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**IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS**

MARQUETTE JORDAN
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal From The Superior Court
Of The District Of Columbia
Criminal Division

**REPLY BRIEF FOR APPELLANT
MARQUETTE JORDAN**

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ARGUMENT

I. The Trial Court Abused Its Discretion When It Removed Juror 15 During Deliberation.

A deliberating juror may be removed only where the record leaves no reasonable possibility that the impetus for the juror’s dismissal was wholly unrelated to the juror’s views of the evidence. The government’s effort to dismiss Juror 15’s remarks as ambiguous,¹ underscores—rather than cures—the defect in the record. Under the governing standard, that ambiguity is dispositive.² Where the record admits any reasonable possibility that a juror was dismissed because of his views of the evidence, removal was constitutionally impermissible as it potentially violated the appellants’ right to a unanimous jury verdict.

Jordan’s claim does not fail because he must infer meaning from an ambiguous record; it succeeds because the record fails to foreclose it. A reasonable possibility does not require any degree of persuasion.³ All that is needed is a record

¹ Describing Juror 15’s remarks as “ambiguous at best.” USAO Br. at 25.

² An ambiguous record cannot justify the dismissal of a deliberating juror. *United States v. Thomas*, 116 F.3d 606, 622 (2d Cir. 1997) (“A presiding judge faced with anything but *unambiguous* evidence that a juror refuses to apply the law as instructed need go no further in his investigation . . . in such circumstances, the juror is not subject to dismissal . . .” (emphasis added)); *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987) (“[U]nless the initial request for dismissal is *transparent*, the court will likely prove unable to establish *conclusively* the reasons underlying it.” (emphasis added)).

³ The standard is equivalent to the beyond a reasonable doubt standard. *See United States v. Kemp*, 500 F.3d 257, 303-04 (3d Cir. 2007) (“[T]he standard is by no means lax: it corresponds with the burden for establishing guilt in a criminal trial.”); *see also United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001) (“We mean for

that admits the possibility of an improper impetus somewhere in the causal chain of the juror's removal. On appellate review, Jordan need not convince this court that Juror 15 *was* removed for his views regarding the evidence. Rather, for the conviction to stand, the record must foreclose the possibility.

The government asserts that Juror 15 was removed for reasons unrelated to the merits and offers an alternative narrative to explain his dismissal. That narrative may be plausible. But the plausibility of an alternative narrative is not the standard. Where an impermissible impetus remains reasonably possible alongside a permissible one, the conviction cannot stand.⁴ The government's ability to articulate an alternative motive for the events does not eliminate the possibility of an impermissible motive; both remain viable in the ambiguity of this record.

Nor should this court assume that a juror's removal must be traceable to a single, discrete cause. A person's actions are not typically driven by one singular motivation. Nor does a person always recognize or accurately assess the basis of

this standard to be basically a 'beyond reasonable doubt' standard."). Doubt is doubt. It does not require persuasion or belief. Only the cold admission that the possibility has not been logically ruled out.

⁴ See e.g., *United States v. Symington*, 195 F.3d 1080, 1088 (9th Cir. 1999) ("While there may have been some reason to doubt [the juror's abilities], there was also considerable evidence to suggest that the other jurors' frustrations with her derived primarily from the fact that she held a position opposite to theirs on the merits of the case."); *Brown*, 823 F.2d at 597 ("We may not be able to say for a certainty that [the juror's] desire to leave the jury stemmed from his view of the adequacy of the government's evidence. But we cannot say with any conviction that [it was not]. Given the possibility . . . that [this juror's] desire to quit deliberations stemmed from his belief that the evidence was inadequate to support a conviction, we must find that his dismissal violated the appellants' right to a unanimous jury verdict.").

their own motivation.⁵ Human decision-making is rarely so tidy. The impetus for Juror 15’s removal may well have been multifactorial—a combination of pressures, frustrations, and competing considerations. That reality matters because the conviction cannot stand if Juror 15’s removal stems, in *any part*, from his view of the evidence.⁶ Even if his substantive view of the evidence was a minor or secondary motivation, his removal is constitutionally impermissible. For the conviction to stand, the record must leave no reasonable possibility that Juror 15’s views of the evidence played *any role whatsoever* in his removal.

⁵ Jurors themselves may not appreciate that their issues stem from the merits. *See Symington*, 195 F.3d at 1088 (“While the other jurors may not have thought their difficulties with [the juror] stemmed from her position on the merits, such difficulties can certainly manifest themselves in concerns about a juror’s reasonableness or general capacity as a juror.”); *see also United States v. Thomas*, 116 F.3d 606, 622 (2d Cir. 1997) (The group of jurors favoring conviction may well come to [incorrectly] view the ‘holdout’ or ‘holdouts’ not only as unreasonable, but as unwilling to follow the court’s instructions on the law.”); *Cf. Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 153 (3d Cir. 1995) (“[The trial] court should not rely simply on the jurors’ subjective assessments of their own impartiality.”).

⁶ The governing standard—whether there exists “any reasonable possibility that the impetus for a juror’s dismissal stems from the juror’s views on the merits of the case”—frames the inquiry in terms of causation, but not proximate cause. It asks a but-for question instead. If the challenged removal would not have arisen but for the juror’s views of the evidence—if it stemmed from or grew out of those views—then removal is impermissible. The standard does not require that the juror’s views be the dominant, primary, or proximate cause of the removal. It is enough that those views played *any* causal role in setting in motion the chain of events that led to removal. Where a juror’s substantive views are a but-for cause of the discord, inquiry, or request for dismissal—even if filtered through intervening considerations—the conviction cannot stand.

