No. 15-10553

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRETT DEPUE,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Nevada

Case No. 2:10-cr-00121-RLH-RJJ-1
Honorable Roger L. Hunt, Presiding

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

Donald M. Falk
Lee H. Rubin
Mayer Brown LLP
2 Palo Alto Square, Ste. 300
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The National Association of Criminal Defense Lawyers does not have a parent corporation or issue publicly traded securities.

/s/ *Donald M. Falk*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES - Continued

Constitutions, Statutes and Rules **Page(s)**

Other Authorities **Page(s)**

INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL), founded in 1958, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for persons accused of crime and other misconduct. NACDL has thousands of members nationwide and when its affiliates' members are included, total membership amounts to approximately 40,000 attorneys. NACDL's members include public defenders, criminal defense attorneys, law professors, U.S. military defense counsel, and even judges.

NACDL strives to preserve fairness and justice within the American criminal justice system. To advance that purpose, NACDL files numerous amicus briefs each year addressing issues of importance to criminal defendants, criminal defense lawyers, and the entire criminal justice system.

This case implicates the contours of the fundamental Sixth Amendment right to a unanimous jury verdict in the context of the dismissal of a juror during deliberations. The NACDL has an interest in safeguarding the fundamental rights that the Sixth Amendment protects.

This Court squarely held in *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999), that a district court may not dismiss a juror

consistent with the commands of the Sixth Amendment where the record evidence demonstrates there is a "reasonable possibility" that a juror's dismissal "stem[med] from" that juror's views on the merits of the case. The panel decision brushes aside this important Sixth Amendment precedent, disregarding the record evidence that shows that the district court's decision to remove a juror was irremediably tainted by that juror's known (and self-described) status as a dissenter in the jury room. Failure to correct the panel's decision will open a gaping hole in the Sixth Amendment's protective requirement of jury unanimity in criminal cases.

Rehearing is also warranted to establish the proper standard for "good cause" under Fed. R. Crim. P. 23(b). The Panel decision wrongly diluted the "good cause" standard by finding that the district court did not abuse its discretion in removing a juror, even though the court neither conducted a factual investigation nor made factual findings that the juror suffered from a mental or physical limitation that would render him unfit to continue to deliberate. The NACDL and its members have a strong interest in ensuring that district courts conduct the necessary inquiry and make the required factual findings before dismissing jurors that are otherwise capable of serving.

A court's failure to adhere to the well-established "good cause" standard for dismissing jurors also implicates a defendant's Sixth Amendment rights. For that reason, this Court should ensure that a trial court's desire to bring finality to proceedings or to avoid the inconvenience of protracted proceedings cannot serve as an excuse to bypass the "good cause" requirement of Rule 23(b).

For all these reasons, NACDL has an interest in a rehearing of this case that would preserve the Sixth Amendment's important safeguards.[1]

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, their counsel, and their members made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is one of those "rare cases" where the record demonstrates a "reasonable possibility" that a juror's dismissal "stem[med] from" that juror's views on the merits of the case. *United States v. Symington*, 195 F.3d 1080, 1086 (9th Cir. 1999). While such cases may be "infrequent," *id.* at 1087 n.6, the right at stake is of surpassing constitutional importance—the "Sixth Amendment right to a unanimous verdict from an impartial jury." *United States v. Christensen*, 828 F.3d 763, 807 (9th Cir. 2015). Here, after the juror in question, Juror 9, reported concerns that he was being targeted for harm by another juror, he told the district court that he "seemed to be the odd man out," and associated his "pounding" heart and "dizziness" with his status as the "odd man out."[2] ER 8-9. Thereafter, the trial judge dismissed Juror 9 when he said he could not "trust" one of his fellow jurors. *Id.* at 12-13.

The sequence of events leading to Juror 9's dismissal belies the panel's assertion that "Juror 9's views on the case played no part in the district court's decision to dismiss him". See *United States v. Depue*, 879 F.3d 1021, 1027 (9th Cir. 2018)). Dismissing a juror who has identified himself as a hold out in the jury room because that Juror says he does not

[2] All quotations of comments by the district court, Depue, or Juror 9 omit internal quotation marks.

trust another juror surely raises at least a "reasonable possibility" that Juror 9's dismissal "stemmed" from his views on the merits of the case. *See Id.* at 3-13. The district court further reinforced this causal link, acknowledging that Juror 9 had described himself as a "hold out" and commenting that leaving the juror in place "would jeopardize the efficacy of a jury verdict." ER 16. In light of this factual record, it is difficult to discern any basis for the district court's dismissal other than Juror 9's contrary views on the strength of the government's case. Accordingly, Depue's conviction runs afoul of this Court's decision in *Symington*.

