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Acting Without "Just Cause": An Analysis of the Ninth Circuit's Decision in *United States v. Symington*

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INTRODUCTION

Both "Article III and the Sixth Amendment of the United States Constitution guarantee to all federal criminal defendants the right to a trial by jury."[1] Early interpretation of this right led to the common law rule that a judge, when faced with a juror who became incapacitated or disqualified during a criminal trial, had to discharge the juror and declare a mistrial.[2] This rigid practice led to a substantial waste of resources by the court, prosecution, and defense—an effect

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[1] Frank A. Bacelli, Note, United States v. Thomas*: When the Preservation of Juror Secrecy During Deliberations Outweighs the Ability to Dismiss a Juror for Nullification*, 48 CATH. U. L. REV 125, 125 (1998) (footnotes omitted); *see also* U.S. CONST. art. III, § 2, cl. 3 ("The trial of all Crimes, except in Cases of Impeachment, shall be by Jury. "); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.. ").

[2] *See* Jeffrey T. Baker, *Criminal Law—Post-Submission Juror Substitution in the Third Circuit: Serving Judicial Economy While Undermining a Defendant's Rights to an Impartial Jury Under Rule 24(c)*, 41 VILL. L. REV 1213, 1213 (1996); Joshua G. Grunat, Note, *Post-Submission Substitution of Alternate Jurors in Federal Criminal Cases: Effects of Violations of Federal Rules of Criminal Procedure 23(b) and 24(c)*, 55 FORDHAM L. REV 861, 861 (1987); Douglas J. McDermott, Note, *Substitution of Alternate Jurors During Deliberations and Implications on the Rights of Litigants: The Reginald Denny Trial*, 35 B.C. L. REV 847, 847 (1994).

that increased dramatically as the trial continued over a longer period of time.[3]

In an effort to alleviate substantial amounts of this waste, the Supreme Court and Congress adopted Federal Rules of Criminal Procedure 23(b) and 24(c) in 1946.[4] Rule 23(b), which has been amended three times at least in part to avoid mistrials;[5] allows a trial to proceed with less than twelve jurors under certain circumstances.[6] Its counterpart, Rule 24(c), allows (among other things) an alternate juror to replace a juror who is "unable or disqualified" to serve.[7] This Rule has been amended three times,

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[3] Baker, *supra* note 2, at 1213.

[4] *Id.* at 1214.

[5] *See* FED. R. CRIM. P. 23; *id.* 23 advisory committee's note (1983); *id.* 23 advisory committee's note (1977); *id.* 23 advisory committee's note (1966).

[6] *Id.* 23(b). In its entirety, Rule 23(b) reads:

> (b) JURY OF LESS THAN TWELVE. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

[7] *Id.* 24(c). Rule 24(c) states:

> (c) ALTERNATE JURORS. (1) *In general.* The court may empanel no more than 6 jurors, in addition to the regular jury, to sit as alternate jurors. An alternate juror, in the order called, shall replace a juror who becomes or is found to be unable or disqualified to perform juror duties. Alternate jurors shall (i) be drawn in the same manner, (ii) have the same qualifications, (iii) be subject to the same examination and challenges, and (iv) take the same oath as regular jurors. An alternate juror has the same functions, powers, facilities and privileges as a regular juror.
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> (2) *Peremptory challenges.* In addition to challenges otherwise provided by law, each side is entitled to 1 additional peremptory challenge if 1 or 2 alternate jurors are empaneled, 2 additional peremptory challenges if 3 or 4 alternate jurors are empaneled, and 3 additional peremptory challenges if 5 or 6 alternate jurors are empaneled. The additional peremptory challenges may be used to remove an alternate juror only, and the other peremptory challenges allowed by these rules may not be used to remove an alternate juror.
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> (3) *Retention of alternate jurors.* When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during

apparently in attempts to promote judicial economy and avoid unnecessary mistrials.[8] Particularly, the most recent amendment of Rule 24(c) harmonized the Rule with a growing body of case law that disregarded a section of the former amendment, which required a judge to discharge all alternate jurors at deliberation and prohibited post-submission juror substitution.[9]

Thus, in light of the increasingly lenient revisions of Rules 23(b) and 24(c) and growing case law, there is a clearly discernable trend toward promoting judicial economy and avoiding unnecessary mistrials. The Ninth Circuit, however, in *United States v. Symington*,[10] bucked that trend by both disregarding the usual abuse of discretion standard for Rule 23(b) decisions and misapplying the measure for "just cause" under the Rule. In *Symington*, the trial court dismissed a juror who, from all accounts of her fellow jurors, was unable to participate meaningfully in deliberations.[11] Despite the consistency with which the jurors questioned her lucidity without ever mentioning or alluding to her beliefs, the Ninth Circuit reversed, holding that no "just cause" existed for her dismissal.[12] By ruling as it did, the Ninth Circuit made juror dismissal nearly impossible in situations where dismissal is sought for any reason not unquestionably independent from the merits.

This Note employs four sections to develop this thesis. Part I charts the evolution of the two Federal Rules of Criminal Procedure that involve post-submission juror dismissal and substitution, Rules 23 and 24.[13] Part II evaluates the current understanding of "just cause" for juror dismissal

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deliberations. If the court decides to retain the alternate jurors, it shall ensure that they do not discuss the case with any other person unless and until they replace a regular juror during deliberations. If an alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.

[8] *See id.*, *id.* 24 advisory committee's note (1999); *id.* 24 advisory committee's note (1966).

[9] *See infra* notes 23-24. *Compare* FED. R. CRIM. P. 24(c) (current version), *with id.* 24(c) (1987) (amended 1999). The latter read: "Alternate jurors ... shall replace jurors who, *prior to the time the jury retires to consider its verdict*, become or are found to be unable or disqualified to perform their duties. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." *Id.* 24(c) (1987) (amended 1999) (emphasis added).

[10] United States v. Symington, 195 F.3d 1080 (9th Cir. 1999).

[11] *See infra* notes 106-09, 127-34 and accompanying text; *infra* note 141.

[12] *See Symington*, 195 F.3d at 1088.

[13] *See infra* notes 17-41 and accompanying text.

under Rule 23(b).[14] Part III presents the facts and holding of *United States v. Symington*, and gives an assessment of the court's decision.[15] Finally, the Note examines the policy implications of *Symington*.[16]

I. THE EVOLUTION OF FEDERAL RULES OF CRIMINAL PROCEDURE 23 AND 24

The early versions of Federal Rules of Criminal Procedure 23(b) and 24(c) were far less flexible than those currently in place. Under the initial Rule 23(b), a verdict could be returned by fewer than twelve jurors only upon stipulation of the parties.[17] Furthermore, Rule 24(c) previously required all alternate jurors to be dismissed at the start of deliberations.[18] Therefore, if a juror were dismissed during deliberations and either of the parties refused to consent to an eleven-juror verdict, a mistrial was the court's only option.[19] The high cost of this mandatory outcome[20] was eventually alleviated by the 1983 amendment to Rule 23, which allowed a valid verdict to be returned by the remaining eleven jurors absent party stipulation, "if the court [found] it necessary to excuse a juror for just cause after the jury ha[d] retired to consider its verdict."[21]

By allowing a valid eleven-juror verdict either at judicial discretion or upon the previously allowed party stipulation, the 1983 amendment to Rule 23 substantially reduced a defendant's power to obtain a mistrial when a juror was dismissed after deliberations had begun. Despite this substantial deprivation of a defendant's power, the constitutionality of Rule 23(b) is unquestioned by the courts.[22] Thus, in allowing a verdict to be rendered by

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[14] *See infra* notes 42-100 and accompanying text.

[15] *See infra* notes 101-62 and accompanying text.

[16] *See infra* notes 163-76 and accompanying text.

[17] FED. R. CRIM. P 23 advisory committee's note (1983).

[18] *Id.* 24 advisory committee's note (1999).

[19] *See id.* 23 advisory committee's note (1983).

[20] *See supra* notes 2-3 and accompanying text.

