgment of the constitutional difficulty in replacing a juror with an alternate after deliberations had begun.<sup>50</sup> The Amendment Advisory Committee also noted that the Supreme Court has indicated its “doubts as to the desirability and constitutionality of such a procedure,” thus later allowing judges to retain alternate jurors only if the court instructs the jury to restart its deliberations and ensure that the alternate juror does not discuss the \*1081 case with anyone prior to being placed on the jury.<sup>51</sup> This instruction addresses the concern that the use of an alternate juror during deliberations may invite coercion from the remaining jurors who have already reached a conclusion based on the evidence.<sup>52</sup> Rule 23(b)(3) and Rule 24(c)(3) therefore work in tandem to allow a court to remove a juror for good cause and replace that juror with an alternate. Together, these rules allow juror deliberations to continue, avoiding unnecessary delay or potential mistrial.

The authority to remove a juror during deliberations is within the discretion of the trial court, to be reviewed under the forgiving “abuse of discretion” standard on appeal.<sup>53</sup> The decisions of trial courts are given a great amount of deference because the trial judge’s observance of a juror’s demeanor during voir dire places them “in the best position to determine the credibility of a juror’s statements.”<sup>54</sup> Appellate courts are “highly reluctant ‘to second guess the conclusion of [an] experienced trial judge,’ when ... that conclusion was ‘based in large measure upon personal observations that cannot be captured on a paper record.’”<sup>55</sup> This discretionary authority equips courts with the ability to avoid a mistrial when, after a lengthy and complex trial, jurors are deemed unable to deliberate.

### **\*1082 1. Types of Misconduct under the Good Cause Standard**

Since amended, Rule 23(b)(3) allows juror removal for good cause during deliberations, and courts have exercised their unilateral authority to dismiss jurors during deliberations for a variety of reasons.<sup>56</sup> One of the most common reasons for good cause dismissal arises when a juror is not physically able to appear for duty. A juror’s absence due to physical inability can range from a juror’s mere failure to appear to a juror’s illness or serious injury.<sup>57</sup> Moreover, various external factors can cause a juror’s physical unavailability, including the death or illness of a juror’s family member.<sup>58</sup> Good cause removal is available under virtually any circumstances causing a juror’s physical unavailability, including those instances where jury duty interferes with an individual juror’s employment or religion.<sup>59</sup> The Second Circuit, for example, has upheld the removal of a juror who required four days of leave to observe religious practices.<sup>60</sup> The court rejected the \*1083 argument that good cause should only be used when “a juror suffers permanent or at least lengthy incapacitation,” reasoning that good cause broadly encompasses “a variety of temporary problems that may arise during jury deliberations.”<sup>61</sup>

While case law demonstrates that physical unavailability is an acceptable use of good cause, some courts do not hold that jurors cannot be removed without first ascertaining the extent to which the juror is actually unavailable.<sup>62</sup> For example, some courts find that a perception of physical unavailability without judicial inquiry does not satisfy good cause.<sup>63</sup> Despite some inconsistency, the determination of physical availability is relatively harmless to defendant’s rights, as a juror’s unavailability is not often linked to the evidence presented against the defendant at trial.<sup>64</sup>

Unlike physical unavailability, a juror’s contact with third parties is often assumed, without a court’s further inquiry, to interfere with the juror’s ability to deliberate impartially.<sup>65</sup> In addition, courts can \*1084 infer the lack of presence of impartiality by

notice of a juror's intentional attempt to introduce information into deliberations that is extraneous to the evidence presented at trial.<sup>66</sup>

In addition to instances of a juror's perceived bias, a juror's mental inability, incapacitation, or incompetence can interfere with his ability to withstand deliberations, satisfying removal under the good cause standard.<sup>67</sup> When a juror has become incapacitated to an extent that they can no longer participate in meaningful deliberation, good cause removal may be proper.<sup>68</sup> Incapacitation or mental instability, however, can sometimes arise from the existence of a holdout juror, requiring courts to tread cautiously under the good cause standard.<sup>69</sup> In light of evidence of a holdout juror, courts attempt to ensure that the juror's disagreement with the majority was not the underlying basis for his removal.<sup>70</sup>

When facing allegations of juror misconduct, courts have struggled to articulate a standard for making this distinction, as it is often hard to differentiate a juror's view on the merits of the case from allegations of a juror's refusal to participate in deliberations, a juror's refusal to follow the law as instructed, or allegations of disruptive behavior.<sup>71</sup> Thus, when the record contains evidence that suggests that the \*1085 juror removed during deliberations was a holdout for the defense, the court has an enhanced duty to ensure that the removal does not violate the Sixth Amendment's unanimity requirement.<sup>72</sup>

This Sixth-Amendment protection most commonly arises in cases involving jurors who are removed for allegedly refusing to deliberate, failing to abide by a court's instructions, participating in nullification, or otherwise engaging in conduct disapproved of by remaining jurors.<sup>73</sup>

Juror nullification has been defined as "a violation of a juror's oath to apply the law as instructed by the court."<sup>74</sup> In articulating this definition, the Second Circuit held that nullification will satisfy good cause for removal by reason that jurors have no right to participate in nullification, and courts, if able, can act accordingly to prevent it.<sup>75</sup> After *United States v. Thomas* established nullification as good cause for removal, other circuits began to expand good cause to reach conduct that is described as a juror's failure to deliberate, which can often include a juror's obnoxious behavior.<sup>76</sup> In so doing, U.S. Courts of Appeal have relied on *United States v. Brown* and *United States v. Thomas*, two significant circuit court cases articulating the standard for removal of a possible holdout juror.<sup>77</sup> While *Brown* and *Thomas* developed a high threshold of evidentiary proof for these cases, circuit \*1086 court decisions that follow are not as protective of a juror who may disagree with the majority.<sup>78</sup>

## 2. *Brown, Thomas, and Their Progeny*

Standards articulated in *Brown* and *Thomas* laid the groundwork for determining when a judge should be restrained from removing a juror during deliberations under Rule 23(b)(3). In *Brown*, the jury deliberated for five weeks before the court received a note from one juror stating: "I Bernard Spriggs am not able to discharge my duties as a member of this jury."<sup>79</sup> In subsequent colloquy with the juror, the judge learned that the juror could not agree with the Racketeer Influenced and Corrupt Organizations Act as it applied to the case.<sup>80</sup> The juror also told the judge that "[i]f the evidence was presented in a fashion in which the law [was] written, then, maybe, [he] would be able to discharge [his] duties."<sup>81</sup> Although the source of the juror's incapability to discharge his duties was unclear, he reported that he was unable to follow the law which, according to the trial court, satisfied good cause removal under Rule 23(b)(3).<sup>82</sup>

The *Brown* court formulated an "any possibility" standard, holding that Rule 23(b)(3) "is not available when the record evidence discloses a[n]y possibility that the juror believes that the government has failed to present sufficient evidence to support a conviction."<sup>83</sup> The court reasoned that the juror's expressed disagreement with the way the evidence was presented created an ambiguous record and, therefore, the court was unable to determine that the juror's request to be dismissed stemmed from anything other than his view of the prosecution's case.<sup>84</sup> The court further reasoned that allowing the government to obtain a conviction by removing a juror unconvinced by the prosecution's \*1087 case would reach a constitutionally impermissible result.<sup>85</sup> While the *Brown* court declined to determine whether a discharged juror's participation in nullification could satisfy good cause for dismissal, the issue was later determined in *United States v. Thomas*.<sup>86</sup>

The *Thomas* court attempted to place a balance between inquiring into the secrecy of deliberations and restricting a juror's ability to nullify the law. In *Thomas*, problems with the nullifying juror<sup>87</sup> came to the court's attention after several weeks of trial when six jurors complained to the courtroom clerk about his distracting behavior during the trial.<sup>88</sup> In response, the court questioned each juror separately, revealing that seven jurors felt that the juror "was a source of some distraction," but only one juror indicated the possibility of experiencing problems during deliberations as a result of his behavior.<sup>89</sup> Not long after deliberations began, one juror informed the court that the jury could not reach a verdict due to the same juror's "predisposed disposition" that the defendants were not guilty.<sup>90</sup> Again, the court questioned each juror and received mixed feedback about the nullifying juror's conduct during deliberations.<sup>91</sup>

Despite the nullifying juror's sentiment of needing "'substantive evidence' establishing guilt 'beyond a reasonable doubt' to convict,"<sup>92</sup> the trial court removed the juror for good cause, finding that he was refusing to convict "because of preconceived, fixed, cultural, [and] economic" reasons that were not permissible.<sup>93</sup> The district court determined that the nullifying juror was not credible because the juror \*1088 "believed that the defendants had 'a right to deal drugs.'" <sup>94</sup> The appellate court held that a juror's participation in nullification may constitute good cause for dismissal but remanded the case for a new trial after adopting the "any possibility" standard used in *Brown*.<sup>95</sup> In adopting this standard, the *Thomas* court reasoned that a higher evidentiary standard was necessary to protect against wrongful removal of jurors and overly intrusive inquiries into the substance of jury deliberations.<sup>96</sup> Out of concern for an overly broad formulation of the rule, other circuits have carved out varying standards for "any possibility" juror removal in an attempt to alleviate the chances that juror dismissal stems from the juror's views on the merits of the prosecution's case.<sup>97</sup> The Ninth Circuit, for example, holds that a court may not dismiss a juror when "the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case ...."<sup>98</sup> Other circuits similarly stress that the good cause standard is appropriately used so long as there is "no reasonable possibility that the allegations of misconduct stem from the juror's view of the evidence."<sup>99</sup> The Eleventh Circuit has framed the inquiry somewhat differently, however, in one instance giving less deference to trial courts when a juror's dismissal implicates Sixth Amendment concerns.<sup>100</sup> Alternatively, some courts choose not to apply the heightened \*1089 Sixth Amendment standard in cases of juror misconduct, relying on the notion that the heightened standard only applies to cases involving allegations of a juror's failure to deliberate or participation in nullification.<sup>101</sup> Most circuits, however, uphold juror dismissal if the reasons provided for removal are unambiguously supported by the record.<sup>102</sup>

In *United States v. Hernandez*, the Second Circuit reversed a conviction by an eleven-member jury after finding that the removal of a holdout juror on the fourth day of deliberations was error because the juror "was the sole hold-out for acquittal."<sup>103</sup> The juror was removed after being found mentally incompetent, despite early signs of the juror's inability to function on the jury properly.<sup>104</sup> Despite the juror's questionable competence, the court was informed that the problem juror expressed belief that there was a lack of evidence.<sup>105</sup> The district judge then declared a mistrial but decided to continue with deliberations when an agreement for a new trial date could not be reached.<sup>106</sup>

\*1090 Soon after deliberations continued, the court received more concern from the jury, expressing frustration with being required to deliberate with the incompetent juror.<sup>107</sup> The district court then, without making any findings on the record, dismissed the juror presumably based on his mental shortcomings.<sup>108</sup> In addressing the rest of the jury, the judge praised the jurors for their efforts to attempt to persuade the problem juror; the judge also expressed "deep appreciation" towards the jury for attempting to prevent a mistrial.<sup>109</sup>

On appeal, the Second Circuit reversed the trial court because the record was not clear as to whether the juror was removed for mental incompetence or to avoid a hung jury.<sup>110</sup> In other words, the court could not determine if the trial court's removal of the problem juror for mental incompetence was justified. More importantly, the Second Circuit held that statements made by the judge to the jury prior to the removal of the problem juror prevented the remaining jurors from reaching a properly considered verdict.<sup>111</sup>