But even if the record evidence somehow can be read not to raise the inference that Juror 9—a self-avowed holdout—was dismissed based on his status as a dissenter in the jury room, the trial court made no factual findings of physical (or mental) incapacity that would be sufficient to support a dismissal for good cause under Federal Rule of Criminal Procedure 23(b). The National Association of Criminal Defense Lawyers respectfully submits that panel or *en banc* rehearing is warranted to rectify those errors, which constitute violations of Depue's Sixth Amendment's rights.

ARGUMENT

Federal Rule of Criminal Procedure 23(b)(3) permits a district court judge to excuse a juror for "good cause." The decision is addressed to the district court's discretion, and as such, this Court reviews questions of juror dismissal for abuse of discretion. *Christensen*, 828 F.3d at 806 (citing *United States v. Vartanian*, 476 F.3d 1095, 1098 (9th Cir. 2007). A district court's discretion in this area, however, is neither "unlimited," *United States v. Ross*, 886 F.2d 264, 267 (9th Cir. 1989), nor "unbounded." *Symington*, 195 F.3d at 1085. On the contrary, the Sixth Amendment to the U.S. Constitution places important boundaries on the district court's decision-making.[3]

"It is undisputed that," under the Sixth Amendment, "a federal criminal defendant[] has a constitutional right to a unanimous verdict." *Symington,* 195 F.3d at 1085 n.2. It is likewise "undisputed" that, if other jurors "seek to remove [a lone holdout] because they disagree[] with her views on the merits[,] then dismissal … [is] improper" under both the Sixth Amendment and Rule 23(b). *Id.* This principle applies even where the request for discharge is made by the holdout juror himself where the

[3] The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI.

juror's request "stems from doubts the juror harbors about the sufficiency of the government's evidence." *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987). These protections are designed "to guard against a spirit of oppression and tyranny on the part of rulers," and have been recognized "from very early times" in our nation's legal and political history "as the great bulwark of … civil and political liberties." *United States v. Gaudin*, 515 U.S. 506, 510-11 (1995) (quoting 2 J. Story, Commentaries on the Constitution of the United States 540-41 (4th ed. 1873)).

For these reasons, this Court held in *Symington*—joining holdings of the D.C. and Second Circuit in *Brown*, 823 F.2d at 596 and *United States v. Thomas*, 116 F.3d 606, 608 (2d Cir. 1997), respectively—that a juror must not be excused if there is any "*reasonable possibility*" that the juror's views on the merits provide "the impetus for her removal."[4] *Symington*, 195 F.3d at 1087 (emphasis in original). Put another way, district courts cannot excuse jurors unless "firmly convinced" that the impetus for dismissal is "unrelated" to the juror's position on the merits of the case. *Christensen*, 828 F.3d at 807 (quoting *Symington*, 195 F.3d at 1088 n.7). A

---

[4] The Supreme Court has looked with favor on the decisions in *Symington*, *Brown*, and *Thomas*, and the California Supreme Court has "found much to praise in these decisions," as well. *Johnson v. Williams*, 568 U.S. 289, 304 (2013) (discussing *People v. Cleveland*, 25 Cal. 4th 466, 483-84 (2001)).

district court thus abuses its discretion by dismissing a juror where there is any reasonable possibility that the dismissal stems from the juror's views on the merits. *Id.* As the panel noted, "the Sixth Amendment would become ineffective" if jurors or trial judges could alter a jury's composition for reasons that possibly relate to a juror's views on the merits. *Depue*, 879 F.3d at 1027. But that is exactly what happened here—and, more important, what would be encouraged should the panel decision remain precedential.

A. Rehearing Is Warranted to Preserve the Clarity and Integrity of Circuit Precedent Because the District Court's Decision to Remove Juror 9 Was Inextricably Intertwined With Juror 9's Self-Declared Status As "Odd Man Out" in Deliberations.