[21] FED. R. CRIM. P 23(b).

[22] *See, e.g.*, United States v. Ahmad, 974 F.2d 1163, 1164 (9th Cir. 1991); United States v. Armijo, 834 F.2d 132, 134 (8th Cir. 1987); United States v. Smith, 789 F.2d 196, 205 (3d Cir. 1986). The Supreme Court has never directly addressed the constitutionality of Rule 23(b), but its ruling in *Williams v. Florida*, 399 U.S. 78, 98-100 (1970), that a twelve-member jury is not a constitutional imperative provides strong evidence that Rule 23(b) would pass constitutional muster. Accordingly, lower courts have used the Court's *Williams* decision as authority for Rule 23(b). *See Ahmad*, 974 F.2d at 1164; *Armijo*, 834 F.2d at 134; *Smith*, 789 F.2d

a jury of less than twelve without the consent of both parties, the 1983 amendment promoted judicial economy and efficiency at the expense of defendant control.

Following the 1983 amendment to Rule 23(b), courts frequently began to overextend their power under the Rules by downplaying or outright ignoring Rule 24(c)'s dual mandates—to discharge alternate jurors[23] and to only replace jurors "prior to the time the jury retires to consider its verdict."[24] This practice led to a branch of precedent-setting scenarios where Rule 24(c)'s clear mandates could be disregarded.[25] Even with widely-accepted judicial exceptions to Rule 24(c)'s clear mandates,

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at 205.

[23] FED. R. CRIM. P. 24(c) (1987) (amended 1999). Instances of judicial disregard of this requirement are many. *See, e.g.*, United States v. Olano, 507 U.S. 725 (1993) (holding that it is not reversible error to allow alternate jurors to sit in during deliberations); United States v. Houlihan, 92 F.3d 1271, 1286-88 (1st Cir. 1996) (holding that it is harmless error to retain alternate jurors in violation of Rule 24(c)); Claudio v. Snyder, 68 F.3d 1573, 1574-76 (3d Cir. 1995) (allowing alternate jurors to be retained and separately sequestered); United States v. Rubio, 727 F.2d 786, 799 (9th Cir. 1983) (permitting alternate jurors to be retained and sequestered); United States v. Hayutin, 398 F.2d 944 (2d Cir. 1968) (finding harmless error in retaining alternate jurors in violation of Rule 24(c)).

[24] FED. R. CRIM. P 24(c) (1987) (amended 1999). This post-submission prohibition, like the discharge requirement, was also frequently disregarded by the courts. *See, e.g.*, United States v. Quiroz-Cortez, 960 F.2d 418, 421 (5th Cir. 1992) (allowing juror substitution after deliberations because defendant was not prejudiced); United States v. Guevara, 823 F.2d 446, 448 (11th Cir. 1987) (finding post-submission substitution acceptable when defendant expressly demanded that alternate be impaneled rather than continue with only 11 jurors); Peek v. Kemp, 784 F.2d 1479, 1485 (11th Cir. 1986) (permitting substitution after deliberations where there is no prejudice); United States v Josefik, 753 F.2d 585, 587 (7th Cir. 1985) (permitting substitution after deliberations where there is no prejudice); Miller v. Stagner, 757 F.2d 988, 995 (9th Cir. 1985) (finding post-submission substitution procedure "preserved the 'essential feature' of the jury"). *But see, e.g.*, United States v. Lamb, 529 F.2d 1153, 1155-57 (9th Cir. 1975) (finding post-submission substitution impermissible absent defendant's consent); United States v. Beasley, 464 F.2d 468 (10th Cir. 1972) (finding presence of alternate during deliberations grounds for mistrial).

For a discussion of the merits of the judicially-improvised post-submission juror substitution under the prior version of Rule 24(c), see Grunat, *supra* note 2 (maintaining that post-submission juror substitution detrimentally affected the rights of defendants).

[25] *See supra* notes 23-24.

however, juror substitution remained a less favored method of avoiding a mistrial than simply proceeding with eleven jurors[26]—despite the small practical difference between the two.[27]

In 1999, Rule 24 was amended to reflect the growing approval for post-submission juror substitution by making post-submission substitution an equally viable alternative to proceeding with the eleven remaining jurors.[28] This amendment allowed the trial court discretionary authority to retain

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[26] *See, e.g.*, 3 ABA STANDARDS FOR CRIMINAL JUSTICE § 15-2.7, commentary (2d ed. 1980) ("[I]t is not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of earlier group discussion."); 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 388, at 393 (2d ed. 1982) ("To permit substitution of an alternate after deliberations have begun would require either that the alternate participate though he has missed part of the jury discussion, or that he sit in with the jury in every case on the chance he might be needed. Either course is subject to practical difficulty and to possible constitutional objections."); FED. R. CRIM. P 23 advisory committee's note (1983) ("[T]he judgment of the Advisory Committee is that it is far better to permit the deliberations to continue with a jury of 11 than to make a substitution [after post-submission dismissal of a juror]."). For a general discussion of the ills of post-submission juror substitution, see Baker, *supra* note 2, at 1247-53, and McDermott, *supra* note 2, at 878-82.

[27] A central concern of those opposing post-submission juror substitution is that the existing jurors would unduly influence a new juror and subvert his free will. *See, e.g.*, FED. R. CRIM. P 23 advisory committee's note (1983). As a practical matter, however, a defendant is no more disadvantaged by the substitution of an alternate juror than by continuing deliberations with the remaining eleven jurors. Obviously, if the other eleven jurors have already decided upon a guilty verdict with the dismissed juror representing the lone holdout, the defendant gains nothing by proceeding with eleven jurors instead of adding an alternate to the panel. In fact, substituting an alternate for the already-dismissed juror represents a better option for the defendant in this situation, as there exists at least a possibility that the alternate will insist upon acquittal. If no alternate were seated, however, the eleven would be sure to convict.

[28] The most recent amendment to Rule 24 went into effect on December 1, 1999, after *Symington* had been decided. Nonetheless, the trend toward judicial economy was apparent at the adjudication, not only because of the 1983 change to Rule 23(b) and the use of post-submission juror substitution in most circuits (including the Ninth Circuit), *see* Baker, *supra* note 2, at 1215 n.10, 1216, but also because the change to Rule 24 had already been approved by the Supreme Court. The Supreme Court order approving the amendments was issued on April 26, 1999—nearly two months before the June 22, 1999 *Symington* decision. Therefore, it is quite likely that the judges of *Symington* knew, or should have known, of the upcoming change.

alternate jurors after submission, so long as the alternates were not allowed to discuss the case with anyone.[29] As a protection of the "sanctity of the deliberative process,"[30] the Rule further states that if an alternate is called to sit as a juror after deliberations have already begun, the jury must "begin its deliberations anew."[31]

This change to Rule 24 further promoted judicial economy by affording a trial judge the additional option of replacing a disqualified juror with an alternate at the deliberation stage without fear of mistrial or reversal.[32] Much like the 1983 amendment to Rule 23,[33] the 1999 change to Rule 24 continued the trend away from the absolute and unyielding protection of a twelve-member jury[34] and toward a goal of facilitating unhindered deliberations and avoiding mistrials. The judicial system—first entirely unable to conduct deliberations without twelve jurors,[35] and later only able to do so upon stipulation of both parties[36]—gained the authority to continue deliberations at its discretion.[37] At the same time, the treatment of alternate

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[29] FED. R. CRIM. P. 24(c)(3).

[30] *Id.* 24 advisory committee's note (1999).

[31] *Id.* 24(c)(3).

[32] *See id.*

[33] *See id.* 23 advisory committee's note (1983).

[34] The Supreme Court's ruling in *Williams v. Florida*, 399 U.S. 78, 89, 98-100 (1970), that a jury of twelve was a mere "historical accident" not mandated by the Constitution created the impetus for this trend. *See supra* note 22. The Court subsequently restricted this holding by ruling in *Ballew v. Georgia*, 435 U.S. 223, 239 (1978), that a jury must contain at least six members to withstand constitutional scrutiny.