The D.C. Circuit diverted from *Brown*, creating a less stringent standard for juror removal.<sup>112</sup> In *United States v. McGill*, the trial court found "good cause" to remove the juror for failing to follow the court's instructions after removing pieces of

paper from the deliberation room that he claimed to be a grocery list.<sup>113</sup> The *McGill* court held that a juror may be excused during deliberations even when he has doubts about the prosecution's case if the court finds an independent, good \*1091 cause justification for removal that bears no "causal link" to the juror's "holdout status."<sup>114</sup>

In *McGill*, several notes from the jury room raised allegations of a juror's refusal to deliberate and a refusal to follow the court's instructions.<sup>115</sup> One note received during deliberations reported that "[o]ne juror has stated categorically that he does not believe in any testimony from any of the cooperating witnesses."<sup>116</sup> The court instructed the jury to continue deliberations and the next day the court received another note that reported that the same juror "stated from the beginning of our deliberation that he does not believe any testimony of or by the prosecution, defense or any law enforcement witness," and the court again instructed the jury to continue its deliberations.<sup>117</sup> The juror maintained his opinion that the prosecution did not meet their burden of proof.<sup>118</sup>

After observing the problem juror remove several pieces of paper from the jury room against the instructions from the marshal, another juror expressed concerns for his safety.<sup>119</sup> The trial judge conducted individual voir dire of both jurors as well as another member of the jury.<sup>120</sup> The jurors reported being suspicious of the problem juror's behavior and expressed concerns about his acting distant and stand-offish.<sup>121</sup> When the problem juror was interviewed by the court, he admitted that he removed one piece of paper from the deliberation room, \*1092 the contents of which he reported contained a grocery list.<sup>122</sup> The problem juror also reported that "whenever someone expresses an opinion that's not the majority, they get shouted down. They don't get a chance to express their opinion."<sup>123</sup>

Fifteen days after deliberations began, the court removed the problem juror pursuant to Rule 23(b)(3), basing dismissal on the juror's alleged refusal to deliberate.<sup>124</sup> Originally, the court did not base its decision to remove the juror on his removal of the notes from the jury room because they could not resolve beyond a reasonable doubt whether the notes were a grocery list or information concerning the case.<sup>125</sup> Later, the trial court determined that by a preponderance of the evidence, the juror removed notes from the deliberation room which satisfied good cause for removal under Rule 23(b)(3).<sup>126</sup>

The circuit court upheld the trial court's decision, reasoning that the problem juror's conduct of removing notes from the deliberation room constituted an "alternative and independent" cause for removal unrelated to his view of the case.<sup>127</sup> Additionally, the circuit court noted that the trial court's inclination to believe a complaining juror over the problem juror depended on whether or not the court was \*1093 required to proceed with the "beyond a reasonable doubt" standard—the use of which the court was unsure of at the time.<sup>128</sup> The circuit court found that the trial court conducted an appropriate, fully adequate factual inquiry; the court's findings were appropriately based on its credibility determinations considering that "[t]he district court, having observed the demeanor of [a] juror [during voir dire questioning], is in the best position to determine the credibility of the juror's statement," and the trial court's decision to remove due to safety concerns was proper.<sup>129</sup>

The *McGill* court identified a causal link standard that allows judges to remove jurors for good cause, despite the juror's potential holdout status. Under *McGill*, a court need only supply the record with a reason for good cause that is unrelated to allegations of the suspect juror's failure to deliberate or participation in other types of conduct indicating his holdout status.<sup>130</sup>

### III. ABUSE OF DISCRETION AND LIMITED INQUIRY RESULT IN A BROAD USE OF GOOD CAUSE THAT IMPERMISSIBLY INTERFERES WITH SIXTH AMENDMENT RIGHTS

An abuse of discretion standard coupled with a judge's limited ability to inquire into the secrecy of jury deliberations has allowed an overly broad interpretation of juror misconduct to satisfy good cause under Rule 23(b)(3). A district court's decision to remove a juror during deliberations faces only one obstacle: a juror may not be removed for good cause if the request for discharge stems from his view on the merits of the prosecution's case.<sup>131</sup> Courts have articulated varying standards in an attempt to uphold this principle while also justifying removal of jurors who may have harbored doubts about the prosecution's case.<sup>132</sup> By distinguishing types of conduct sufficient to satisfy \*1094 good cause, judges, in exercising minimal inquiry into the deliberation process, can uphold principles of unanimity and impartiality.

### *A. Maintaining Limited Judicial Inquiry is Crucial to Protecting the Sanctity of Juror Deliberations and Avoiding Undue Influence of the Judiciary*

Good cause removal is problematic because judges attempt to remedy misconduct that, by virtue of the secrecy of jury deliberations, they should know nothing about.<sup>133</sup> When a judge embarks to inquire about whether removal is warranted, she must also consider whether statements from jurors could lead to an unambiguous determination that the problem juror's conduct presented "no substantial possibility" that the juror was rendering proper jury service.<sup>134</sup> This is a potentially difficult task when disagreement and unpopular opinions are expressed within the deliberation room, as is likely to be expected when jury service is properly rendered.<sup>135</sup>

#### **1. Judicial Inquiry is Not an Adequate Method for Ascertaining the Extent of Misconduct by Individual Jurors**

For a court to establish good cause, there must be some inquiry into the deliberation process, but to preserve the secrecy of jury trials, courts are limited in their ability to question jurors when problems arise \*1095 during deliberations.<sup>136</sup> Despite the degree of caution acknowledged by trial courts, extensive judicial inquiry presents various issues concerning determination of the relevant facts required to ascertain whether good cause exists.<sup>137</sup> The importance of strict inquiry articulated in *Thomas*<sup>138</sup> has received pushback by other courts. For example, in *United States v. Kemp*, the court held that conducting voir dire of each individual juror on three separate occasions during deliberations was an acceptable use of discretion.<sup>139</sup> While acknowledging that the amount of questioning was intrusive, the court reasoned that sometimes "individual questioning is the optimal way in which to root out misconduct."<sup>140</sup> This view fails to recognize, however, the rarely acknowledged but common occurrence of juror disagreement during deliberations.<sup>141</sup> Such disagreement can prompt allegations of juror misconduct, originating merely from the fact that one juror disagrees \*1096 with the majority.<sup>142</sup> Allegations of misconduct that result from one disagreeing juror are hardly reconcilable through judicial inquiry because judges have limited ability to obtain an accurate report of conduct in the jury room.<sup>143</sup>

Controversial use<sup>144</sup> of the good cause standard is commonly initiated by complaints from the juror box.<sup>145</sup> In most instances of a juror's allegation of misconduct, statements exchanged between judges and jurors, and those left unsaid, will determine whether a juror is dismissed.<sup>146</sup> For example, the discharged juror in *Brown* made one statement concerning his view of the way the prosecution presented the evidence.<sup>147</sup> If he would not have made the statement when questioned by the judge, his dismissal likely would not have been considered error on appeal.<sup>148</sup>

To avoid dismissal under the good cause standard, a juror must attempt to reference their view in relation to evidence put on during the trial, to indicate "a substantial possibility that they [are] willing and able to discharge their duties."<sup>149</sup> The district court will thus embark on what is cautioned to be a limited inquiry, while attempting to obtain unambiguous evidence of whether the juror engaged in misconduct.<sup>150</sup> This presents a difficult task for courts when colloquies undertaken in response to juror misconduct may inherently elicit juror statements \*1097 regarding deliberation discussion.<sup>151</sup> An example of this occurs when judges interrupt jurors during colloquy after jurors attempt to explain the cause of their alleged misconduct.<sup>152</sup> As a result, a judge, in attempting to determine whether removal is proper, may "honestly misinterpret[] the juror's language as proof of misconduct, and thereby substitute his own judgment in place of the ordinary citizen's."<sup>153</sup> Undertaking questioning of individual jurors on the deliberation process is contrary to the "freedom of debate" and "independence of thought" principles that are critical to maintaining the integrity of the deliberation process.<sup>154</sup>

#### **2. The Good Cause Standard Must be Refined to Eliminate the Interference of Implicit Bias**

Intrusions into the deliberation process place the entire jury in jeopardy of contamination.<sup>155</sup> When conducting a voir dire to \*1098 determine whether misconduct has in fact occurred, judges become the sole arbitrator of juror credibility.<sup>156</sup> Trial

judges are deemed the best individuals to make these findings of fact, even though they are not actually present during the deliberations nor are they allowed to inquire into the substance of deliberations.<sup>157</sup>

Further, the judge hears evidence as the jury does; it seems unlikely that judges will not formulate their own opinion about the prosecution's evidence as the case proceeds.<sup>158</sup> While judges may not possess actual bias, the discretionary nature of their decision under the good cause standard "may allow judges to tap into their unconscious biases."<sup>159</sup> The large amount of discretion awarded to judges under Rule 23(b)(3) is bound to prompt implicit biases.<sup>160</sup> And the presence of such bias could influence good cause removal and have a negative effect on the jury.

*United States v. Hernandez* offers an example of how a judge's statement could impermissibly influence a jury. In *Hernandez*, the judge thanked the members of the jury for being forthcoming concerning the problem juror.<sup>161</sup> The judge's statements to the jury regarding the problem juror in *Hernandez* led to uncertainty as to whether the jury was prevented from reaching a proper verdict based solely on the evidence.<sup>162</sup> *Hernandez* demonstrates that trial courts must be careful to remain objective in making statements to the jury regarding jurors facing removal. Otherwise, they run the risk of unintentionally disclosing to the jury the court's subjective feelings about the juror in question.

### **\*1099 B. Broad Use of 23(b)(3) Fails to Support its Intended Purpose and Results in Inconsistent Determinations of Good Cause**

Without distinguishing the type of conduct necessary to satisfy the good cause standard, courts can remove jurors for conduct that is slight in comparison to a defendant's constitutional rights to a fair trial and unanimous verdict. However, some instances of juror misconduct should not be treated equally under Rule 23(b)(3) based on a distinction between circumstances that require judicial inquiry and circumstances that do not. By making these classifications, trial judges can avoid the risk of interfering in the deliberation process. Failure to make such a distinction has resulted in inconsistent interpretations of good cause removal, thus, continued use of Rule 23(b)(3), as it stands, impermissibly allows elimination of possible holdout jurors.

#### **I. A Distinction Between Conduct That Satisfies the Good Cause Standard Without Constitutional Issue and Conduct That Does Not is Necessary**

Rule 23(b)(3) dismissal is not problematic when used for its intended purpose: to dismiss a juror who is physically unavailable.<sup>163</sup> For example, in cases where jurors are physically unable to participate in deliberations,<sup>164</sup> good cause removal is not controversial because judges are able to inquire into the extent to which the juror is unavailable without any inquiry into the deliberation process.<sup>165</sup> Inquiry is limited, or in some cases precluded, when physical unavailability is caused by sources unknown to the district court or extraneous to the instant trial.<sup>166</sup> Similarly, good cause removal may be proper when a \*1100 juror has been potentially influenced by information not introduced at trial or when a juror has had contact with a third party.<sup>167</sup> Such removal under the good cause standard raises no issues for defendants' rights, as judges can proceed with removal by minimal intrusion into the secrecy of deliberations and without displaying any subjective views of the sufficiency of the evidence.<sup>168</sup>

Many findings of good cause for reason of impartiality are findings based on a jurors' exposure to extrinsic persons or information, allowing a distinction to be drawn on the rare occurrence of a juror's expression of their own impartiality.<sup>169</sup> Unlike jurors who come in contact with extrinsic information, jurors who indicate their own biases often do indicate the presence of his or her disagreement with the majority.<sup>170</sup> Outside of physically unavailable jurors and jurors who obtain information extrinsic to the evidence or contact persons not at trial, dismissal under Rule 23(b)(3) is difficult because it requires extensive inquiry of individual jurors and because courts inconsistently apply the rule's good cause standard for juror removal.<sup>171</sup>

Remedying juror misconduct regarding juror bias, allegations of nullification, failure to deliberate, or failure to follow the court's instructions requires questioning of individual jurors.<sup>172</sup> A distinction between allegations of juror bias and the latter three forms of conduct is necessary because juror impartiality is an explicit requirement of a defendant's Sixth Amendment right to a fair trial.<sup>173</sup> In comparison, juror misconduct in the form of nullification, failure to deliberate, or failure to follow the

court's instructions is viewed as violation of "the \*1101 sworn jury oath and prevents the jury from fulfilling its constitutional role."<sup>174</sup>

The duties which accompany jurors regarding the latter forms of misconduct are not principles enshrined by the Sixth Amendment. Instead, they require a court to inquire into the internal factors influencing juror decision making, contrary to the sacred protection afforded to the way jurors deliberate. In distinguishing between conduct that is external to an individual juror's decision making and conduct that is internal, a court can proceed without upsetting fundamental principles of the Sixth Amendment.

