

I.

INTRODUCTION

Pursuant to Federal Rule of Criminal Procedure 23(b)(3) and after [NUMBER] hours of deliberations, the Court determined there was good cause to excuse a juror and continue deliberations with the 11 remaining jurors. The Court's decision to continue deliberations with 11 jurors, rather than to declare a mistrial, was erroneous. Mr. CLIENT therefore requests that the Court grant the motion for mistrial under Federal Rule of Criminal Procedure 26.3.

II.

THE COURT CANNOT DISMISS A JUROR WHEN THERE EXISTS ANY REASONABLE POSSIBILITY THAT THE REQUEST FOR DISCHARGE STEMS FROM DOUBTS ABOUT THE SUFFICIENCY OF THE EVIDENCE

Federal Rule of Criminal Procedure 23(b)(3) grants a trial court the discretion to dismiss a juror for good cause and continue deliberations with 11 jurors. Fed. R. Crim. P. 23(b)(3). Rule 23(b) "generally pertains to physical incapacity or absence due to religious observance," but has been applied "when [a] district court determine[s] that [a] juror was unable to deliberate impartially." *United States v. Symington*, 195 F.3d 1080, 1085 (9th Cir. 1999). While Rule 23 grants a district court discretion to determine whether there is good cause to excuse a juror, that discretion "is not unbounded." *Id.* "Indeed, 'a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the evidence.'" *Id.* (quoting *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987)). To dismiss a juror who has doubts about the government's evidence "is to deny the defendant his right to a unanimous verdict." *Symington*, 195 F.3d at 1085 (quotation and citation omitted); *see also Brown*, 823 F.2d at 596 ("If a court could discharge a juror on the basis of such a request, then the

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right to a unanimous verdict would be illusory.").

In *Brown*, the D.C. Circuit considered the propriety of a district court's order dismissing a juror where the juror sent a note stating he had difficulty with "the way [the RICO statute] was written *and* the way the evidence has been presented." *Brown*, 823 F.2d at 597. The district court found that the juror refused to follow the law and dismissed him. *Id.* at 595. On appeal, the D.C. Circuit noted that the district court "at one point expressed the view that [it] could not question [the juror] further because additional inquiry would intrude on the secrecy of the jury's deliberations." *Id.* The appellate court then went on to hold that, because the evidence disclosed the possibility that the request to be excused stemmed in part from the juror's view about the sufficiency of the evidence, the court should have denied the juror's request. *Id.* at 595-96.

The Ninth Circuit adopted much of the *Brown* court's reasoning. In *Symington*, the Ninth Circuit held 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." *Symington*, 195 F.3d at 1087 (emphasis added). Instead, a trial court must either "send the jury back to continue deliberating or declare a mistrial." *Id.*

Here, [INSERT FACTS].

Like the court in *Brown*, the Court in this case did not ask any questions about deliberations for fear of invading juror secrecy. But the evidence volunteered by the juror reveals that there is a "reasonable possibility that the impetus for [her] dismissal stems from [her] views on the merits of the case." *Symington*, 195 F.3d at 1087. Thus, the juror should not have been dismissed. The jury should have been ordered to continue deliberating or the Court should have declared a mistrial. Now that the juror has been excused, the Court must declare a mistrial.

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