As for the unanimity requirement, the Court has been somewhat more protective. While the Court has recognized that jury unanimity does not inure to state criminal trials, a plurality of the Court indicated, albeit in dicta, that unanimity remained a constitutional imperative in federal prosecutions. *See* Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972); *cf.* FED. R. CRIM. P 31(a) ("The verdict *shall* be unanimous." (emphasis added)). Most lower courts view the unanimity requirement as so sacrosanct that it cannot be waived. *See* United States v. Smedes, 760 F.2d 109, 113 (6th Cir. 1985); United States v. Pachay, 711 F.2d 488, 490-93 (2d Cir. 1983); United States v. Morris, 612 F.2d 483, 488-89 (10th Cir. 1979); United States v. Lopez, 581 F.2d 1338, 1340-42 (9th Cir. 1978); United States v. Scalzitti, 578 F.2d 507, 511-12 (3rd Cir. 1978). *But see* Sanchez v. United States, 782 F.2d 928, 932-34 (11th Cir. 1986) (allowing waiver "in exceptional circumstances").

[35] *See supra* note 2 and accompanying text.

[36] FED. R. CRIM. P 23(b) (1976) (amended 1983); *id.* 23 advisory committee's note (1977).

[37] FED. R. CRIM. P. 23(b); *id.* 23 advisory committee's note (1983).

jurors evolved from a Rule that mandated their dismissal at the start of deliberations[38] into one that allowed substitution under certain circumstances,[39] then ultimately to a version allowing juror substitution at the court's discretion.[40] With these revisions, the trend toward judicial economy became unmistakable. It was just as these constraints upon judicial economy were relaxing to afford trial judges more flexibility in post-submission juror dismissal and replacement that the Ninth Circuit stymied the trend's momentum with its decision in *United States v. Symington*.[41]

II. "JUST CAUSE" UNDER RULE 23(B)

Although 1983's amendment to Rule 23(b) allowed a trial court to excuse a juror without party stipulation, the Rule limited the judge's power by requiring that the juror only be dismissed for "just cause."[42] The determination of "just cause" for dismissal was left to the discretion of the trial court,[43] making "[a]pplication of Rule 23(b) hinge[ ] on the trial judge's determination of 'just cause.'"[44]

With the determination of "just cause" left to the courts and not the Rule writers, an overarching definition of the term has developed on a case-by-case basis as new scenarios have arisen.[45] Consequently, a variety of circumstances have met the "just cause" threshold.[46] Generally, however, "just cause" under Rule 23(b) has fallen into three different categories—juror illness, sudden juror unavailability during deliberations, and juror inability or unwillingness to return an impartial verdict.[47]

Illness, expressly mentioned in the Notes of the Advisory Committee,[48] is clearly within the purview of "just cause."[49] Not surprisingly, a juror's

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[38] *Id.* 24(c) (1987) (amended 1999).

[39] *See, e.g.*, United States v. Hillard, 701 F.2d 1052 (2d Cir. 1983).

[40] FED. R. CRIM. P. 24(c)(3).

[41] United States v. Symington, 195 F.3d 1080 (9th Cir. 1999).

[42] FED. R. CRIM. P 23(b).

[43] *Id.*

[44] Bacelli, *supra* note 1, at 145-46.

[45] United States v. Araujo, 62 F.3d 930, 934 (7th Cir. 1995).

[46] *See infra* notes 47-100 and accompanying text.

[47] Bacelli, *supra* note 1, at 146.

[48] *See* FED. R. CRIM. P. 23 advisory committee's note (1983).

[49] *See* United States v. Glover, 21 F.3d 133, 135-36 (6th Cir. 1994) (upholding the dismissal of an ill juror); United States v. Wilson, 894 F.2d 1245, 1249-51 (11th Cir. 1990) (allowing dismissal of a juror whose repeated illness led to an

physical inability to participate in the deliberation, whether by illness or injury, remains the most common reason for excusal.[50] A serious injury requiring medical attention,[51] an ankle injury,[52] and injuries sustained in an automobile accident[53] have all provided "just cause" under Rule 23(b). Certain physical disabilities have also been included under "just cause," including a substantial hearing impairment.[54]

Like physical illness or injury, mental illness or incapacity has also been grounds for "just cause."[55] Jurors have been properly dismissed because of a mental instability and inability to engage in rational discussion,[56] depression,[57] and a suicidal and paranoid mental condition.[58] Furthermore, a trial court's dismissal of a juror who was "nervous and upset," had been crying during deliberations, had taken a tranquilizer, and whose health was at risk if she continued with the deliberations satisfied the "just cause" requirement.[59]

Similarly, the "just cause" of Rule 23(b) has been applied in instances of juror unavailability.[60] These situations have included jurors who became

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inability to deliberate); United States v. Hillard, 701 F.2d 1052, 1054-61 (2d Cir. 1983) (upholding trial court's discharge of ill juror despite government's request to take one day recess to see if juror recovered). *But see* United States v. Patterson, 26 F.3d 1127 (D.C. Cir. 1994) (holding that no "just cause" existed for summary dismissal of juror who had gone to doctor for severe chest pains).

[50] Bacelli, *supra* note 1, at 146.

[51] *See* United States v. Dischner, 974 F.2d 1502, 1512-13 (9th Cir. 1992).

[52] *See* United States v. Acker, 52 F.3d 509, 513, 515-16 (4th Cir. 1995).

[53] *See* United States v. Armijo, 834 F.2d 132, 134-35 (8th Cir. 1987); United States v. Smith, 789 F.2d 196, 204-05 (3d Cir. 1986).

[54] United States v. Leahy, 82 F.3d 624, 629 (5th Cir. 1996).

[55] *See infra* notes 56-59 and accompanying text.

[56] *See* United States v. Walsh, 75 F.3d 1, 4-5 (1st Cir. 1996).

[57] *See* United States v. O'Brien, 898 F.2d 983, 986 (5th Cir. 1990).

[58] *See* United States v. Huntress, 956 F.2d 1309, 1312 (5th Cir. 1992).

[59] United States v. Molinares Charris, 822 F.2d 1213, 1222-23 (1st Cir. 1987).

[60] *See infra* notes 61-63 and accompanying text. *But see* United States v. Araujo, 62 F.3d 930 (7th Cir. 1995) (finding it an abuse of discretion to dismiss juror due to weather-related problems); United States v. Tabacca, 924 F.2d 906 (9th Cir. 1991) (finding it an abuse of discretion to dismiss a juror who was out due to transportation difficulties but who would be present the following day); United States v. Essex, 734 F.2d 832 (D.C. Cir. 1984) (finding it a reversible error to dismiss a missing juror without making any effort to locate him or discover the reason for his absence).

unable to deliberate because of a religious holiday,[61] a business trip,[62] and even a previously planned vacation.[63] Juror unavailability, like physical illness or injury, "is not a difficult determination for a trial judge, nor does it require an extensive inquiry into the truthfulness of the incapacity."[64] Instead, the district court judge can decide whether or not to dismiss a juror upon a very cursory examination.

The third major category of "just cause" under Rule 23(b) occurs when a juror becomes unable to render an impartial verdict. Under this category, "[c]ourts have found 'just cause' to dismiss jurors who, although available and physically capable of serving, are nonetheless found to be unable to perform their duties properly."[65] For example, jurors in multiple instances have been excused with "just cause" after feeling threatened by one of the parties.[66] In one situation, a juror was "disabled by fear" after receiving what he thought was a threat from the defendant and was properly dismissed.[67] Additionally, in *United States v. Casamento*,[68] a juror was properly excused after his daughter received a suspicious and threatening phone call.[69]

Dismissal under the "just cause" standard has also been held proper where a juror is discovered to have a relationship with one of the parties[70] or his attorney.[71] "Just cause" for dismissal also existed where a juror's impartiality was put at issue when he learned, during deliberations, that his girlfriend was arrested and purportedly mistreated by police.[72] Likewise, a court has held it appropriate under Rule 23(b) to dismiss two jurors who developed an intense and bitter dislike for each other that escalated during

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[61] *See* United States v. Stratton, 779 F.2d 820, 830-31 (2d Cir. 1985).