Despite the holding in *United States v. Thomas*, a juror's act of supposed jury nullification or refusal to deliberate is not conduct that should be contemplated under Rule 23(b)(3) because judicial investigation into such an allegation is bound to encounter the juror's thought process regarding his view of the evidence in the prosecution's case.<sup>175</sup> Such intrusion does not assist courts in consistent application of Rule 23(b)(3), and courts have found ways to avoid the requirement that a juror may not be dismissed when the record discloses "a possibility that the juror believe[d] that the government ... failed to present sufficient evidence to support a conviction."<sup>176</sup>

## 2. Lack of Clarity in the Removal Standard Provides No Protection for the Holdout Juror

The appellate court in *United States v. McGill* held: A juror who harbors doubts about the prosecution's case may be dismissed under Rule 23(b)(3) if the court forms an independent, good-cause justification for removing the juror that bears no causal link to the juror's holdout status.<sup>177</sup> Notably, the trial court in *McGill* originally discharged a juror for failure to deliberate because the court was not sure which standard under Rule 23(b)(3) to use to dismiss the juror when he \*1102 removed notes from the deliberation room.<sup>178</sup> The circuit court found this confusion understandable because that circuit had never established an explicit standard-of-proof threshold of factual findings for dismissal under good cause.<sup>179</sup> It seems possible, however, that the judge was aware that the removal of a holdout juror implicated the defendant's constitutional concerns and thus contemplated the requirement of higher evidentiary standard.<sup>180</sup> Moreover, the trial court's standard was not inconsistent with that previously announced by the Eleventh Circuit, requiring a standard equivalent to that of making a finding beyond a reasonable doubt.<sup>181</sup>

*McGill* demonstrates the issue that arises when evidence of a holdout juror exists, but the juror has also engaged in conduct that can be deemed as failing to follow the court's instructions.<sup>182</sup> In this instance, *McGill* developed a causal link standard that allows a court to disregard evidence of a juror's holdout status while still finding good cause for removal. Similarly, the Fifth Circuit has refused to conduct any Sixth Amendment analysis at all when the juror's removal does not stem from his failure to deliberate or participate in nullification.<sup>183</sup> This relaxed good cause standard provides no protection for holdout jurors because it permits removal of said jurors without giving much thought to the juror's holdout status.

### \*1103 C. Abuse of Discretion Review Enforces Arbitrary Removal Under the Good Cause Standard

The broad range of discretion granted to judges results in denial of adequate consideration of Sixth Amendment rights and has created a standard insufficient to guide district courts towards making decisions under Rule 23(b)(3). Rule 23(b)(3) is unlike any other rule governing juror misconduct, as it can upset the traditional workings of a trial by jury by overriding concerns for unanimity and secrecy of jury deliberations for the need to protect against "irresponsible juror activity."<sup>184</sup> The decision in *United States v. Thomas* has erupted into broad use of Rule 23(b)(3). But instead of courts proceeding with caution as instructed by the *Thomas* court, Rule 23(b)(3) has become a vehicle for arbitrary juror removal.<sup>185</sup> Moreover, the abuse of discretion standard disproportionately reinforces arbitrary juror removal under Rule 23(b)(3). The deprivation of Sixth Amendment rights including principles of unanimity, impartiality, and secrecy of jury deliberations, however, support an amendment to Rule 23(b)(3).

Evidence that a juror is a holdout should reveal that the state's burden of proof has not been met and thereby outweigh any government interest in allowing removal of a holdout juror under Rule 23(b)(3). Dismissal of a juror who has refused to vote with the majority clearly contradicts a defendant's right to a unanimous verdict and encompasses exactly what the *Brown* court considered unconstitutional in its formulation of the "any possibility" standard.<sup>186</sup> When a juror casts a vote not in line with the



majority, that juror's subsequent dismissal results in a non-unanimous verdict.<sup>187</sup> A juror's refusal to play by the rules, such as failing to deliberate or participating in nullification, may "frustrate[] the smooth workings of judicial administration." \*1104 but this frustration is not outweighed by the crucial role that jurors play in a criminal trial.<sup>188</sup>

Two competing private interests are at stake when dealing with these issues. The first interest involves the importance of maintaining the finality of a jury verdict.<sup>189</sup> The second is the defendant's right to receive a unanimous verdict. Jury privacy and the ability to debate freely are necessary requirements to the attainment of a just verdict:

Where the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in favor of the lesser of two evils protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity.<sup>190</sup>

The judicial practice of questioning individual jurors under Rule 23(b)(3), even with limited inquiry into the substance of the jury deliberations, therefore, interferes with the framework that the jury requires secrecy to administer just outcomes.<sup>191</sup> Still, the judicial intrusion considered necessary by *Thomas* has resulted in minimally scrutinized inquiry during deliberations.<sup>192</sup> A potential cause of relaxed inquiry could be attributed to a court's ability to question juror's internal \*1105 decision making process, as such inquiry is impermissible when jurors are questioned in post-verdict inquiries of the validity of a jury's verdict.<sup>193</sup>

The varying treatment of post-verdict and pre-verdict inquiry is not insignificant. The good cause standard imposes little to no restriction on judges removing jurors for reasons of bias and refusing to follow courts instructions, but defendants face a disproportionately high burden in raising issues of impartiality on a motion for a new trial.<sup>194</sup> While protecting against partiality may seem to be appropriate in weeding out an allegedly biased juror, the good cause standard is more often used to weed out instances of a juror's attempted nullification or alleged refusal to deliberate.<sup>195</sup>

When judges are permitted to remove jurors--specifically, jurors who seemingly did not conform to the ideals of the remaining members of the jury--from deliberations, they are essentially permitted to erode the fundamental principles of the Sixth Amendment and cast doubt on the entire workings of the system.<sup>196</sup> Rule 23(b)(3) functions to allow courts to remove holdout jurors based on the prevailing principle that "a juror who refuses to deliberate or who commits jury nullification violates the sworn jury oath and prevents the jury from fulfilling its constitutional role."<sup>197</sup>

\*1106 These commonly relied on principles assume that the only constitutional role of the jury is to follow a trial court's instructions. This assumption is not true. Regardless of a juror's reason for disagreeing with the majority, the occurrence of such disagreement, even when due to a juror's disagreement with the law itself, ensures that the jury is functioning exactly how it is intended to.<sup>198</sup> For example, the one feature consistently found with a hung jury in felony jury trials is the "jurors' opinions about the fairness of the law as applied during the trial."<sup>199</sup> Allowing mid-deliberation removal of jurors who have allegedly disobeyed a judge's instructions can interfere with the jury's role as a cross-section of the community<sup>200</sup> by weeding out the juror who disagrees with the majority.<sup>201</sup> The American jury represents fundamental principles of democracy, and thus, the jury acting as a check on \*1107 governmental power suggests that when evidence from the record indicates a disagreement within the deliberation room, use of good cause is misplaced when used in an instance other than to remove a juror who is practically unavailable or has otherwise come into contact with information that allows an inference of impartiality.<sup>202</sup>

A less protective view of the right to a unanimous verdict has the ability to erode "the jury trial provisions in the Federal and State Constitutions [that] reflect a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge ...."<sup>203</sup> By amending the rules to distinguish misconduct contemplated under good cause, a trial court will have more guidance in its determination of whether removal of a juror may interfere with the defendant's right to a unanimous verdict. Applying a new standard will not burden the judiciary nor the government's interest in obtaining a conviction because the judiciary will still maintain effective control over removal decisions. Under this Note's proposed amendments, judges cannot remove jurors on a minimally articulable basis. But, guided by balancing factors, this

Note's proposed amendments will preclude trial courts from inquiring into deliberations and appellate courts will have enough evidence to review a trial court's basis for dismissal.

#### IV. AMENDING RULE 23(B)(3) TO PROTECT A UNANIMOUS VERDICT

The good cause provision was added to Rule 23(b)(3) to remedy the difficulty that occurs when a juror becomes unavailable and when the trial is of a substantial enough length that a mistrial would be a significant waste of resources.<sup>204</sup> This policy can still be upheld by further amending Rule 23(b)(3) to incorporate a higher evidentiary requirement when a trial court attempts to remove a juror for good cause. The text of Rule 23(b)(3) currently reads: "After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror."<sup>205</sup> While Rule 23(b)(3) currently allows a court to \*1108 permit an eleven-member verdict after finding that good cause exists to dismiss a juror during deliberations, the scope of good cause must be limited to protect a holdout juror. Therefore, Rule 23(b)(3) should be amended to read:

After the jury has retired to deliberate, a court may permit a jury of eleven persons to return a verdict without stipulation by parties, *only if* a juror has become severely incapacitated:<sup>206</sup> found to be physically unable to remain on the jury for the remainder of deliberations;<sup>207</sup> or if a juror has come in contact with outside information (or third parties) that has rendered them incapable of coming to an impartial decision.<sup>208 209</sup>

\*1109 By further defining "good cause," judges can make a preliminary determination on how to proceed without breaching the secrecy of the jury's deliberations.<sup>210</sup> Under this amendment, the scope of judicial questioning will remain restricted to subject matter that has no relation to the evidence presented in the instant trial. On each occasion for removal under this criteria, the source which affects the juror's ability to participate in deliberations is one that exists outside of the evidence presented in the trial itself, allowing courts to inquire minimally into the status of the juror's distress. For example, the provision allowing for removal once a party has become incapacitated is a common theme for proper removal under good cause because, in such instances, the juror's mental or physical unavailability would cause an involuntary delay in the remainder of a trial.<sup>211</sup> Such unavailability or incapacitation results in the proper conclusion that the juror is no longer able to remain on the jury and thus, the trial court may continue the remainder of the trial with an alternate juror.

Moreover, to ensure that judges remain equipped to prevent prejudicial occurrences should they arise outside of the above limited criteria, a provision should be added to allow judges to consider removal under such circumstances. A new Rule 23(b)(3)(A) would read:

During deliberations, a court may not dismiss a juror without weighing the following factors to determine whether dismissal is appropriate subject to constitutional considerations:

- (1) the length of time the jury has been out for deliberations;
- (2) whether any evidence in the record indicates that, at the time of the alleged misconduct, the existing jurors have failed to render a unanimous verdict;
- (3) the length of the trial prior to deliberations;
- (4) whether the alleged misconduct would actually prejudice the defendant's right to a fair trial.