Juror 9's ultimate dismissal from the jury began with a note to the Judge from Juror 9, reading, "I feel as though someone in this room has poisoned or drugged either my drink or the food I brought for lunch." ER 4. At the outset of the district court's questioning, it cautioned Juror 9 not "to discuss anything that the jury has been deliberating about." *Id.* at 8. Juror 9, however, did not heed that caution: on the contrary, the first words out of the juror's mouth were "[w]ell, umm, I seem to be the odd man out on this." *Id.* He went on to describe his "pounding" heart and "dizziness" while testimony had been re-read to the jury, and then explained: "And . . . that was a concern of mine. I felt like it was seeing

how I am the odd man out." *Id.* at 9. Later in the colloquy, Juror 9 confirmed he did not typically suffer from these conditions, explaining that he had emphysema but the only thing that "causes" is "having to expel phlegm," "[b]ut not these other conditions." *Id.* at 11.

Against the backdrop of Juror 9 describing himself as the "odd man out" and associating his hold-out status with his physical signs of illness, the trial court then asked Juror 9 if he "could continue as a juror in this case." *Id.* at 12. Juror 9 responded that he did not "trust someone in that jury room" and when asked whether he could "participate in deliberations" in light of that fact, Juror 9 indicated he could not. *Id.*

The result of this colloquy is a record that betrays at least a reasonable possibility—indeed a likelihood—that Juror 9 was dismissed as a result of his views on the merits of the case. Indeed, when combined with Juror 9's self-described status as the "odd man out" and the physical manifestations of illness that he related to his hold out role, his dismissal for not "trusting someone" on the jury is unavoidably intertwined with his views on the merits of the case.

In *Symington*, this Court "commended" the trial judge "for scrupulously avoiding any discussion of jurors' views on the merits" when questioning various jurors. *Symington,* 195 F.3d at 1086 n.4.

Nonetheless, and notwithstanding the trial judge's best efforts, it was "improper" to dismiss the *Symington* juror, who stated "she felt the other jurors were frustrated with her because [she couldn't] agree with the majority all the time." *Id.* at 1088, 1092. The situation here is no different. The trial judge's first question, after cautioning Juror 9 not to discuss deliberations, was "what it is that you observed or why it is you feel that someone has poisoned or drugged your food or drink?" ER 8. Juror 9 did not equivocate, but answered, twice, that he appeared to be the "odd man out" and subsequently indicated that his discomfort with continuing to deliberate stemmed from his lack of "trust" in another juror. *ER* 8, 12. This chain of events unavoidably ties Juror 9's dismissal to his views on the merits of the case and renders his removal unconstitutional.

The panel decision tries to evade a conflict with *Symington* by asserting that the district court "ignored" Juror 9's "odd man out" comments and consigned its review instead to Juror 9's "physical incapacity" and other, unspecified "juror problems." *Depue*, 879 F.3d at 1028. But the record belies that conclusion, which is difficult to sustain even on the face of the panel opinion.

For starters, the district court cited Juror 9's potential holdout status when explaining its decision to dismiss Juror 9. After the district

court excused the juror, Depue again voiced his objection that the dismissal would be improper if Juror 9 "really was the only holdout." ER 16. The district court did not disclaim consideration of the juror's holdout status, but suggested instead that Juror 9 might not have been the only dissenting voice. *Id.* ("I'm not confident that he's the only holdout in the jury"). But that comment only confirms that the Court understood Juror 9 to be categorizing himself as a dissenting juror. And the trial court's express rationale that leaving Juror 9 to deliberate "would jeopardize the efficacy of a jury verdict" makes clear that the court was concerned, at least in part, that Juror 9 might present an obstacle to a unanimous verdict. *Symington* strictly prohibits these types of considerations from playing any role in the decision to dismiss a juror. 195 F.3d at 1085; *see also Christensen*, 828 F.3d at 807.

In dismissing Juror 9, the trial court also expressed concern that Juror 9's condition could "force him to capitulate" to the other jurors, another indication that the trial court understood that Juror 9 was a holdout. Focusing on the coercion Juror 9 might suffer if left on the jury gets the *Symington* standard precisely backward: the "[r]emoval of a holdout juror is the ultimate form of coercion," not the inclusion of such a juror. *Sanders v. Lamarque*, 357 F.3d 943, 944 (9th Cir. 2004).

Under this Court's precedent, the ultimate question is not whether Juror 9's "views on the merits of the case provided *the* impetus for [his] removal," but rather whether "the evidence before the district court disclosed a *reasonable possibility* that [Juror 9's] views on the merits provided the impetus for [his] removal." *Symington,* 195 F.3d at 1088 n.7 (emphasis in original). "The reason for this prohibition is clear": "'[i]f a court could discharge a juror'" singled out for her holdout status, "'then the right to a unanimous verdict would be illusory.'" *Id.* at 1085 (quoting *Brown,* 823 F.2d at 596). When there is "any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case," a trial judge has but "two options": keep the juror or "declare a mistrial." *Id.* at 1087. The one thing a trial judge absolutely cannot do is dismiss the potential holdout juror. *Id.* And that is precisely what the district court did here. Because the panel ignored the abundant evidence that linked Juror 9's dismissal to his views on the case, the panel decision conflicts with this Court's decision in *Symington*. Rehearing is therefore warranted to secure uniformity of Circuit precedent on this issue implicating critical Sixth Amendment safeguards.