[62] *See* United States v. Reese, 33 F.3d 166, 173 (2d Cir. 1994).

[63] *See* United States v. McFarland, 34 F.3d 1508, 1512 (9th Cir. 1994).

[64] Bacelli, *supra* note 1, at 147

[65] United States v. Thomas, 116 F.3d 606, 613 (2d Cir. 1997).

[66] *See, e.g.*, United States v. Ruggiero, 928 F.2d 1289, 1300 (2d Cir. 1991); United States v. Casamento, 887 F.2d 1141, 1186-87 (2d Cir. 1989).

[67] *Ruggiero*, 928 F.2d at 1300.

[68] *Casamento*, 887 F.2d at 1141.

[69] *See id.* at 1186-87

[70] *See* United States v. Ramos, 861 F.2d 461, 464-66 (6th Cir. 1988) (holding that a juror whose wife was seen conversing with the defendant and hugging the defendant's wife was properly dismissed).

[71] *See* United States v. Barone, 114 F.3d 1284, 1305-07 (1st Cir. 1997) (finding that a juror was unable to render a fair and impartial verdict after learning that the defense attorney had represented his cousin).

[72] *See* United States v. Egbuniwe, 969 F.2d 757, 760-61 (9th Cir. 1992).

deliberations into shouting, finger-pointing, and name-calling.[73] Finally, "just cause" has been held to include the discharge of a juror for attempting to exercise the nullification power.[74]

At times, the source of the impartiality concern is some readily-definable event or relationship between juror and party.[75] This makes the source of the problem "easily identifiable and subject to investigation and findings without intrusion into the deliberative process."[76] Such situations include the threatening note in *Ruggiero*,[77] the threatening phone call in *Casamento*,[78] the relationship between juror's wife and defendant in *Ramos*,[79] and the arrest and mistreatment of the juror's girlfriend in *Egbuniwe*.[80] Situations like these allow the judge to discover the full extent of the juror's alleged bias without risking an inquiry into the juror's views of the case merits.[81] Instead, the judge's inspection focuses on the unrelated event or relationship and its effect on the juror's ability to fairly adjudicate.[82]

On the other hand, when the complaint about the juror is based not upon a readily-definable event but upon a less overt or unknown reason, the judge is faced with a much more difficult dilemma. Such situations, which include certain investigations into impartiality concerns and examinations of a juror's mental state, necessitate some sort of inquiry into the juror's "cognitive ability to deliberate impartially."[83] The necessity of this

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[73] *See* United States v. Beard, 161 F.3d 1190, 1192-94 (9th Cir. 1998).

[74] *See* United States v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997) ("[A] juror who intends to nullify the applicable law is no less subject to dismissal than is a juror who disregards the court's instructions due to an event or relationship that renders him biased or otherwise unable to render a fair and impartial verdict."). Although the court held that "just cause" included nullification, it reversed the defendants' convictions on other grounds. *See id.* at 625.

[75] *See supra* notes 65-74 and accompanying text.

[76] *Thomas*, 116 F.3d at 621.

[77] United States v. Ruggiero, 928 F.2d 1289 (2d Cir. 1991); *see also supra* note 67 and accompanying text.

[78] United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989); *see also supra* notes 68-69 and accompanying text.

[79] United States v. Ramos, 861 F.2d 461 (6th Cir. 1988); *see also supra* note 70 and accompanying text.

[80] United States v. Egbuniwe, 969 F.2d 757 (9th Cir. 1992); *see also supra* note 72 and accompanying text.

[81] *Thomas*, 116 F.3d at 621.

[82] *See id.*

[83] Bacelli, *supra* note 1, at 147

investigation into the juror's thought processes produces a conflict with the protection of jury secrecy "Once a jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct [or bias] comes into conflict with a duty that is equally, if not more, important—safeguarding the secrecy of jury deliberations."[84] As one commentator noted:

> Juror privacy is a prerequisite of free debate, without which the decision-making process would be crippled. For the process to work according to theory, the participants must feel completely free to dissect the credibility, motivations, and just deserts [sic] of other people. Sensitive jurors will not engage in such a dialogue without some assurance that it will never reach a larger audience.[85]

This commentary reflects the prevailing view toward secrecy during jury deliberations.[86]

Because of the conflict between jury secrecy and an investigation into potential juror bias or misconduct, courts' post-submission inquiries of jurors must be limited to preserve secrecy.[87] Thus, an investigating court "may not delve deeply into a juror's motivations"[88] in discerning the root of the alleged problem with the deliberating juror, especially when the asserted basis for dismissal is the juror's bias in refusing to join the views of his colleagues.[89]

The judge must be careful not to probe into topics that would reveal how the jury stands on the merits of the case, yet must conduct an inquiry

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[84] *Thomas*, 116 F.3d at 618.

[85] Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV 886, 889-90 (1983) (citations omitted).

[86] *See, e.g.*, Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 295 ("[J]urors must deliberate in secret so that they may communicate freely with one another, secure in the knowledge that what they say will not be passed along to others."); *see also Thomas*, 116 F.3d at 619 ("The jury as we know it is *supposed* to reach its decisions in the mystery and security of secrecy; objections to the secrecy of jury deliberations are nothing less than objections to the jury system itself."); United States v. Antar, 38 F.3d 1348, 1367 (3d Cir. 1994) (Rosenn, J., concurring) ("We must bear in mind that the confidentiality of the thought processes of jurors, their privileged exchange of views, and the freedom to be candid in their deliberations are the soul of the jury system.").

[87] *See Thomas*, 116 F.3d at 620.

[88] United States v. Brown, 823 F.2d 591, 596 (D.C. Cir. 1987).

[89] *Thomas*, 116 F.3d at 620-21.

that delves deeply enough into deliberations to understand the problem and its source.[90] For example, if the court suspects juror nullification, the only foolproof way "to determine whether a juror is bent on defiant disregard of the applicable law [is to] intrude into the juror's thought processes."[91] As a result of the potentially serious problems of jury secrecy that such an inquiry raises, the inquiry is subject to some very strict limitations:

> [A] court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations. Thus, unless the initial request for dismissal is transparent, the court will likely prove unable to establish conclusively the reasons underlying it. Given these circumstances, we must hold that if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request.[92]

Thus, in a nullification inquiry, for example, "[i]f the court does not find evidence of nullification beyond all doubt, then the investigation must stop and the trial court may not dismiss the juror for 'just cause.'"[93]

Although this standard is very high, commentators and courts alike have lauded the application of such a standard when a juror's motivations must be evaluated.[94] Furthermore, the analogous but inapplicable Federal Rule of Evidence 606(b)[95] complements the spirit of this standard. Federal

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[90] *See* Terence J. Lynam, *Dilemma of Dismissing a Juror During Deliberations*, CRIM. JUST., Winter 1999, at 12, 13. Mr. Lynam was one of the attorneys representing John Fife Symington III before the Ninth Circuit. United States v. Symington, 195 F.3d 1080, 1082 (9th Cir. 1999).

[91] *Thomas*, 116 F.3d at 621.

[92] *Brown*, 823 F.2d at 596.

[93] Bacelli, *supra* note 1, at 159

[94] *See, e.g., id.* at 159-60; *Symington*, 195 F.3d at 1086-87; *cf. supra* notes 90-93 and accompanying text.

[95] The Rule states that:

> [u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.