These factors serve several benefits. First, a trial court should consider how long the jury has been out for deliberations and whether any evidence in the record indicates that at the time of the alleged misconduct, \*1110 the existing jurors have failed to render a unanimous verdict.<sup>212</sup> When a jury panel does not agree on a verdict, the court may persistently encourage jurors to keep deliberating and attempt to reach a verdict.<sup>213</sup> The longer a jury has been deliberating under a deadlock, the more tension in the deliberation room will rise.<sup>214</sup> Therefore, if the court knows that the existing jurors have failed to render a unanimous verdict, and the deliberation is of substantial length, the court should tread lightly, erring in favor of retaining the particular juror.<sup>215</sup>

Other factors to be considered are how long the jury was out for deliberations before the alleged misconduct occurred and how long the trial lasted prior to deliberations.<sup>216</sup> Lastly, prior to dismissing the juror during deliberations, courts should consider whether the alleged misconduct would actually prejudice the defendant's right to a fair trial.<sup>217</sup> Stated differently, if, but for the removal of the juror, the case would have resulted in a mistrial, then the appropriate result should have been a mistrial.<sup>218</sup>

\*1111 When attempting to dismiss a juror during deliberations under subsection (A) of the proposed amendment, trial courts should also be required to show by clear and convincing evidence that the cause justifying removal did not interfere with the defendant's right to a unanimous verdict.<sup>219</sup> An alternative viewpoint would argue that attempting to distinguish between types of conduct that create cause for removal limits a trial judge's authority to remedy misconduct not explicitly considered by the rule. However, due to the constitutional concerns at issue here, a limit on judicial inquiry in this area of law is long overdue.<sup>220</sup> The proposed amendment to the rule contemplates the key aspects of juror conduct that, when it occurs, will interfere with a defendant's fundamental right to a unanimous verdict. The amendment also contemplates the frustrations that arise from situations where trials have been lengthy and complex and from which a substantial loss would occur due to a mistrial from a juror's unavailability.

Consider the misconduct in *Wofford v. Woods*, for example. In *Wofford*, the trial court dismissed the juror after finding that her contact with a lawyer was a "flagrant violation of the Court's instructions."<sup>221</sup> Under the proposed amendment, a juror may not be removed for supposed violation of a court's instructions unless said violation would impose on the defendant's right to an impartial jury.<sup>222</sup> To remove the juror for this type of misconduct, two determinations must first be made: (1) whether the juror had contact with a third party, and (2) whether that contact could interfere with the juror's impartiality. The first prong of this analysis is quite easy to determine. The second prong of this inquiry requires more, however. For the second prong, the trial court would consider whether the juror's contact with the attorney \*1112 exposed her to information likely to interfere with her ability to adjudicate guilt or innocence upon the merits of the defendant's case.<sup>223</sup>

Under the facts of *Wofford*, the first prong was quite simple to analyze, as an attorney appeared in court upon request of the juror.<sup>224</sup> However, regarding the second prong, the judge would not have been able to decide. The court would consider factors used to determine the prejudicial effect of a juror's contact with third parties, including but not limited to "the nature and seriousness of the communication, whether the extrinsic communication was shared with other members of the jury, the manner in which it was discussed, the length of time it was available to the jury, [and] whether the communication related to factual evidence not developed at the trial."<sup>225</sup> The juror's contact with an attorney in *Wofford v. Woods* was limited to the extent that the juror retained the attorney for the sole purpose of obtaining protection from her alleged harassment and verbal abuse by other jurors.<sup>226</sup> Moreover, the attorney in *Wofford* who appeared on behalf of the juror informed the court that he had not "discuss[ed] any of the facts of the case" with the juror, nor had he discussed any aspects of the juror's vote.<sup>227</sup> Under the proposed standard, the court would need to proceed under the subsection (A) analysis, to ensure that good cause removal for the juror's conduct would not interfere with the defendant's Sixth Amendment rights.

First, the trial court may consider the length of time that the jury has been out for deliberations because a longer and more complex trial would tend to support removal under traditional use of good cause.<sup>228</sup> In *Wofford*, the trial lasted a total of nine days, and the jury deliberated for approximately four days.<sup>229</sup> This factor would not lean in favor of good cause removal as Rule 23(b)(3) dismissal is motivated in part by removal necessitated in trials of substantial length, spanning over well \*1113

more than this thirteen days.<sup>230</sup> In light of the length of trial and deliberations, a court would next consider whether the jury has obtained a unanimous verdict. In conducting this analysis, the court would consider the notes received from the jury which prompted its initial inquiry into the conduct of a particular juror. In doing so, the court would be able to consider whether the jurors, having failed to reach unanimity, are stifled by a disagreement. This consideration would allow the court to identify whether the jury requires re-instruction. Such instruction could be an instruction of law previously given, or it could be one that encourages the jury to continue deliberating to reach a unanimous verdict.

Under the facts of *Wofford v. Woods* the inquiry could end here, because on the third day of deliberations the court received a note from the jury that said "We Have a Jury member who SERIOUSLY doesn't understand what reasonable doubt is!! We have a hung jury and we need instructions! !!"<sup>231</sup> This note from the jury, as well as the juror's subsequent action of contacting outside support, places sufficient doubt in the court's ability to remove her. Thus, the factors as applied to *Wofford*, would not support good cause removal.

This Note's amendment will harmoniously work to protect a defendant's constitutional rights to a unanimous verdict and an impartial jury of his or her peers while also offering judges a solution other than a mistrial when juror removal becomes necessary. The rule must be amended to allow further consideration of these issues at the trial court level because, on appeal, the finality of the verdict becomes a huge obstacle for a defendant to overcome by claiming juror impropriety.

## V. CONCLUSION

As the law stands, Rule 23(b)(3) allows judges to remove jurors during deliberations for conduct that does not meet standards for impartiality and is slight in comparison to a defendant's right to a unanimous verdict.<sup>232</sup> Juror misconduct can interfere with a defendant's constitutional right to a fair trial by an impartial jury; in turn, courts are obligated to remedy this behavior when it occurs.<sup>233</sup> Some forms of \*1114 misconduct are not wholly related to the defendant's right to an impartial jury but are driven instead by policy considerations that attempt to avoid a mistrial.<sup>234</sup> Judges have the ultimate discretion when dealing with these issues, but their ability to make factual determinations is hindered by the requirement of secrecy of jury deliberations.<sup>235</sup> When a holdout juror is removed during the deliberation process for some form of misconduct that does not clearly implicate the requirement of an impartial jury or a juror's physical unavailability, the removal can have a devastating impact on the defendant's right to a unanimous verdict. The amendment proposed by this Note will require judges to undergo a careful analysis prior to removing a juror during deliberations. Limiting judicial inquiry, moreover, will eliminate the possibility of removing a holdout juror and overt judicial inquiry contaminating the deliberation process, allowing jurors to proceed uninfluenced by judges and judges to avoid the need to decipher allegations of misconduct by jurors.

## Footnotes

a1 Staff Member, Volume 51 and Notes Editor, Volume 52, *The University of Memphis Law Review*; Juris Doctor Candidate, University of Memphis Cecil C. Humphreys School of Law, May 2022. Special thanks to all who counseled me throughout the note-writing process, including the invaluable assistance from my faculty advisor, Professor Demetria Frank, and the thoughtful guidance from Katelyn Jackson. Thank you, Evan Johnson, Sara Burns, and the Staff and Editorial Board of Volume 52 of *The University of Memphis Law Review* for your thoughtful comments and diligent editing. To my friends and family, especially my mom, thank you for the motivation and encouragement along the way.

1 A criminal defendant facing these penalties is at risk of losing both life and liberty at the hands of the government. The Fourteenth Amendment of the Constitution forbids states from enforcing such penalties without providing defendants with due process of the law. U.S. CONST. amend. XIV. The right to a unanimous verdict by a fair trial and an impartial jury is included in the Due Process Clause of the Fourteenth Amendment. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). The Constitution also guarantees these rights under federal law. U.S. CONST. amends. V, VI.

- 2 This hypo is based off the facts in *Wofford v. Woods*, 969 F.3d 685, 690 (6th Cir. 2020).
- 3 Early on during deliberations, the holdout juror was referred to by another as having unreasonable doubts. *Id.* Additionally, the lawyer who appeared on behalf of the holdout juror informed the court that he did not know any facts of the case but was present solely to notify the court of how the juror was being treated poorly by the other jurors. *Id.* at 691.
- 4 *Id.* State law on criminal procedure provided the basis for removal in *Wofford v. Woods*, and the district court granted Wofford's request for relief under writ of habeas corpus. *Id.* at 688. Thus, unlike the cases discussed in later sections of this Note, Sixth Circuit review in *Wofford* was conducted under the purview of AEDPA deference. *Id.*
- 5 Rules regarding the removal of a juror in state court vary, but many states follow closely to the rules for removal in federal court. Accordingly, this Note will primarily discuss "good cause" removal during deliberations under the Federal Rules. The standard of removal in state court, however, attempts to strike a similar balance as that of federal circuit courts in attempting to assure that a juror's removal is not due to his status as a holdout juror. *See infra* notes 13-15 and accompanying text. For example, the Indiana Supreme Court requires "a carefully developed record as to the grounds for removal and ... precautions to avoid inappropriate consequences from the removal." *Riggs v. State*, 809 N.E.2d 322, 327 (Ind. 2004). Other states, such as Michigan, require the showing that an actual constitutional violation occurred under the removal authority vested in the trial court's discretion when defendant challenges a conviction based on a juror's removal during deliberations. *People v. Tate*, 624 N.W.2d 524, 529 (Mich. Ct. App. 2001).
- 6 *Wofford*, 969 F.3d at 692.
- 7 As discussed later in this Note, trial courts receive great deference when exercising the authority to remove a juror for good cause. *E.g.*, *United States v. Litwin*, 972 F.3d 1155, 1158 (9th Cir. 2020).
- 8 *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). In *Duncan*, the Court held that a criminal defendant's Sixth Amendment right to a jury trial applies to all states. *Id.*
- 9 *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020).
- 10 This Note argues that the trial judge has too much discretion when he or she may determine the scope of misconduct sufficient to justify dismissal during the deliberation phase. The type of misconduct is not at issue, but only whether it precludes a juror from making an unbiased decision based solely on the evidence. *See infra* Section III.
- 11 *See Turner v. Louisiana*, 379 U.S. 466, 471-72 (1966) ("The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.") (citation omitted).
- 12 Courts have minimally addressed a defendant's Sixth Amendment right as it relates to these issues. The only mention of due process occurs in *United States v. Thomas*, where the court discusses juror nullification. 116 F.3d 606, 614-16 (2d Cir. 1997).
- 13 *See Wofford v. Woods*, 969 F.3d 685, 701-04 (6th Cir. 2020) (discussing the history of judges finding ways to punish "jurors who were thought to have given verdicts contrary to the evidence"). These practices included imposing fines on jurors for their verdict, cutting off food and drink until the return of a unanimous verdict, imprisoning jurors for their verdict, and imprisoning them for being the holdout juror. *Id.* at 702.