B. The District Court Failed to Make the Required Factual Findings to Support "Good Cause" Removal for Mental or Physical Incapacity.

Separate and apart from the rule announced in *Symington*, the decision to dismiss a juror for "good cause" under Rule 23(b) must be supported by factual findings which are reviewed for "clear error." *Christensen*, 828 F.3d at 806 ("The district court's factual findings relating to the issue of juror misconduct are reviewed for clear error."); *United States v. Araujo*, 62 F.3d 930, 934 (7th Cir. 1995) ("Before dismissing a juror pursuant to Rule 23(b), the district court must render a finding that it is necessary to do so for just cause….").

The district court here committed clear error by not making sufficient factual findings to support any "good cause" for Juror 9's dismissal. "Good cause" under Rule 23(b) "encompasses primarily physical incapacity," but also covers problems such as juror misconduct, family emergencies, and absences due to religious observance. *United States v. McFarland*, 34 F.3d 1508, 1512 (9th Cir. 1994); *see also Depue*, 879 F.3d at 1027; *Symington,* 195 F.3d at 1085; *United States v. Vartanian*, 476 F.3d 1095, 1098 (9th Cir. 2007).

The panel characterized the district court's dismissal of Juror 9 as based on Juror 9 being "physically unwell," and his statement that he

could not serve because of his lack of "trust" for someone in the jury room and his "conclusory allegations against" his fellow jurors. *Depue*, 879 F.3d at 1028.

But as explained above, in this setting, Juror 9's "mistrust" was merely reflected his status as the "odd man out" among the jurors on the merits of the case, and therefore cannot provide a factual basis for a "good cause" dismissal under Rule 23(b) for the reasons explained above And, as we show below, there is no record evidence to support a finding of mental incapacity and any finding of physical incapacity was clearly erroneous.

1. The District Court Made No Factual Finding That Juror 9 Had a Mental Incapacity That Precluded Him From Continuing to Deliberate

The district court insinuated that Juror 9's dismissal was grounded in fears of juror coercion and concerns for the juror's health. ER 16. In that regard, the panel remarked that "Juror No. 9's allegations did not reflect favorably on his mental state." *Depue*, 879 F.3d at 1028. The Panel's generalized and cryptic insinuations about Juror 9's mental status cannot substitute for what is missing: record evidence that Juror 9 suffered from mental incapacity that would have supported dismissing him from the jury, and trial court findings of mental incapacity. And while it is generally true, as the panel remarked, that appellate courts

"review judgments, not the reasons guiding the courts below," *Depue*, 879 F.3d at 1028, that general principle cannot supplant Rule 23(b)'s specific requirement that a district court "render a finding that it is necessary to [dismiss a juror] for just cause…." *United States v. Araujo*, 62 F.3d at 934.

Here, the panel not only conceded that the district court conducted no inquiry into Juror 9's mental state, but commended the court for sparing the dismissed juror, the parties, and the court itself "the indignity and expense of investigating [Juror 9's] mental state." *Depue*, 879 F.3d at 1028. The failure to delve further into Juror 9's mental status left no evidence that could conceivably support Juror 9's dismissal for "mental incapacity." *See e.g., United States v. Patterson*, 26 F.3d 1127, 1129 (D.C. Cir. 1994) (finding abuse of discretion because the trial court "made no attempt to learn the precise circumstances or likely duration" of a juror's absence even though that juror had complained of severe chest pain and gone to see her doctor); *United States v. Ginyard*, 444 F.3d 648, 653 (D.C. Cir. 2006) (vacating a conviction and remanding for a new trial because the district court did not conduct an adequate inquiry regarding the holdout juror's continuing availability and instead released him after he said he might lose a job opportunity). And the phrasing of the panel

decision suggests to the district courts that this deficiency is a virtue rather than a limitation on the ability to discharge a juror.