FED. R. EVID. 606(b). This Rule does not apply to the pre-verdict juror dismissal evaluation because its scope is expressly limited to "an inquiry into the validity of

Rule of Evidence 606(b) permits jurors to testify to extraneous prejudicial information that may have influenced their decision, but prohibits them from revealing their impressions of the trial.[96]

Nonetheless, this restriction is tempered somewhat by the fact that all trial court decisions to excuse a juror for "just cause" under Rule 23(b) are reviewed for an abuse of discretion.[97] A court has abused its discretion only when "its 'decision is based on an erroneous conclusion of law or when the record contains no evidence on which [it] rationally could have based that decision.'"[98]

Under an abuse of discretion standard of review, an appeals court cannot substitute its judgment for the trial court's—making the standard very deferential to the trial court.[99] Therefore, the appeals court must affirm the judgment of the lower court unless it is "left with the definite and firm conviction that the court committed a clear error of judgment in reaching its conclusion after weighing the relevant factors."[100] Thus, while the standard that a district court must apply in evaluating "just cause" is fairly difficult to meet, an appellate court's review of the trial court's decision is quite limited by the "abuse of discretion" nature of its examination.

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a *verdict* or *indictment*." *Id.* (emphasis added).

[96] *Id.*

[97] *See* FED. R. CRIM. P. 23(b) ("[I]f the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, *in the discretion of the court* a valid verdict may be returned by the remaining 11 jurors." (emphasis added)); *see also* United States v. Beard, 161 F.3d 1190, 1193 (9th Cir. 1998); United States v Wilson, 894 F.2d 1245, 1250 (11th Cir. 1990).

[98] United States v. Schlette, 842 F.2d 1574, 1577 (9th Cir.), *amended by* 854 F.2d 359 (9th Cir. 1988) (quoting Hill v. United States Immigration & Naturalization Serv., 775 F.2d 1037, 1040 (9th Cir. 1985) (alteration in original)); *see also* Ladien v. Astrachan, 128 F.3d 1051, 1056 (7th Cir. 1997) ("The abuse of discretion standard means something more than our belief that we would have acted differently if placed in the circumstance confronting the district judge." (citations omitted)).

[99] *Ladien*, 128 F.3d at 1056 ("To disagree with the district court's decision and to find that the court abused its discretion are two different things. The district court's decision must strike us as fundamentally wrong for an abuse of discretion to occur.") (internal citations and quotation marks omitted); *Schlette*, 842 F.2d at 1577 ("Under [an abuse of discretion] standard of review, this court does not substitute its judgment for that of the district court.").

[100] *Beard*, 161 F.3d at 1194 (quoting United States v. Egbuniwe, 969 F.2d 757, 761 (9th Cir. 1992)); *see also* Schmidt v. Herrmann, 614 F.2d 1221, 1224 (9th Cir. 1980).

III. UNITED STATES V SYMINGTON

A. Factual Background

In 1997, former Arizona Governor John Fife Symington III was indicted on twenty-three counts relating to purportedly false personal financial statements. The financial statements had been submitted in support of loan applications he made while a commercial real estate developer.[101] His trial by jury began on May 13, 1997, and continued through the first week in August.[102] Twenty-one of the twenty-three counts were submitted to the jury on August 8, 1997 [103] Two days later, the jury sent a note to the trial judge that stated, "Your Honor, we respectfully request direction. One juror has stated their [sic] final opinion prior to review of all counts."[104] After discussing the matter with the parties' attorneys, the district court judge wrote back to the jurors reminding them of their duty to participate in meaningful discussion with each other, but also stressed that each juror should make his own individual determination on the charges.[105]

Nine days later, on August 19, the jury sent the judge another note explaining more fully their difficulties with one of the jurors. In particular, the note cited the juror's "[i]nability to maintain a focus on the subject of discussion," "[i]nability to recall topics under discussion," and "[r]efusal to discuss views with other jurors."[106] The jurors also expressed frustration that "[a]ll information must be repeated two to three times to be understood, discussed, or voted on. Immediately following a vote, the juror cannot tell us what was voted."[107] As a result, the jury revealed that they "question[ed] the [juror's] ability to comprehend and focus on the information discussed."[108] With this second note, the jury revealed the juror in question as Juror Cotey, a woman in her mid-seventies.[109]

After again meeting with the attorneys for both sides, the trial judge opted to interview each juror separately, with counsel present and

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[101] United States v. Symington, 195 F.3d 1080, 1083 (9th Cir. 1999).
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*

participating in the questioning.[110] During these interviews, all of the jurors (with the exception of Juror Cotey) agreed that the note correctly represented their concerns.[111] Each juror also articulated specific individual events that fueled their overall concerns about Juror Cotey's ability to properly deliberate.[112] In addition to the testimony of the jurors, the trial judge's law clerks informed the judge that Juror Cotey had "needed assistance from another juror when asked to return a copy of an exhibit, was confused as to whether she was an alternate or regular juror, and needed help completing the lunch menu."[113]

When the judge had completed interviews with all jurors, he heard arguments from the attorneys on both sides.[114] Subsequent to these arguments, the court rendered its decision regarding Juror Cotey. While noting that "no juror should yield a thoughtfully-held position simply to arrive at a verdict,"[115] the court decided to dismiss Juror Cotey for "just cause," finding she was "either unwilling or unable to deliberate with her colleagues."[116]

At Symington's request, the judge seated one of the alternative jurors in Cotey's place on the next day, and instructed the newly-altered jury to begin its deliberations anew.[117] On September 3, 1997—fourteen days after the substitution of the alternate juror and twenty-six days after the jury initially began deliberations—the jury completed its consideration.[118] It convicted Symington on seven counts, acquitted him on three, and deadlocked on the remaining eleven.[119] The trial court, after granting Symington's motion for acquittal on one of the seven counts, sentenced him to thirty months imprisonment, and subsequently dismissed the eleven mistried counts without prejudice as violative of the Speedy Trial Act.[120] Symington timely appealed his conviction and sentence, and the government cross-appealed on other issues.[121]

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[110] *Id.*

[111] *Id.*

[112] *See id.* at 1093-96 (Fitzgerald, J., dissenting); *infra* notes 125-30 and accompanying text; *infra* note 141.

[113] *Symington*, 195 F.3d at 1094 (Fitzgerald, J., dissenting).

[114] *Id.* at 1096 (Fitzgerald, J., dissenting).

[115] *Id.* at 1084.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] Speedy Trial Act, 18 U.S.C. §§ 3161-74 (1994).

[121] *See Symington*, 195 F.3d at 1084. The government's cross-appeal dealt with the trial judge's post-verdict acquittal on one of the counts, as well as the court's

B. Holding

Upon a review of the trial court's findings, the Ninth Circuit reversed, holding that the lower court had acted improperly when it dismissed Juror Cotey for "just cause" under Rule 23(b). Dealing with a scenario new to the court, the Ninth Circuit determined that, in such a post-submission situation, "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."[122] The court likened the "reasonable possibility" of this test to the standard of "reasonable doubt" in criminal law generally, which made the threshold for dismissal a firm belief that the motive for a juror's removal was unrelated to that juror's position on the merits.[123] Applying this new standard, the court ruled that the trial court had incorrectly applied Rule 23(b) in discharging Juror Cotey because "it was reasonably possible that the impetus for Juror Cotey's dismissal came from her position on the merits of the case."[124]

Central to the Ninth Circuit's decision to reverse the lower court's discharge of Juror Cotey were statements by Jurors Witter and Bamond taken during the judge's individual interview sessions.[125] In its opinion, the court stated, "Juror Witter asked the district judge to dismiss [Juror] Cotey because otherwise the result would be 'an undecided vote, a hung jury.' Juror Bamond complained that because of Cotey, 'we are blocked and blocked and blocked. And I don't want to be blocked any more.' "[126] However, this characterization of the two jurors' statements is taken out of context, and is not entirely accurate. Juror Witter, in response to the trial judge's question whether there was anything the court might do to help alleviate the problems with the eventually-dismissed Juror Cotey, responded:

> Well, I said there's probably the only things [sic] we can do and that would be completely go through the process like you instructed us to, but

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dismissal of the eleven mistried counts for violation of the Speedy Trial Act. *See id.* at 1089-92. The issues on cross-appeal, however, do not overlap the concerns of a Rule 23(b) juror dismissal and are thus insignificant for purposes of this Note.

[122] *Id.* at 1087

[123] *Id.* at 1087 n.5.

[124] *Id.* at 1088.