- 14 *Id.* at 701-04. A juror's role is to determine the facts of the case, apply the law to those facts, and ultimately conclude a defendant's guilt or innocence. *United States v. Gaudin*, 515 U.S. 506, 513-14 (1995). A judge, in deciding whether removal of a juror is necessary, must remain wary of this role, “[b]ecause our jury system works only when both the judge and the jury respect the limits of their authority ....” *United States v. Brown*, 996 F.3d 1171, 1183-84 (11th Cir. 2021).
- 15 The state procedure for removal in *Wofford v. Woods* used the term “good reason” to empower courts to remove jurors during deliberations. 969 F.3d at 703 n. 19.
- 16 U.S. CONST. amend. VI.
- 17 *See, e.g.*, *Riggs v. State*, 809 N.E.2d 322, 327-28 (Ind. 2004); *State v. Adams*, 727 A.2d 468, 471-72 (N.J. 1999); *see also supra* notes 14, 15, and accompanying text.
- 18 *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987).
- 19 *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (holding that the Sixth Amendment right to a unanimous verdict applies equally to federal and state criminal trials).
- 20 The Supreme Court in *Apodaca v. Oregon* found that a unanimous verdict was not an absolute requirement of the Sixth Amendment. 406 U.S. 404, 410-11 (1972), *overruled by* *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020).
- 21 The cost-benefit analysis argues that dispensing the unanimity requirement is necessary to reduce the rate of hung juries, which create the possibility of a mistrial. The *Apodaca* decision has been criticized because of the justices' use of “sweeping assumptions about the psychology of jury decision-making” in forming their individual opinions. Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J.L. REFORM 569, 576 (2007). The Court could have instead relied on psychological research in juror decision making which concludes that a unanimous verdict “appears preferable to majority rules because of the importance of deliberation thoroughness, expression of individual viewpoints, and protection against sampling variability effects of initial verdict preference.” *Id.* at 581 (citing REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 149, 229 (1983)).
- 22 *Ramos*, 140 S. Ct. at 1401 (rejecting the cost-benefit analysis in *Apodaca*). Despite this, in 2021 the Supreme Court held that the unanimity requirement announced in *Ramos* “does not apply retroactively on federal collateral review.” *Edwards v. Vannoy*, 141 S. Ct. 1547, 1552 (2021).
- 23 *Ramos*, 140 S. Ct. at 1398. Three convictions were challenged in *Apodaca*: two consisted of an eleven to one guilty verdict, and the third consisted of a guilty verdict by a vote of ten to two. *Apodaca*, 406 U.S. at 406.
- 24 *Ramos*, 140 S. Ct. at 1395.
- 25 *Id.* at 1401.
- 26 *See id.* at 1402 (“When the American people chose to enshrine [the right to unanimity] in the Constitution, .... [t]hey were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed.”).

- 27 United States *ex rel.* McCann v. Adams, 126 F.2d 774, 776 (2d Cir. 1942) (noting that the function of the jury “introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions [sic]”). *rev'd on other grounds*, 320 U.S. 220 (1943).
- 28 Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 874-75 (2017) (Alito, J., dissenting). Justice Alito regards this concept as being protected by closely guarding the confidentiality of jury deliberations. *Id.* at 875.
- 29 See *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) (“Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”) (recognizing the importance of jurors as arbitrators of fact in connection with jury trials); *United States v. Brown*, 996 F.3d 1171, 1183 (11th Cir. 2021) (highlighting the rationale for applying a rigorous standard to the removal of jurors during deliberations in consideration of unanimity).
- 30 See *Brown*, 996 F.3d at 1183 (first citing *Blakely*, 542 U.S. at 305-06; and then citing *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019)).
- 31 *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (first citing *Green v. United States*, 356 U.S. 165, 215 (1958); and then citing *Duncan v. Louisiana*, 391 U.S. 145, 187 (1968)).
- 32 See *supra* notes 26-28 and accompanying text. Shielding the debate from professional judgment refers to the requirement that judges remain extrinsic to discussion that occurs within the deliberation room. See *Pena-Rodriguez*, 137 S. Ct. 855, 874-75 (2017) (Alito, J., dissenting); see also *infra* Section II.A.2, which discusses the goal of maintaining an impartial jury selection as required by the Sixth Amendment through a cross-section of the community.
- 33 *Ramos v. Louisiana*, 140 S. Ct. 1390, 1396 (2020).
- 34 *Williams v. Florida*, 399 U.S. 78, 100 (1970). The right to a fair trial was thought to require a twelve-member jury until the Court's decision in *Williams v. Florida*. See *id.* at 89-90 (“[W]hile sometime in the 14th century the size of the jury at common law came to be fixed generally at [twelve], that particular feature of the jury system appears to have been a historical accident, unrelated to the great purposes which gave rise to the jury in the first place.”). Although *Williams* permits a jury of less than twelve to render a verdict, it does not address the situation where a twelve-member jury panel begins deliberations and the trial ends with an eleven-member verdict.
- 35 *Williams*, 399 U.S. at 100 (“[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.”).
- 36 *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (citing EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND 155b (1628) (reviewing THOMAS DE LITTLETON, TENANNT EN FEE SIMPLE EST CELUY (1482) (internal quotation marks omitted)).
- 37 *Id.*
- 38 *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

- 39 See generally *Turner*, 379 U.S. 466 (juror in close contact with deputy sheriffs involved in case); *Smith v. Phillips*, 455 U.S. 209 (1982) (juror seeking employment with prosecution's office during trial); *Arizona v. Washington*, 434 U.S. 497 (1977) (juror exposed to improper statements made by defense counsel).
- 40 For a discussion on post-verdict evidence of juror impartiality and the ability of juror bias to contaminate verdicts, see Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165, 167-69 (2011).
- 41 See *Remmer v. United States*, 347 U.S. 227, 229 (1954).
- 42 See *Smith v. Phillips*, 455 U.S. at 216-17 (“[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation.”). Actual bias prohibits a defendant from asserting grounds for a new trial based on implicit bias. See *id.* at 216 (finding implicit bias insufficient to interfere with juror impartiality). Implicit bias is defined by *Dennis v. United States*, where the defendant argued that the classification of many of the jurors as government employees evidenced implicit biases because the jurors were subject to an executive order allowing for them to be discharged based on reasonable grounds for belief of disloyalty to the government. 339 U.S. 162, 167 (1950).
- 43 *United States v. Blumeyer*, 62 F.3d 1013, 1016 (8th Cir. 1995) (quoting *Remmer*, 347 U.S. at 229 (1954)). If a presumption of prejudice applies, courts then determine whether the presumption has been sufficiently rebutted, assessing whether the juror's extrinsic contact was harmless beyond a reasonable doubt. *Id.* at 1017. This analysis involves consideration of, but is not limited to, the following factors:
- (1) whether the extrinsic evidence was received by the jury and the manner in which it was received; (2) whether it was available to the jury for a lengthy period of time; (3) whether it was discussed and considered extensively by the jury; (4) whether it was introduced before a verdict was reached and, if so, at what point during the deliberations was it introduced; and (5) whether it was reasonably likely to affect the verdict, considering the strength of the government's case and whether it outweighed any possible prejudice caused by the extrinsic evidence.
- Id.* (citing Memorandum & Order at 12, *United States v. Blumeyer*, No. 4:93CR68, (E.D. Mo. Aug. 30, 1994)); see also *United States v. Basham*, 561 F.3d 302, 320 (4th Cir. 2009) (“Courts look at a variety of factors in determining if this standard has been met, including the extent of the improper communication, the extent to which the communication was discussed and considered by the jury, the type of information communicated, the timing of the exposure, and the strength of the Government's case.”).
- 44 On allegations of juror bias in a motion for a new trial, courts are only required to allow a defendant an opportunity to prove actual bias resulting from the alleged conduct or interaction. *Smith v. Phillips*, 455 U.S. at 216 (citing *Remmer*, 347 U.S. at 230, which held that the remedy for allegations of juror partiality is a hearing where the defendant can prove actual juror bias). A defendant's ability to prove actual bias is limited by a juror's ability to only discuss matters occurring extrinsic to the trial. FED. R. EVID. 606(b).
- 45 *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997). The secrecy of the jury's deliberation is regarded as “essential to the proper functioning of juries.” *Id.*
- 46 Voir dire is a preliminary questioning of jurors where counsel for both parties attempt to excuse jurors with potential biases and prejudices. Kimberly Wise, Comment, *Peering into the Judicial Magic Eight Ball: Arbitrary Decisions in the Area of Juror Removal*, 42 J. MARSHALL L. REV. 813, 815-16 (2009).
- 47 *Id.* at 819.



- 48 *See, e.g.*, *United States v. Casamento*, 887 F.2d 1141, 1186-87 (2d Cir. 1989) (juror found unable to render an impartial verdict after receiving threatening phone call); *United States v. Egbuniwe*, 969 F.2d 757, 762-63 (9th Cir. 1992) (juror found unable to render an impartial verdict after learning that girlfriend had been arrested and mistreated by police).
- 49 FED. R. CRIM. P. 23 advisory committee's notes to 1983 amendment. These two circumstances are illustrated by *United States v. Meinster*, 484 F. Supp. 442, 443 (S.D. Fla. 1980) (juror had a heart attack) and *United States v. Barone*, 83 F.R.D. 565, 567 (S.D. Fla. 1979) (juror removed after recommendation and testimony of a psychiatrist).
- 50 FED. R. CRIM. P. 23 advisory committee's notes to 1983 amendment. The good cause provision was added to the rule in 1983, and Rule 24(c)(3) went from requiring alternate jurors to be excused prior to deliberations, to allowing alternate jurors to be retained so long as they are insulated from the remaining jurors. *Id.*; FED. R. CRIM. P. 24 advisory committee's notes to 1999 amendments.
- 51 FED. R. CRIM. P. 23 advisory committee's notes to 1983 amendments. Prior to the 1983 amendments, Rule 23(b)(2) required all parties to consent to the dismissal of a juror before the remaining jurors could render a verdict. FED. R. CRIM. P. 23 advisory committee's note to 1983 amendment.
- 52 *See United States v. Phillips*, 664 F.2d 971, 995 (5th Cir. 1981) ("The most substantial concern about substitution of an alternate juror after deliberations have begun is that the alternate might be coerced by jury members who might have already formulated positions or viewpoints or opinions."), *overruled on other grounds by United States v. Huntress*, 956 F.2d 1309, 1316 (5th Cir. 1992). The Fifth Circuit overruled the *Phillips* decision because the *Phillips* court replaced one juror with an alternate during deliberations, prior to the advisory committee's 1999 amendment to Rule 24(c)(3), thereby allowing alternate jurors to be retained once deliberations began. *Huntress*, 956 F.2d at 1317; *see also* FED. R. CRIM. P. 24 advisory committee's note to 1999 amendments.
- 53 *E.g.*, *United States v. Abbell*, 271 F.3d 1286, 1303 (11th Cir. 2001).
- 54 *E.g.*, *United States v. McGill*, 815 F.3d 846, 871 (D.C. Cir. 2016) (citing *United States v. Gartmon*, 146 F.3d 1015, 1029 (D.C. Cir. 1998)).
- 55 *McGill*, 815 F.3d at 871-72 (D.C. Cir. 2016) (quoting *United States v. Ruggiero*, 928 F.2d 1289, 1300 (2d Cir. 1991)).
- 56 *See United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007) (juror dismissal for failure to deliberate); *United States v. Luisi*, 568 F. Supp. 2d 106 (D. Mass. 2008) (juror dismissal for attempting to nullify the jury); *McGill*, 815 F.3d at 846 (D.C. Cir. 2016) (juror dismissal for failure to following the court's instructions).
- 57 *United States v. Levenite*, 277 F.3d 454, 464 (4th Cir. 2002) (juror sick with intestinal flu and posed risk of infecting others), *cert. denied*, 535 U.S. 1105 (2002); *United States v. Gibson*, 135 F.3d 257, 260 (2d Cir. 1998) (juror was elderly and hospitalized after collapsing in a subway); *United States v. Dischner*, 960 F.2d 870, 880 (9th Cir. 1992) (juror involved in accident requiring hospitalization), *reh'g denied*, 974 F.2d 1502 (9th Cir. 1992); *United States v. Wilson*, 894 F.2d 1245, 1249 (11th Cir. 1990) (pregnant juror developed tooth abscess that could not be treated with medication), *cert. denied*, 497 U.S. 1029 (1990).
- 58 *See, e.g.*, *United States v. Shenberg*, 89 F.3d 1461, 1472 (11th Cir. 1996) (juror went into labor after over a month of deliberations), *cert. denied*, 522 U.S. 1014 (1997); *United States v. Chorney*, 63 F.3d 78, 81 (1st Cir. 1995) (death of a juror's family member); *United States v. Scopo*, 861 F.2d 339, 350 (2d Cir. 1988) (juror's mother's illness rendered him unavailable), *cert. denied sub nom. Montemarano v. United States*, 490 U.S. 1022 (1989).