Where an issue like a juror's mental state is at issue, district courts do not "suffer from the same lack of investigative power that limits the court's ability to inquire into problems among deliberating jurors." *Christensen*, 828 F.3d at 808. As a consequence, the district court could have fully explored Juror 9's mental status, with the assistance of medical personnel or through the "question[ing] [of] a selection of jurors individually." *Christensen*, 828 F.3d at 809. *See also*, *e.g.*, *United States v. Godwin*, 765 F.3d 1306, 1318 (11th Cir. 2014) (crediting the consistent testimony of eleven jurors over the inconsistent testimony of one). Ironically, the trial judge arranged to have Juror 9 examined by on-site medical staff, but only *after* excusing him. ER 13-15. A medical exam before dismissal might have provided sufficient "good cause" to excuse the juror. But no such finding could be made on this barren record. The panel therefore could not properly affirm the district court's dismissal on the theory that Juror 9 was mentally incapable of continuing to deliberate.

2. The District Court Made No Factual Findings That Could Support the Dismissal of Juror 9 for Physical Incapacity.

To the extent—as the Panel concluded—that Juror 9's dismissal was for physical incapacity, the district court also made no factual findings of physical incapacity that would be susceptible to appellate review. Rule 23(b)'s advisory committee notes make clear that the rule addresses situations where a juror becomes "seriously incapacitated" after deliberations have begun. "[I]f the record does not already make clear the precise nature or likely duration of the juror's inability to serve, the court bears an affirmative duty to inquire further into those circumstances." *Araujo*, 62 F.3d at 934.

The district court here made no inquiry into the likely duration of Juror 9's unavailability due to physical incapacity, and the record does not demonstrate any serious incapacity. On the contrary, while Juror 9 initially complained of a racing heart, "dizziness, and a slight headache and … stomachache" (which he associated with his sense that he was the "odd man out") ER 8-9, he later reported that he was "still feeling" "[j]ust slight symptoms." ER 12. These described ailments fall far short of the sort of serious physical symptoms that support "good cause" for dismissal during deliberations. *See*, *e.g.*, *Patterson*, 26 F.3d at 1129 (D.C. Cir. 1994)

(abuse of discretion to dismiss juror who complained of "severe chest pain" and was instructed to see doctor "immediately" because the trial judge "made no attempt to learn the precise circumstances or likely duration of the twelfth juror's absence"). As noted above, the trial judge arranged for an on-site medical examination, but excused Juror 9 before learning the results of that exam. ER 13-15.

Moreover, when the district court asked Juror 9, "[d]o you feel that you can continue as a juror in this case," the juror did not reference his physical health, but instead stated, "at this point, … I do not trust somebody in that jury room." ER 12. And while the district court tried to bring the questioning back around to Juror 9's physical condition, Juror 9 advised the district court that he had "only slight symptoms." *Id.* If, at that point, the district court was still concerned about Juror 9's ability to serve, it was incumbent on the district court to conduct a more robust inquiry to determine if there actually was a physical impairment that would prevent the juror from continuing to deliberate. But the district court's failure to make any factual findings of physical incapacity precludes this Court from finding that the district court had "good cause" to dismiss the juror on that basis.

Like the district court's violation of the *Symington* rule, the absence of a factual basis to support dismissal under Rule 23(b) for any physical or mental incapacity also violated Depue's Sixth Amendment rights. See *Williams v. Cavazos*, 646 F.3d 626, 642-43 (9th Cir. 2011) *rev'd on other grounds*, *Johnson v. Williams*, 568 U.S. 289 (2013) (holding that the absence of "good cause" in dismissing a juror renders the removal unconstitutional under the Sixth Amendment). Because the face of the opinion reveals the panel's failure to hold the district court to its constitutional obligations to ensure that deliberating jurors are only dismissed for "good cause," the district courts (and other panels of this Court) could be misguided into providing or approving constitutionally insufficient reasons for discharging nonconforming jurors. That confusion on an important issue warrants rehearing.

CONCLUSION

The petition for rehearing should be granted.

April 5, 2018 Respectfully submitted,

/s/ *Donald M. Falk*

Donald M. Falk
Lee H. Rubin
Mayer Brown LLP
2 Palo Alto Square, Ste. 300
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000

Counsel for amicus curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), the undersigned counsel for the National Association of Criminal Defense Lawyers certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(d) because it contains 4,082 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ *Donald M. Falk*

CERTIFICATE OF SERVICE

I hereby certify that all participants in this case are registered CM/ECF users and that, on April 5, 2018, service of the foregoing brief was accomplished electronically via the Court's CM/ECF system.

/s/ *Donald M. Falk*