[125] *See id.*

[126] *Id.*

> I do know what the outcome is going to be, other than a few items that we—we do mutually agree upon. And that would be an undecided vote, a hung jury or I don't know—if there was a replacement person that can come in, I don't know the process of how that works.[127]

As Juror Witter's comment reveals, he made no specific request to dismiss Juror Cotey, but simply stated—in response to the trial judge's question—that he viewed a hung jury as the inevitable result of deliberations with Cotey and saw her replacement as a viable option to avoid this fate. His statement, while clearly establishing that he viewed Juror Cotey as an obstacle to a verdict, made no allusion to a belief that her position on the case merits was preventing a verdict. In fact, Juror Witter never once cited Juror Cotey's beliefs as a hindrance, but instead proffered examples showing her incapacity to carry out her duties. Specifically, Juror Witter stated that one juror had to explain to Juror Cotey everything that was happening, that the jurors had to constantly refresh her memory, and that Juror Cotey often changed her mind after voting.[128] As such, Juror Witter's statement reinforces the notion that the obstacle to a decision was Juror Cotey's inability to effectively deliberate, not her position on the merits. Furthermore, this out of context citation by the court "ignored the bulk of Witter's testimony which supports the trial judge's ultimate decision."[129]

Likewise, Juror Bamond's partial statement about the jury being "blocked and blocked and blocked"[130] was ambiguous at best and provided no indication that substantive disagreements with Cotey fueled his frustration. With this statement, Bamond might very well have been indicating that the jury was blocked from effectively deliberating, or considering other counts, or voting on counts.[131] Juror Bamond, like Juror Witter, also testified at length regarding Juror Cotey's inability to deliberate—pointing out that she "had 'tangents off line,' asked what the jury was talking about after a discussion was completed,"[132] was unsure what had been voted on, and sometimes did not comprehend or know where the jury was.[133] Consequently, Juror Bamond's statement, like Juror

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[127] *Id.* at 1094 (Fitzgerald, J., dissenting).

[128] *Id.*

[129] *Id.* at 1097 (Fitzgerald, J., dissenting); *see also supra* note 127 and accompanying text.

[130] *Symington*, 195 F.3d at 1088.

[131] *See id.* at 1097 (Fitzgerald, J., dissenting).

[132] *Id.* at 1095 (Fitzgerald, J., dissenting).

[133] *Id.* at 1095-96 (Fitzgerald, J., dissenting).

Witter's statement, does not adequately support the Ninth Circuit's finding that "it was reasonably possible that the impetus for Juror Cotey's dismissal came from her position on the merits of the case."[134]

Although not used as a justification for the majority's holding, the jury's first note likewise fails to support the result. While the first note's intimation that "[o]ne juror has stated their [sic] final opinion prior to review of all counts"[135] might on its face indicate that Juror Cotey disagreed with her colleagues, the note's explanatory value was superseded by the second note and individual interviews. The first note was imprecise and devoid of anecdotal support or explanation. The second note served to elaborate upon the first,[136] and the juror interviews subsequent to this note delineated the jury's difficulties even further.[137] Not only does the detail provided in the second note and juror interviews fail to provide any indication that substantive disagreements fueled the dismissal, it actually establishes conclusively that Juror Cotey's inability to deliberate led to her dismissal.[138] In this context, the note fails to provide a "reasonable possibility" that Juror Cotey disagreed with the rest of the jury on the case merits.

Possibly recognizing the weak evidentiary grounds supporting its finding, the Ninth Circuit rationalized that the other jurors may not have even realized that their complaints about Juror Cotey arose from her views on the case merits, but that these complaints nonetheless did so emanate.[139] The court defended this assertion by maintaining that "it was only because of their disagreement with Cotey on the merits that the other jurors had occasion to question her ability to deliberate. . . Had Cotey tended to agree with the other jurors on all points, they probably would never have noticed her alleged inability to defend or explain her views."[140]

This logic, however, fails for two reasons. First, maintaining that the jury's questions about Juror Cotey's ability to deliberate could only have arisen *because of* a disagreement with her on the case merits ignores the possibility that she simply was not lucid enough to deliberate at all. There was ample evidence presented during the judge's interviews with the jurors, as well as from the judge's own law clerks, that Juror Cotey was not

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[134] *Id.* at 1088.

[135] *Id.* at 1083.

[136] *See supra* notes 106-09 and accompanying text.

[137] *See supra* notes 127-34 and accompanying text; *infra* note 141.

[138] *See supra* 106-09, 127-34 and accompanying text; *infra* note 141.

[139] *Symington*, 195 F.3d at 1088.

[140] *Id.* at 1088 n.8.

rational or coherent enough to effectively deliberate.[141] The jurors, in their interviews with the judge and attorneys, each individually and consistently painted a clear picture of Cotey as a juror who was unaware of the subject of discussion, made unrelated statements and asked unrelated questions, was unable to remember her vote, and required help from her fellow

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[141] *See supra* notes 105-13, 127, 131-32 and accompanying text.

In their interviews with the district judge, Juror Cotey's fellow jurors gave numerous examples of her inability to deliberate. Juror Carlson stated that Juror Cotey was very inattentive, would go into "rambling discourses," had trouble remembering what was being discussed, and provided answers unrelated to questions asked of her. Juror Tejada said that Juror Cotey asked questions unrelated to the debate, was unable to recall what was under discussion, made unrelated comments and isolated herself from her colleagues.

Juror Witter told the judge that one juror had to explain to Juror Cotey everything that was occurring, that the jurors had to repeatedly refresh her memory, and that she often changed her mind on an issue after she had already voted. Juror Smith testified that Juror Cotey was unable to immediately recall what she had just voted on, and looked for exhibits or testimony unrelated to the issue being discussed. Juror Seaman stated that Juror Cotey strayed from the issue being discussed, alluded to things unrelated to the discussion, needed to have another juror explain things to her, did not understand the evidence, refused to discuss her views, and would frequently "drift off."

Juror Streeter likewise testified that Juror Cotey was unable to concentrate on the subject of discussion and could not recall what was being discussed, would ask questions unrelated to the topic of discussion, was unable to formulate her views into words, and was unable to comprehend what the jury was doing. Juror Thompson also maintained that Juror Cotey did not comprehend what the jury was doing, was inattentive, was unable to discuss the subject at issue, made unrelated statements, and needed everything to be explained three or four times. In his interview, Juror Robinson testified that Juror Cotey was unable to comprehend what the jury was doing, could not follow the discussion, made random comments, and did not want to participate despite the jury's efforts to help her understand and participate. Juror Pettas asserted that Juror Cotey was unable to understand the discussion even if it was explained to her two or three times, did not comprehend everything, and was unable to recall what she had just voted on. Juror Hartle stated that Juror Cotey did not comprehend the events around her, was unaware of what issue was being discussed, and could not recall what issue had just been voted on. Finally, Juror Bamond recalled that Juror Cotey denied voting a certain way after a tally, was sometimes unaware of her surroundings, and made comments unrelated to the discussion. *Symington*, 195 F.3d at 1093-96 (Fitzgerald, J., dissenting).

jurors.[142] The concerns expressed repeatedly by the individual jurors spoke to basic capacity to function as a juror, not a particular stance on the merits.

The second factual element that runs contrary to the Ninth Circuit's reversal was that the jury was out for eleven days before Cotey was dismissed and replaced, and fourteen days after the alternate juror was substituted.[143] That the post-substitution jury deliberated longer than the pre-substitution jury suggests that Juror Cotey's dismissal was not the result of her colleagues' desire to rid themselves of a lone holdout. Further corroborating this conclusion, the post-Cotey jury ultimately convicted Symington on only seven of the twenty-three counts, while acquitting him on three counts and deadlocking on the remaining eleven.[144]

As this mixed verdict shows, this was clearly not the "lone holdout" situation intimated by the Ninth Circuit. Given the time taken to deliberate and the fragmented nature of the eventual verdict, it is apparent that the post-Cotey jury was not markedly more successful in reaching consensus than the Cotey jury. Cotey's departure did not alleviate the jury's continued disagreement on at least eleven of the twenty-three counts, so her dismissal could not have been motivated by a desire to eliminate her as a holdout to an otherwise unanimous verdict.