- 59 United States v. Reese, 33 F.3d 166, 170-71 (2d Cir. 1994) (juror required leave for a business trip), *cert. denied*, 513 U.S. 1092 (1995); *see also* United States v. Simmons, 560 F.3d 98, 110 (2d Cir. 2009) (recognizing that when one juror's short-term unavailability would cause an extension in the proceedings, rendering remaining jurors unavailable, that juror may be dismissed for cause), *cert. denied*, 558 U.S. 1008 (2009).
- 60 United States v. Stratton, 779 F.2d 820, 830 (2d Cir. 1985), *cert. denied sub nom. Parness v. United States*, 477 U.S. 906 (1986).
- 61 *Id.* at 832.
- 62 *Compare* United States v. Essex, 734 F.2d 832, 845 (D.C. Cir. 1984) (finding plain error in removal of an absent juror when the court failed to inquire into the nature of the juror's absence prior to proceeding with only eleven jurors), *and* United States v. Ginyard, 444 F.3d 648, 653 (D.C. Cir. 2006) (instructing courts to conduct "searching inquiry in order to determine a juror's continuing availability"), *with* Simmons, 560 F.3d at 110 (inquiry into the juror's length of absence was unnecessary when extending the trial would cause remaining jurors to be absent as well).
- 63 *See Ginyard*, 444 F.3d at 653; United States v. Araujo, 62 F.3d 930, 936 (7th Cir. 1995) (finding error in the district court's removal of a juror for being stuck on the side of the road when juror may have been able to find an alternate method of transportation).
- 64 *See supra* notes 53-55 and accompanying text.
- 65 In *United States v. Ruggiero*, a juror was approached at his home by two unknown individuals prior to the start of the trial's deliberations. 928 F.2d 1289, 1295 (2d Cir. 1991). Due to this encounter, the juror, in fear of the uncertain future threat of harm to his family, expressed his inability to take a vote in accordance with the evidence presented and was thus removed from the jury. *Id.* at 1297; *see also* United States v. Vartanian, 476 F.3d 1095, 1098-99 (9th Cir. 2007) (finding removal proper where juror made contact with defense attorneys and family of the defendant); United States v. Register, 182 F.3d 820, 838-839 (11th Cir. 1999) (en banc) (finding removal proper where it appeared that juror had spoken with her husband about the case), *reh'g denied*, 196 F.3d 1263 (11th Cir. 1999), *cert. denied*, 530 U.S. 1250 (2000); United States v. Edwards, 188 F.3d 230, 235-37 (4th Cir. 1999) (finding removal proper where juror received a phone call urging him not to convict the defendants).
- 66 One example of this is when jurors attempt to conduct experiments, seeking to some extent to reenact the material at issue in the instant trial. Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 331-34 (2005).
- 67 Courts have upheld the use of good cause removal for problems such as severe depression, *United States v. O'Brien*, 898 F.2d 983, 985 (5th Cir. 1990), hearing or language impairments, *United States v. Leahy*, 82 F.3d 624, 629-30 (5th Cir. 1996); *United States v. Campbell*, 544 F.3d 577, 579-80 (5th Cir. 2008), and having an emotional state that prevents them from deliberating, *United States v. Smith*, 659 F. App'x. 908, 917 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1235 (2017).
- 68 *See Smith*, 659 F. App'x. at 917.
- 69 *See* United States v. Samet, 207 F. Supp. 2d 269, 281-82 (S.D.N.Y. 2002) (finding error in the trial court's determination of good cause when the record revealed that the juror's mental instability stemmed from the juror's holdout status).

- 70 See, e.g., *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999); *United States v. Hernandez*, 862 F.2d 17, 23 (2d Cir. 1988).
- 71 See *United States v. Brown*, 996 F.3d 1171, 1184 (11th Cir. 2021) (acknowledging that often only a “vanishingly thin” line can be drawn between juror’s refusal to deliberate and a juror’s disagreement with the sufficiency of the evidence (quoting *United States v. McIntosh*, 380 F.3d 548, 556 (1st Cir. 2004)) (internal quotations omitted)).
- 72 See *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987); *Hernandez*, 862 F.2d at 23.
- 73 See Jeffrey Bellin, *An Inestimable Safeguard Gives Way to Practicality: Eliminating the Juror Who “Refuses to Deliberate” Under Federal Rule of Criminal Procedure 23(b)(3)*, 36 U. MEM. L. REV. 631, 639 (2006) (“Most reported cases involving a refusal to deliberate occur in the context of a lone holdout juror.”).
- 74 *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997).
- 75 See *id.* (rejecting the notion that courts should allow juror nullification “when it is within their authority to prevent [it]”).
- 76 Courts’ reliance on *Thomas* lies in the court’s discussion of nullification and that a juror has a constitutional duty to apply the law as instructed by the judge. *Id.* at 616-17. The *Thomas* court concluded that “a juror who is determined to ignore his duty, who refuses to follow the court’s instructions on the law and who thus threatens to ‘undermine[] the impartial determination of justice based on law’ is subject to dismissal.” *Id.* (alteration in original) (citation omitted) (quoting *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988)).
- 77 The issue was one of first impression at the time of these cases and, at that time, courts treated the issue as two separate ones: whether a juror could be dismissed when he harbored doubts about the prosecution’s case; and whether a nullification was a basis for good cause removal. See *id.* at 618; *Brown*, 823 F.2d at 596.
- 78 See discussion *supra* pp. 16-17.
- 79 *United States v. Brown*, 823 F.2d 591, 594 (D.C. Cir. 1987).
- 80 *Id.*
- 81 *Id.*
- 82 *Id.* at 595. The eleven-member jury returned a guilty verdict three weeks after the holdout juror was dismissed. *Id.* This depicts an early attempt of a court ascertaining whether a juror participated in nullification, albeit avoiding the question of whether nullification could stand as a proper basis for dismissal. See *id.* at 597.
- 83 *Id.*
- 84 *Id.*
- 85 *Id.*

- 86 116 F.3d 606 (2d Cir. 1997).
- 87 The trial court found this juror's views to indicate possible nullification issues, therefore he will be referred to as the "nullifying" juror.
- 88 The jurors complained that juror number five was squeaking his shoes, rustling cough drop wrappers, and engaging in conduct that showed agreement towards points made by defense counsel. *Thomas*, 116 F.3d at 609-10.
- 89 *Id.* at 610.
- 90 *Id.* at 611.
- 91 *See id.* at 611-12. A few jurors alleged that juror number five was the sole holdout for acquittal for personal reasons, such as the defendants being "his people," or his believing the defendants were good people. *Id.* But several other jurors stated that juror number five based his beliefs on the insufficiency of the evidence. *Id.*
- 92 *United States v. Thomas*, 116 F.3d 606, 611 (2d Cir. 1997).
- 93 *Id.* at 612.
- 94 *Id.* at 614. The district court made this finding despite inconsistent reports from other deliberating jurors. Some jurors took the opinion that the nullifying juror was a holdout for acquittal due to his background, while other jurors indicated that the nullifying juror's disagreement with the sufficiency of the evidence fueled his holdout status. *Id.* at 611.
- 95 *Id.* at 621-22 (citing *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987)).
- 96 *Id.* at 622. In further discussion, the court instructs that "[a] presiding judge faced with anything but unambiguous evidence that a juror refuses to apply the law as instructed need go no further in his investigation of the alleged nullification." *Id.* Under these circumstances, a "juror is not subject to dismissal on the basis of his alleged refusal to follow the court's instructions." *Id.*
- 97 *United States v. Symington*, 195 F.3d 1080, 1086-87 (9th Cir. 1999).
- 98 *United States v. Litwin*, 972 F.3d 1155, 1170 (9th Cir. 2020) (quoting *United States v. Christensen*, 828 F.3d 763, 807 (9th Cir. 2016)).
- 99 *United States v. Fattah*, 914 F.3d 112, 150 (3d Cir. 2019) (quoting *United States v. Kemp*, 500 F.3d 257, 304 (3d Cir. 2007)).
- 100 *United States v. Brown*, 996 F.3d 1171, 1194 (11th Cir. 2021). Here, the court instructed that in reviewing the record, it must "ensure that 'no substantial possibility' existed that the dismissed juror was rendering proper jury service." *Id.* at 1185 (quoting *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001)). The Eleventh Circuit's standard is one that incorporates the beyond a reasonable doubt standard. *Abbell*, 271 F.3d at 1302.
- 101 *United States v. Ebron*, 683 F.3d 105, 127 (5th Cir. 2012).

- 102 See, e.g., *Brown*, 996 F.3d at 1186.
- 103 862 F.2d 17, 22 (2d Cir. 1988).
- 104 Before the trial began, the prosecutor reported that the juror was seen speaking with the girlfriend of one of the defendants, as well as winking, smiling, and nodding his head at the defendants. *Id.* at 22. The circuit court noted that this behavior would have justified removal for good cause if the juror had been removed at that time. *Id.* Had the court exercised removal then, it would have likely been made in reference to concerns of impartiality due to the juror's various contacts with third parties that could indicate bias. Early in the trial, the judge prompted the later discharged juror to pay attention to the proceedings, and the next day, outside of the presence of the jury, the judge expressed his concerns about the juror. *Id.* at 19. Moreover, early during deliberations, the court received a note from the jury describing the problem juror as having "prejudice and lack[ing] the rational common sense to deliberate in a logical way." *Id.* at 20.
- 105 *Id.* at 20. At this time, the court was also informed of altercations between the problem juror and two others. *Id.* The note received by the judge from the jury indicated that the problem juror threw water on one juror and twisted the arm of another. *Id.* The judge conducted a voir dire of the problem juror, where he stated that he threw the glass of water only after another juror had assaulted him. *Id.*
- 106 *Id.* Prior to proceeding with deliberations, the jury foreperson assured the court that deliberations could proceed "in a calm manner." *Id.*
- 107 *Id.* This time, a new issue was raised--the problem juror had informed other members of the jury that "he had been discharged from the armed services for psychiatric reasons." *Id.* at 21.
- 108 *United States v. Hernandez*, 862 F.2d 17, 22 (2d Cir. 1988). The court made no express findings that the juror's removal was based on his mental incompetence, leaving the appellate court to find significant doubt as to whether the juror's dismissal stemmed from his status as a hold out for acquittal. *Id.* at 23.
- 109 *Id.* at 22 ("I think you can feel proud of yourselves in attempting to ... go the extra mile in order to help us, you have.").
- 110 *Id.* at 23-24.
- 111 *Id.* at 23. The Court further reasoned that if the juror's removal for incompetence was justified, the latest it should have occurred was on the second day of deliberations. *Id.*
- 112 See *United States v. McGill*, 815 F.3d 846, 868 (D.C. Cir. 2016).
- 113 *Id.* at 864-66.
- 114 *Id.* at 869 (citing *United States v. Ginyard*, 444 F.3d 648, 652 (D.C. Cir. 2006)).
- 115 *Id.* at 862. One of the notes received by the court alleged that the problem juror refused to participate in deliberations. *Id.* at 862-63. Another was signed by two jurors who reported that the problem juror removed three pieces of paper from his yellow tablet and used his eye glass to remove them from the deliberation room at the end of the day. *Id.* at 863. One note included statements by one juror who reported being disturbed and concerned by the juror's action of removing the pieces of paper: the note also requested that the judge replace the juror with the alternate. *Id.* at 863.

116 *Id.* at 862.

117 *Id.*

118 *Id.*

119 *Id.* at 863. The problem juror's removing notes from the deliberation room was regarded cautiously because the trial was one in which the court had empaneled an anonymous jury. *Id.* at 873.

120 *Id.* at 864.

121 *Id.*

122 *Id.* At the time of questioning, the problem juror reported to have already discarded the alleged grocery list that he had removed from the deliberation room. *Id.* at 865.

123 *Id.*

124 *Id.* The trial court found that the facts reported in the jury's notes and voir dire testimony were sufficient to support a conclusion that the problem juror "had been totally unwilling to consider the evidence or discuss the case with the others, in violation of his oath as a juror and the court's instructions." *Id.*

125 *Id.* Apparently, the court was "not clear [what] the proper standard [should be]" by which it could find that the juror had committed misconduct of removing notes from the deliberation room. *Id.* "The district court understood *Brown* to require it to make a factual finding, beyond a reasonable doubt, that [the problem juror] had refused to consider the law and the evidence at all." *Id.*

126 *Id.* at 866. Here, it seems like the court went back to correct an error by deciding that good cause removal requires a showing that misconduct occurred by a preponderance of the evidence. However, Rule 23(b)(3) gives judges discretionary authority to find good cause for removal and, at the time this case was decided, courts had interpreted the higher evidentiary standard applied in *Brown* to apply only to cases involving a juror's alleged inability to apply the law or participate in deliberations.

127 *Id.* at 869 ("That kind of misconduct--unlike a juror's refusal to deliberate or a juror's intent to nullify--poses no inherent potential for confusion with a juror's evidence-based inclination to acquit.").

128 *Id.* at 870.

129 *Id.* at 871-72, 874 (alteration in original) (citing *United States v. Gartmon*, 146 F.3d 1015, 1029 (D.C. Cir. 1998)).

130 *Id.* at 868.

131 *E.g.*, *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987).

- 132 See *United States v. Kemp*, 500 F.3d 257, 304 (3rd Cir. 2007) (noting a “slight difference” in the standards expressed by the Ninth and Eleventh Circuits and the D.C. and Second Circuits); *McGill*, 815 F.3d at 869 (emphasizing that *Brown* treatment is only applicable when there is “some causal link between a juror’s holdout status and the juror’s dismissal”).
- 133 Judges are not permitted to intrude on the secrecy of deliberation as to preserve the thought process of the jurors, allowing free and open debate between them, while insulating the process from external influences. Ran Zev Schijanovich, Note, *The Second Circuit’s Attack on Jury Nullification in United States v. Thomas: In Disregard of the Law and the Evidence*, 20 CARDOZO L. REV. 1275, 1317 (1999).
- 134 *United States v. Brown*, 996 F.3d 1171, 1185 (11th Cir. 2021) (citing *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001)). This is the most recent modification of the good cause standard articulated by the Eleventh Circuit. A trial court’s determination that “no substantial possibility exists that the pertinent juror is basing her decision on the sufficiency of the evidence” is a finding of fact that will not be disturbed without a showing of clear error. *Abbell*, 271 F.3d at 1303.
- 135 See *supra* notes 24-29 and accompanying text.
- 136 *United States v. Thomas*, 116 F.3d 606, 619-20 (2d Cir. 1997). Judges typically make these determinations based on few facts available. See *United States v. Symington*, 195 F.3d 1080, 1088 n.7 (9th Cir. 1999) (acknowledging that the requirement that the court avoid “compromising the secrecy of the jury’s deliberations” necessitates that the “evidence available to the ... court” will be “necessarily limited”).
- 137 When a court undertakes voir dire of jurors considering allegations of juror misconduct, they make findings of fact regarding the juror’s credibility. See *supra* notes 46-48 and accompanying text; see also *Abbell*, 271 F.3d at 1303 (11th Cir. 2001) (noting that a judge is in the best position to determine the “motivations and intentions” of a juror in making misconduct determinations). Cf. *Brown*, 996 F.3d at 1186 (11th Cir. 2021) (rejecting the government’s argument that it must defer to the factual findings of the district court’s credibility determination).
- 138 The high evidentiary standard articulated in *Thomas* attempted to balance the grave importance of maintaining secrecy while allowing judicial inquiry. *Thomas*, 116 F.3d at 621 (acknowledging that a “judge may well have no means of investigating the allegation [of nullification or refusal to deliberate] without unduly breaching the secrecy of deliberations”).
- 139 500 F.3d 257, 302 (3d Cir. 2007).
- 140 *Id.* (citing *United States v. Resko*, 3 F.3d 684, 686 (3d Cir. 1993); see also Brian Osimiri, *The Legacy of United States v. Thomas: Second Circuit’s Swing and a Miss Puts Defendants’ Rights at Risk*, 30 REV. LITIG. 159, 175-76 (2010) (suggesting that judicial inquiry should be less restricted to allow more effective investigation).
- 141 See *Brown*, 996 F.3d at 1188 (recognizing that jurors often disagree, and such disagreement can prompt concern for one juror’s ability to deliberate) (citing *Symington*, 195 F.3d at 1088).
- 142 *Id.*; Reichelt, *supra* note 21, at 583-85.
- 143 One commentator describes the function of Rule 23(b)(3) as “chance,” suggesting that the rule “puzzlingly relies on jurors to draft a note that hits upon a Rule 23(b)(3) ‘good cause’ formulation, while providing no information to the jurors that ‘good cause’ dismissal is even available, or on what grounds.” Bellin, *supra* note 73, at 652-53.

- 144 Use of good cause is controversial when used during deliberations because the allegations are likely to be accompanied by the existence of a holdout juror. Reichelt, *supra* note 21, at 584.
- 145 Bellin, *supra* note 73, at 652-53.
- 146 *Id.* at 652.
- 147 *Id.*
- 148 *See id.*, *supra* notes 78-84 and accompanying text.
- 149 United States v. Brown, 996 F.3d 1171, 1186-87 (11th Cir. 2021) (first citing United States v. Thomas, 116 F.3d 606, 623-24 (2d Cir. 1997); and then citing United States v. Brown, 823 F.2d 591, 596-97 (D.C. Cir. 1987)).
- 150 *Id.* at 1185 (acknowledging that “only an unambiguous record may withstand reversal”).
- 151 Schijanovich, *supra* note 133, at 1316. When allegations of juror misconduct relate to a juror's internal decision-making process, such as “the reasons behind a juror's ... vote,” courts are unable to inquire into the deliberation process without offending the “cardinal principle that the deliberations of the jury shall remain private and secret in every case.” *Id.* at 1315-16 (quoting FED. R. CRIM. P. 23(b) advisory committee's note to 1983 amendment).
- 152 Inquiry likely results in judges interrupting jurors who attempt to respond to questions regarding the juror's refusal to deliberate or to follow the courts instructions. *See, e.g., Brown*, 996 F.3d at 1178-79. When judges have any inclination that a juror is about to articulate his or her defense to allegations by other jurors, a judge will be required to cease questioning or interrupt the juror.
- 153 *See id.* at 1185 (citing *Thomas*, 116 F.3d at 622) (recognizing a higher standard of review under circumstances where removal of a juror implicates the Sixth Amendment).
- 154 These principles acknowledged in *Thomas* derive from the Federal Rule of Evidence 606(b) that restricts a juror from testifying to any affect upon his mental processes, including anything that may have affected his assent or dissent of the verdict. Schijanovich, *supra* note 133, at 1314-15.
- 155 Judicial voir dire of individual jurors poses a risk of placing undue influence on jurors. Bellin, *supra* note 73, at 644. Additionally, preserving the integrity of the deliberation led the Advisory Committee to first reject the use of alternate jurors during deliberations. *See* FED. R. CRIM. P. 23(b)(3) Advisory Committee's notes to 1983 amendment. *But see* FED. R. CRIM. P. 24(c) Advisory Committee's notes to 1999 amendment (authorizing the use of an alternate after deliberations begin but requiring certain procedures to protect the sanctity of the deliberation process).
- 156 *See generally* Wise, *supra* note 46 (discussing the arbitrary decisions of judges regarding juror removal at every stage of the trial beginning with initial juror voir dire).
- 157 *See supra* Section III.A.1.



- 158 One commentator argues that some trial courts have employed arguably coercive investigation tactics in attempting to obtain a unanimous verdict in the event of a holdout juror. Reichelt, *supra* note 21, at 584-89.
- 159 Wise, *supra* note 46, at 823.
- 160 *Id.* (“The combination of judicial bias and the arbitrary nature of deciphering between a bull-headed reluctance in following instructions and genuine questioning of the sufficiency of evidence are deadly to the legitimacy of trials.”).
- 161 *See supra* notes 107-09 and accompanying text.
- 162 *See United States v. Hernandez*, 862 F.2d 17, 20 (2d Cir. 1988).
- 163 *See supra* notes 56-58 and accompanying text.
- 164 *See United States v. Thomas*, 116 F.3d 606, 620 (2d Cir. 1997). “Physically unable” refers to jurors who have been discharged for reasons extrinsic to the trial such as a juror’s observance of a religious holiday, sudden or unexpected illnesses, or incapacitation as considered by Rule 23(b)(3). *Id.* at 613.
- 165 *Id.* at 620. Some types of misconduct do not require judicial inquiry. *See United States v. Armijo*, 834 F.2d 132, 134 (8th Cir. 1987) (juror in car accident); *United States v. Reesc*, 33 F.3d 166, 172-73 (2d Cir. 1994) (juror unavailable due to business trip).
- 166 *See supra* notes 56-57; *see also United States v. Erickson*, 843 F. App’x. 417, 418 (2d Cir. 2021) (affirming dismissal of a juror undertaken without any judicial inquiry when the juror became sick on the second day of deliberations).
- 167 *See Gershman*, *supra* note 66, at 325-30 (discussing the ways that courts have dealt with a juror’s contact with third parties and a juror’s exposure to material extrinsic to the trial).
- 168 *See supra* Section III.A.
- 169 *See, e.g., United States v. Oscar*, 877 F.3d 1270, 1285-86 (11th Cir. 2017).
- 170 *See, e.g., id.* at 1285.
- 171 *See supra* Section II.B.1.
- 172 This type of juror misconduct requires individual questioning due to its ability to implicate a juror’s thought process and a courts apparent obligation to prevent improper nullification. *See supra* notes 73-74 and accompanying text; *see also supra* note 46 and accompanying text; *United States v. Thomas*, 116 F.3d 606, 612 (2d Cir. 1997).
- 173 Schijanovich, *supra* note 133, at 1293; *see supra* notes 37-40 and accompanying text.
- 174 *United States v. Boone*, 458 F.3d 321, 329 (3d Cir. 2006) (citing *United States v. Thomas*, 116 F.3d 606, 608 (2d Cir. 1997)).