Furthermore, since the ultimate vote was so fragmented and far from unanimous, it is impossible that Cotey could have disagreed with all of her fellow jurors on every count. With a vote so split, she would have at the very least agreed with one of her colleagues on each of the eleven deadlocked counts,[145] yet her fellow jurors were unanimous in criticizing

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[142] *See supra* note 141; *Symington*, 195 F.3d at 1093-96 (Fitzgerald, J., dissenting).

[143] *See supra* notes 103-18 and accompanying text.

[144] *See supra* note 119 and accompanying text.

[145] There does exist a theoretical possibility that Juror Cotey was the lone holdout for acquittal on all counts. However, such a scenario requires not only that her replacement likewise remain the lone holdout for acquittal on the eleven mistried counts, but also that he convince the other jurors to acquit Symington on three counts and vote to convict on seven counts. The occurrence of such a possibility, while theoretically possible, would be against tremendous odds and therefore is too remote to merit serious attention.

A somewhat more likely (yet still improbable) scenario makes Juror Cotey the lone holdout for acquittal on the seven counts upon which Symington was found guilty or the lone holdout for conviction on the three counts that were ultimately decided in Symington's favor. This scenario, although more conceivable than the first, does not solve the problem that Cotey would have had to align her vote with one of the two stalemated sides on the eleven deadlocked counts, which would

her inability to function as a juror. If a group of jurors had wanted to eliminate Cotey because of a disagreement with her views, those other jurors who agreed with Cotey on at least one count would have likely objected to her removal.[146] This never happened, however, as no juror even hinted that Cotey's position on the merits was a reason for her dismissal.

Truly, "nothing in the findings alludes to Juror Cotey's position on the merits of the case, and nothing in the findings suggests that the impetus for Juror Cotey's removal came from her position on the merits."[147] There was no evidence that she favored acquittal (if she indeed did), or that the trial judge knew of her position on the merits.[148] The complaint by the other jurors was not that Juror Cotey was stuck on an unpopular position, but that she had no discernable position at all.[149] As such, the trial court acted justifiably in dismissing Juror Cotey.

Further calling into doubt the reversal of Symington's conviction, the Ninth Circuit's review of the trial court's dismissal of a juror under Rule 23(b) was supposed to have been limited to a cursory exam for an "abuse of discretion."[150] Under this standard, a decision may only be reversed when it "is based on an erroneous conclusion of law or when the record contains no evidence on which [the court] rationally could have based that decision."[151] The reviewing court does not substitute its judgment for the trial court's,[152] and reversal under an abuse of discretion standard requires

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create within these allies a disincentive to her removal.

[146] Again, it is theoretically possible that there existed no deadlock on the eleven mistried counts until after Cotey departed. Such a situation would, however, require a dramatic shifting of votes between Cotey's substitution and the ultimate verdict. *See supra* note 145.

[147] *Symington*, 195 F.3d at 1097 (Fitzgerald, J., dissenting).

[148] The court evidently believed that the trial judge was able to avoid learning any jurors' views on the merits. *See id.* at 1086 n.4.

[149] *See supra* note 141.

[150] *See* United States v. Beard, 161 F.3d 1190, 1193 (9th Cir. 1998); Perez v Marshall, 119 F.3d 1422, 1426 (9th Cir. 1997); United States v. Wilson, 894 F.2d 1245, 1250 (11th Cir. 1990); *see also* FED. R. CRIM. P 23(b) ("[I]f the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, *in the discretion of the court* a valid verdict may be returned by the remaining 11 jurors." (emphasis added)).

[151] United States v. Schlette, 842 F.2d 1574, 1577 (9th Cir.), *amended by* 854 F.2d 359 (9th Cir. 1988).

[152] *Id.* ("Under [an abuse of discretion] standard of review, this court does not substitute its judgment for that of the district court.").

more than a belief by the reviewing court that it would have acted differently if placed in the trial judge's position.[153] Using this very deferential standard of review,[154] the appeals court must affirm the judgment of the lower court unless it is "left with the definite and firm conviction that the court committed a clear error of judgment in reaching its conclusion after weighing the relevant factors."[155] Furthermore, in the context of reviewing post-submission juror dismissal, "[t]he judgment of the trial judge, who can appraise the jurors face to face, deserves great weight."[156]

Despite the abuse of discretion standard under which the appellate court's inquiry was supposed to have occurred, the Ninth Circuit used its newly-anointed "reasonable possibility" test[157] to evaluate the district court's determination anew.[158]

To justify its departure from the abuse of discretion standard mandated in Rule 23 reviews, the Ninth Circuit rationalized that the trial court was in no better position to evaluate the reason for the request for a juror's dismissal because of the strict limits on the trial court's inquiry [159] Consequently, the court deduced, the district court would likely be unable to establish definitively the reasons underlying the dismissal request, and unlike the typical case, would not be in the best position to evaluate the juror's ability to effectively deliberate.[160]

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[153] Ladien v. Astrachan, 128 F.3d 1051, 1056 (7th Cir. 1997) ("The abuse of discretion standard means something more than our belief that we would have acted differently if placed in the circumstance confronting the district judge.").

[154] *See id.* ("To disagree with the district court's decision and to find that the court abused its discretion are two different things. The district court's decision must strike us as fundamentally wrong for an abuse of discretion to occur.").

[155] *Beard*, 161 F.3d at 1194 (quoting United States v. Egbuniwe, 969 F.2d 757, 761 (9th Cir. 1992)); *see also* Schmidt v. Herrmann, 614 F.2d 1221, 1224 (9th Cir. 1980).

[156] United States v. Walsh, 75 F.3d 1, 7 (1st Cir. 1996).

[157] *See supra* notes 121-23 and accompanying text.

[158] United States v. Symington, 195 F.3d 1080, 1087-88 (9th Cir. 1999).

[159] *See id.* at 1086. Once deliberations have begun, a trial judge is prohibited from delving into the substance of the jury's discussions or any juror's positions on the merits or mental processes. *See id.* at 1087; *cf.* FED. R. EVID. 606(b). The court in *Symington* went so far as to praise the trial judge for "scrupulously avoiding any discussion of jurors' views on the merits when he questioned them about Juror Cotey," *Symington*, 195 F.3d at 1086 n.4, yet still disregarded his firsthand view of the jurors' testimony.

[160] *Symington*, 195 F.3d at 1086.

This logic is flawed, however, because the trial judge, although prohibited from inquiring into the jurors' mental processes, still maintains the unique position of evaluating the jurors face to face. Much like the preference given live witnesses over deposition testimony at trial,[161] the district court judge's face to face evaluation of the jurors deserves preference over the appeals court's evaluation of written transcripts and attorney arguments.[162] Ignoring this preference, the Ninth Circuit reevaluated the trial court's decision as if it were the court's own. Consequently, the Ninth Circuit not only disregarded the abuse of discretion evidentiary standard applicable in Rule 23(b) situations, but also ignored the broad preference for the trial court's face-to-face evaluation of the jurors.

IV POLICY IMPLICATIONS OF *UNITED STATES V SYMINGTON*

The central policy ramification of *United States v. Symington*[163] comes from the precedential value of the standard applied to the dismissal request. Upon a cursory examination, the court's addition of the word "reasonable" to the standard used by the Second and D.C. Circuits[164] (requiring a dismissal request to be denied "if the record evidence discloses any possibility" that it stems from the juror's substantive views on the case) seemed to lessen the barrier to post-submission juror removal.[165] In fact, the

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[161] *See* FED. R. CRIM. P 15; *see also* Grinman v. Makousky, 76 F.3d 151, 153 (7th Cir. 1996); United States v. Marcos, No. SSSS 87 CR. 598 JFK, 1990 WL 58825, at *2 (S.D.N.Y May 1, 1990); United States v. Ontiveros-Lucero, 621 F Supp. 1037, 1038 (W.D. Tex. 1985).

[162] *See* United States v. Walsh, 75 F.3d 1, 7 (1st Cir. 1996) ("The judgment of the trial judge, who can appraise the jurors face to face, deserves great weight.").

[163] *Symington*, 195 F.3d at 1080.

[164] *See* United States v. Thomas, 116 F.3d 606, 620-21 (2d Cir. 1997); United States v. Brown, 823 F.2d 591, 596 (D.C. Cir. 1987).

[165] It is debatable whether the insertion of the word "reasonable" makes any substantive difference in the application of the standard. The *Symington* majority apparently perceived a genuine difference between the standards, as it noted that the "any possibility" standard could potentially bar dismissal in all cases where a juror's thought processes are involved. *See Symington*, 195 F.3d at 1087 n.5. It is also possible, however, that reasonableness is implicit in the test of *Brown* and *Thomas*, so the Ninth Circuit's addition is of marginal practical value. *See Brown*, 823 F.2d at 596 (reversing because of a "substantial possibility" that the juror in question was discharged because of his position on the merits); *see also Symington*, 195 F.3d at 1087 n.5 (quoting United States v. Watkins, 983 F.2d 1413, 1424 (7th Cir. 1993) (Easterbrook, J., dissenting)) (stating that "[a]nything is possible in a

court itself claimed to relax the standard for establishing "just cause" under Rule 23(b) when a juror's thought processes are involved.[166] Quite the contrary was true, however, as the court's application of the standard in *Symington* rendered any future successful use of the test nearly impossible. Applying this ostensibly easier test, the Ninth Circuit still held that a reasonable possibility existed that the juror in question had been improperly dismissed based upon her views of the merits—despite no concrete evidence to support that conclusion.[167] As a practical matter, the Ninth Circuit made the seemingly more relaxed standard all but a complete bar to substitution by reversing the trial court's substitution decision based on "considerable evidence"[168] that consisted of nothing more than two partial sentences from two of the jurors.[169]

Such a strict application of the "just cause" standard was not warranted. Although the Ninth Circuit looked to the Second and D.C. Circuits for guidance, neither court was so harsh in its evaluation. Both the Second and D.C. Circuits could point to clearly defined examples where the dismissed juror showed substantive doubts, and both relied heavily on these instances as justification for reversal. In *United States v. Brown*,[170] the dismissed juror spoke of doubts about the prosecution's evidence and indicated an unwillingness to convict based upon the evidence presented.[171] In *United States v. Thomas*,[172] there were several indications that the dismissed juror harbored doubts about the sufficiency of the evidence presented at trial, and four of the juror's colleagues testified that his disagreements with the other jurors were based upon these doubts.[173] Furthermore, both *Brown* and

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world of quantum mechanics"); *cf.* United States v. Siam, 2000 WL 1130084, at *6 (E.D. Pa. Aug. 9, 2000) (noting that any distinction between the *Brown-Thomas* test and the *Symington* test would prove irrelevant in that case). In any event, the addition marks an improvement over the prior version, since it makes explicit a criterion that was likely implicit in the prior version of the test.

[166] *See Symington*, 195 F.3d at 1087 n.5.

[167] *See id.* at 1097-98 (Fitzgerald, J., dissenting); *supra* Part III.B.

[168] *See Symington*, 195 F.3d at 1088.

[169] *See id.* The jury's first note could arguably support this conclusion as well. However, the court didn't use the note as a basis for its conclusion, *see id.*, and the jury's second note and subsequent interviews clarified the meaning of the first note by setting forth the impetus behind it, *see id.* at 1083; *id.* at 1093-96 (Fitzgerald, J., dissenting); *supra* notes 134-38 and accompanying text.

[170] *Brown*, 823 F.2d at 591.

[171] *Id.* at 594.

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

[173] *See id.* at 610-11.

Thomas presented situations of a lone holdout for acquittal—a scenario that was absent from the *Symington* case.[174] In *Symington*, there was no evidence that either was true, yet the Ninth Circuit reversed Symington's conviction.

Not only was such a strict application of the "just cause" standard unwarranted, it also represented a dangerous precedent. By finding an absence of "just cause" in a situation where the dismissed juror truly seemed to lack lucidity, the court established a rule making dismissal nearly impossible where a juror's thought processes are at issue. Under the Ninth Circuit standard, dismissal would be improper whenever it is *theoretically* possible that a juror harbored substantive doubts about the case—with or without any real evidence as to the juror's actual beliefs. Under this rationale, even if conclusive proof exists that the juror was unfit for deliberations, a judge is nonetheless forbidden from dismissing that juror where there is no definitive prejudicial event. For example, the Ninth Circuit's reasoning would prevent trial judges from dismissing jurors of dubious competency without definitive proof that that juror's views on the merits did not lead to requests for dismissal. Conclusively proving a negative proposition such as this is quite difficult even under normal circumstances, and doing so without infringing upon the protection of juror secrecy is an entirely impossible task.

Compounding the importance of the *Symington* holding is the infrequency with which this type of situation occurs. With most cases confronting post-submission juror substitution stemming from a single readily-definable event, the Ninth Circuit's decision would likely be afforded great weight by other courts dealing with this issue.

CONCLUSION

"Just cause" for dismissal under Rule 23(b), by its very nature, is an amorphous concept. Its meaning and application have been continually defined and redefined by the courts that employ it. However, since its inception, the phrase has met a more and more liberal definition. Both trial and appellate courts, as well as the Rule writers themselves, have increasingly construed "just cause" to facilitate judicial economy, and have abandoned prior arguments that more liberal constructions of Rule 23 and Rule 24 would violate criminal defendants' constitutional rights.

With this backdrop in mind, the Ninth Circuit's decision is quite perplexing. On one hand, it claims to lessen the requirements for "just

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[174] *See supra* notes 145-46 and accompanying text.

cause" with its "reasonable possibility" test. This relaxation is consistent with the need to promote judicial economy evidenced by the evolution of Rules 23(b) and 24(c). On the other, however, the court's stringent application of this standard to the facts of *United States v. Symington* precludes the test's usefulness. In so ruling, the Ninth Circuit effectively created a more "relaxed" standard that was more difficult to fulfill than the one it replaced. Indeed, the Ninth Circuit's test has the practical effect of creating an insurmountable obstacle to post-submission juror substitution in situations involving a juror's thought processes. Courts unable to point to a clearly defined, self-evident incident justifying removal are powerless under the *Symington* decision to find "just cause" for dismissing an incompetent juror where that juror's thought processes are implicated.

The *Symington* case presented numerous examples of Juror Cotey's inability to function as a juror, yet her dismissal could not withstand the Ninth Circuit's rigorous application of the "reasonable possibility" standard. Because the facts of *Symington* so clearly pointed to juror incompetence and the Ninth Circuit refused to allow dismissal, the decision renders impossible a rightful dismissal of an incompetent juror when the justification for dismissal does not come from an external event. After all, if the *Symington* facts could not leave one "firmly convinced that the impetus for a juror's dismissal is unrelated to her position on the merits,"[175] it is difficult to imagine a realistic set of facts that would. Effectively precluding any post-submission juror substitution that is not based on some clearly-defined, self-evident event, the *Symington* decision has derailed the trend toward judicial economy and overinflated defendants' Rule 23(b) protections.

The application of the "reasonable possibility" standard should reflect common sense. "Reasonable possibility" means more than a theoretical academic chance, but a genuine possibility under the present circumstances. Contrary to the holding by the *Symington* majority, there is no need for theoretical or hypothetical situations when all facts indicate that a juror is not a lone holdout. The application of a legal standard such as this "reasonable possibility" test should not be made without at least some deference to common sense.[176]

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[175] United States v. Symington, 195 F.3d 1080, 1087 n.5 (9th Cir. 1999).

[176] *See* DiSanto v. Pennsylvania, 273 U.S. 34, 43 (1927) (Brandeis, J., dissenting) ("[T]he logic of words should yield to the logic of realities.").