- 175 Schijanovich, *supra* note 133, at 1316 (“[I]n investigating a nullification allegation, it is precisely the juror’s thought process regarding the case that must necessarily be probed.”).
- 176 *United States v. Brown*, 823 F.2d 591, 597 (D.C. Cir. 1987).
- 177 *United States v. McGill*, 815 F.3d 846, 869 (D.C. Cir. 2016).
- 178 The district court expressed concerns of whether it was required to find that the juror removed the notes from the deliberation room by a preponderance of the evidence standard or by a reasonable doubt standard. *Id.* at 870.
- 179 *Id.* at 870-71.
- 180 Some courts treat Rule 23(b)(3) removal with higher scrutiny. For example, the Ninth Circuit in *United States v. Litwin* found that the trial court abused its discretion in removing a juror when the record did not indicate a potential malice towards the deliberation process or any unwillingness on behalf of the juror to deliberate. 972 F.3d 1155, 1173 (9th Cir. 2020). The court made this finding by taking the view that the grounds for dismissal were not supported by the transcripts. *Id.*
- 181 *See United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001).
- 182 *See supra* discussion accompanying notes 114-17.
- 183 *See United States v. Ebron*, 683 F.3d 105 (5th Cir. 2012). In this case, the juror was removed despite early indications that the jury was deadlocked and unable to reach a verdict. *Id.* at 122-23.
- 184 *United States v. Thomas*, 116 F.3d 606, 623 (2d Cir. 1997) (citing *McDonald v. Pless*, 238 U.S. 264, 267 (1915)); *see* discussion *supra* Section III.A.
- 185 *See supra* Section III.A; *see also supra* notes 179-84 and accompanying text.
- 186 *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987).
- 187 *See supra* notes 23-28 and accompanying text.
- 188 *Bellin*, *supra* note 73, at 653-54 (concluding that courts have not “adequately considered or resolved the tension that a Rule 23(b)(3) dismissal for refusing to deliberate places on a right to a ‘unanimous’ verdict”).
- 189 Courts are not inclined to jeopardize the finality of the verdict by allowing post-verdict inquiries into the jury room. *Compare McDonald v. Pless*, 238 U.S. 264, 267-68 (1915) (acknowledging that treating the substance of juror deliberations as evidence open and available to establish juror misconduct sufficient to throw out a verdict would “make what was intended to be a private deliberation[] the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference”), *with Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 (2020) (discussing the requirement of unanimity of a jury verdict as required by the Constitution and the erroneous abandonment of the unanimity requirement by the court in *Apodaca v. Oregon*, 406 U.S. 404 (1972)).

- 190 *Thomas*, 116 F.3d at 623.
- 191 *See supra* notes 131-33 and accompanying text.
- 192 *See supra* notes 109-10 and accompanying text; *see also* notes 139-42 and accompanying text.
- 193 *See* Alison Markovitz, Note, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493, 1509-25 (2001) (distinguishing the post-verdict secrecy requirement from the pre-verdict secrecy requirement); *see also* FED. R. EVID. 606(b). Rule 606(b) offers only three matters concerning juror deliberations on which a juror may testify: "(A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form."
- 194 *See supra* notes 41, 43.
- 195 *See, e.g.*, *United States v. Wilkerson*, 966 F.3d 828 (D.C. Cir. 2020); *United States v. Ebron*, 683 F.3d 105, 127 (5th Cir. 2012); *United States v. Luisi*, 568 F. Supp. 2d 106 (D. Mass. 2008); *United States v. Kemp*, 379 F. Supp. 2d 690, 705 (3d Cir. 2005).
- 196 The trial court's act of removing a juror during deliberations must not be taken lightly when there is any ambiguity as to whether the juror disagreed with the prosecution's case. *See supra* notes 82 and 83 and accompanying text.
- 197 *United States v. Kemp*, 500 F.3d 257, 301 (3d Cir. 2007) (quoting *United States v. Boone*, 458 F.3d 321, 329 (3d Cir. 2006)); *e.g.*, *United States v. Luisi*, 568 F. Supp. 2d 106, 122 (D. Mass. 2008).
- 198 Government has always disfavored the occurrence of juror nullification, despite the inability to ascertain whether nullification has actually occurred. Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 435 (1998). It remains true however, that nullification attempts are not always clearly identifiable and can be mistaken for a good faith effort to execute proper jury duty. *See United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997) ("[W]here the alleged misbehavior is a purposeful disregard of the law, [it is] a particularly difficult allegation to prove and one for which an effort to act in good faith may easily be mistaken."); *see also United States v. Brown*, 996 F.3d 1171, 1185 (11th Cir. 2021) (noting that trial courts have been "wrong to dismiss jurors whose references to the evidence in explaining their positions left open a substantial possibility that they were willing and able to discharge their duties").
- 199 Reichelt, *supra* note 21, at 582. In analyzing the phenomena of a hung jury, researchers have identified three factors that commonly attribute to the existence of a holdout juror in felony trials: "(1) the evidentiary characteristics of the case; (2) the interpersonal dynamics of deliberations; and (3) jurors' opinions about the fairness of the law as applied during the trial." *Id.* (quoting Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249, 1265-66 (2003)).
- 200 *See supra* notes 28-31 and accompanying text. In *Ramos*, the Court noted that, as a response to *Apodaca*, many states have expressed support in favor of relaxing the unanimity requirement. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1407 (2020). In rejecting the state's argument to enforce a rule permitting conviction by a non-unanimous verdict, the Court reasoned that the State's interest in maintaining the finality of a verdict is not outweighed by the substantial interest in preserving constitutionally protected liberties. *Id.* at 1408. The Court also reasoned that it is improper for the Court to make determinations on whether the right to a unanimous verdict is significant enough to retain. *Id.* at 1402.

- 201 *See supra* Section III.B.
- 202 The unanimity principle was once considered animated by a juror's unspoken right to participate in nullification, Schijanovich, *supra* note 133, at 1299.
- 203 *Id.* at 1293 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).
- 204 *See supra* note 48 and accompanying text.
- 205 FED. R. CRIM. P. 23(b)(3).
- 206 A juror should only be deemed severely incapacitated if they are unable to *meaningfully* participate in deliberations. *See supra* notes 67-68 and accompanying text. This Note's amendment incorporates the use of the word "severely" into the determination of incapacitation because, in some instances, a juror's seemingly incapacitated state can be found to have arisen by the juror's holdout status. *United States v. Samet*, 207 F. Supp. 2d 269, 281-82 (S.D.N.Y. 2002). *United States v. Hernandez* is instructive on this point, in that a juror's mental competence would permit removal well before initiation of deliberations. *See supra* notes 102-104 and accompanying text.
- 207 Incapacitated and physically unavailable juror removal supports the intended use of Rule 23(b)(3) by legislatures. FED. R. CRIM. P. 23(b)(3).
- 208 A juror's exposure to information not introduced at trial is often the basis for allegations of impartiality, and a judicial determination of this type does not require any intrusion into the secrecy of jury deliberations. *See supra* notes 165-66 and accompanying text; *see also supra* note 11 and accompanying text (describing the constitutional requirement that jury determinations be based solely on evidence presented at trial). A juror's perceived bias when not relating to extrinsic contact is outside the scope of this Note. Perceived bias, however, is a prevalent problem in jury trials—an issue that has prompted commentary that proposes differing mechanisms pre-trial and pre-deliberation to weed out jurors with perceived biases. *See West, supra* note 40; *Wise, supra* note 46, at 833-35.
- 209 Judges would no longer be required to inquire into the substance of deliberations prior to determining whether the juror should be dismissed. *Cf. United States v. Ginyard*, 444 F.3d 648, 654 (D.C. Cir. 2006) (holding that a trial court must ascertain the extent of a holdout juror's unavailability prior to exercising removal under Rule 23(b)). Judges must remain restricted in their mid-deliberation inquiries. *See supra* notes 197-98 and accompanying text. When allegations of juror misconduct require investigation, such investigation should comport with the principles of maintaining juror secrecy. *See supra* note 139.
- 210 *See supra* Section III.A.
- 211 *See supra* notes 67-68 and accompanying text.
- 212 Courts should consider how long the jury has been deliberating prior to dismissing a juror seemingly at odds with the majority because of tensions that can build in the jury room. Holdout jurors are present in most cases involving allegations of misconduct or refusal to deliberate. Reichelt, *supra* note 21, at 584.
- 213 Courts can induce cooperation of jurors through *Allen* charges in an attempt to reach a unanimous verdict. *Allen v. United States*, 146 U.S. 492 (1896).

- 214 There is no criterion in the law to establish when a judge may or may not order a mistrial. Therefore, when jurors are confined to a space with the same people for an indefinite amount of time, courts should consider whether the environment of the jury box contributed to any allegations of juror misconduct. *Id.*
- 215 *Id.*
- 216 In addition to tensions building in the jury room, the aim of Rule 23(b)(3) is to provide a remedy for circumstances involving jurors physically unable to participate in deliberations to avoid a mistrial when a trial is of substantial length. *See supra* notes 49-50. Thus, prior to proceeding with dismissal during deliberations, an appropriate consideration is whether the trial actually was of substantial length.
- 217 When claims of juror impartiality arise on a motion for a new trial, defendants are required to show actual bias. *See Smith, supra* note 38, at 215-17. If a defendant is required to show actual prejudice to prevail on a claim of juror bias, the same scrutiny should be required by judges using Rule 23(b)(3) for removal.
- 218 The cause-in-fact determination employed here is based on the particularity that a court only has two options when dealing with a juror who disagrees with the prosecution's case: (1) declare a mistrial, or (2) send the jurors back into deliberations to attempt to reach an agreement. *See United States v. Litwin*, 972 F.3d 1155, 1169 (9th Cir. 2020) (quoting *United States v. Symington*, 195 F.3d 1080, 1085-86 (9th Cir. 1999)).
- 219 *See supra* notes 134-35 and accompanying text.
- 220 *See supra* Section II.A. Since the *Thomas* court acknowledged that nullification can be a basis for misconduct, courts have increasingly employed Rule 23(b) to remove allegedly nullifying jurors during the deliberation process. *See, e.g., United States v. Luisi*, 568 F. Supp. 2d 106 (D. Mass. 2008); *United States v. Baker*, 262 F.3d 124 (2d Cir. 2001); *United States v. Kemp*, 379 F. Supp. 2d 690 (E.D. Pa. 2005); *United States v. Christensen*, 828 F.3d 763 (9th Cir. 2016).
- 221 *Wofford v. Woods*, 969 F.3d 685, 691 (6th Cir. 2020).
- 222 The juror's conduct in *Wofford* would first be analyzed under the provision allowing for removal of a juror whose contact with extrinsic information would render them incapable of being impartial. *See supra* note 209 and accompanying text.
- 223 *See supra* note 42 and accompanying text.
- 224 *Wofford*, 969 F.3d at 691.
- 225 *See Gershman, supra* note 66 at 328 (discussing the factors used to consider whether a juror's contact with outside parties can be considered prejudicial); *see also supra* note 42 and accompanying text.
- 226 *Wofford*, 969 F.3d at 691.
- 227 *Id.*
- 228 *See supra* note 48 and accompanying text.

229 *Wofford*, 969 F.3d at 691.

230 FED. R. CRIM. P. 23(b) advisory committee notes to 1983 amendment.

231 *Wofford*, 969 F.3d at 691.

232 *See supra* notes 130-34 and accompanying text.

233 *See supra* notes 30-35 and accompanying text.

234 *See supra* text accompanying notes 119-29.

235 *See supra* notes 106-11 and accompanying text.

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