By focusing heavily on the trial judge’s stated reasons for removing Juror 15, the government’s argument errs in a further and more fundamental way.⁷ The governing inquiry is not whether the trial court articulated a permissible motive in its final decision, but whether the process leading to removal was tainted by the impermissible motive of *someone* who played *any part in the events leading to removal*.⁸ That means that, on review, this court must consider, in addition to the trial judge’s motivations, the prosecutors and the jurors. By narrowing its focus to the trial court’s stated reasons, the government creates an easier test to pass, but that is not the applicable legal standard. Under the correct standard, the record must foreclose not merely improper motivation by the trial court, but the possibility that impermissible considerations contaminated it.

That fundamental question of contamination was never addressed by the trial court. The government argues that the trial court dismissed Juror 15 for a lack of participation and his apparent inability to continue deliberations. Citing *Shotikare* the

⁷ See e.g., USAO Br. at 26 (suggesting Juror 15 was not dismissed for his views, but because the trial court determined he was not participating and would not deliberate further).

⁸ The inquiry stretches back to the reasoning and motivation of those who set off the inquiry. See, e.g., *Shotikare v. United States*, 779 A.2d 335, 345 (D.C. 2001) (Noting the complaint that “set off the inquiry”, had “nothing to do with the case” and nothing suggested the juror was a holdout. Rather, the complaint focused on abusive behavior, not any views of the evidence or any unwillingness to yield to any majority.). Even if it is the jurors themselves who initiate the inquiry by requesting their own removal, the court must ensure that the request to be released is not due to pressure to change their views. See *Pitt v. United States*, 220 A.3d 951, 970 (D.C. 2019) (considering whether juror’s claimed illness was pretext); *Brown*, 823 F.2d at 596 (juror’s request to remove themselves improperly granted where it appeared possible the request was related to a belief the evidence was insufficient).

government submits that the trial court was correct to disregard the issue because there was no reason whatsoever to believe the issues with Juror 15 stemmed from the merits. USAO Br. at 26-27. Not so.

Shotikare approved of a deliberating juror's removal precisely because the record left no ambiguity as to the reason for dismissal: the juror had engaged in criminal misconduct by threatening bodily harm to fellow jurors during an argument wholly unrelated to the case. *Shotikare*, 779 A.2d at 341. Because the altercation had nothing to do with the evidence or the merits, the court's inquiry disclosed nothing about the jurors' respective positions, and nothing suggested that the subject juror was a holdout or unable to align with the majority. *Id.* Every fact in the *Shotikare* record pointed in a single direction—criminal threats entirely divorced from deliberations. *Id.* at 345.

Critically, the outcome in *Shotikare* would have been different had the record suggested otherwise. Any indication that the juror felt targeted because of a position taken on the case, was possibly a dissenting juror, or that the misconduct stemmed from views of the evidence would have created the very ambiguity that forbids removal. Nothing in the record even suggested that the conflict tracked disagreement over the verdict. That absence of ambiguity—not merely the presence of misconduct—is what justified removal in *Shotikare* and what distinguishes it from this case.

Here, in contrast, Jordan's jurors implicated the most fundamental feature of the deliberative process: the requirement of unanimity. Jurors 13 and 28 each

described the central difficulty as the inability to reach an agreement. Juror 13 raised concerns explicitly linked to unanimity while stating that a specific juror was uncomfortable making a judgment *against* others. Juror 28 complained that deliberations had become unproductive and were no longer “moving forward.” 2023-12-14 Tr. 13, Juror 28 blamed the impasse on Juror 15, saying he was “dismissive” of other jurors’ arguments and, when asked to articulate his own, could only respond, “I am trying to think.” 2023-12-14 Tr. 14. Juror 15 himself expressed difficulty reaching the “same” agreement as the other jurors and suggested, if not outright declared, he would not abandon his own beliefs for unanimity. “I get my own little idea that I hold onto, and I think I am going to hold on to it.” *Id.* at 43. Far from being divorced from Juror 15’s substantive views, the jurors described an internal issue—unproductive deliberation and misunderstanding. Taken together, the facts squarely suggested the possibility that Juror 15 was a holdout.

A. The trial court recognized ambiguity but did not address it.

After Juror 15’s declaration that he would hold on to his little idea, the trial court correctly recognized that Juror 15 was quite possibly refusing to change a merits-based position. Recognizing the possibility, the court sought to address the ambiguity, saying, “I’m not sure what you mean by that.” *Id.* at 43. The court asked Juror 15 to clarify his position, but *without discussing the substance of the deliberations*. Juror 15 responded that he could not: “That’s kind of hard to do. . . . I don’t know how to state this.” The trial court itself seemed to recognize the request’s impossibility and cut off questioning. During the bench conference that followed, the

court continued, “I think he needs to tell us at this point what the sticking point is. . . . And I can’t get to where I want to go because, like, it will be asking a little bit--” too much.” 2023-12-14 Tr. 46. All of which suggests that, in the moment, the trial court recognized the glaring ambiguity.

What the trial court did in the face of that ambiguity, however, was not permissible. The government suggests that the trial court did the best it could under the circumstances and compiled the best record it could. USAO Br. at 24. That may be so. The court undoubtedly faced competing interests and was, in many respects, caught between a rock and a hard place. But those practical difficulties did not alter the governing standard or excuse the need for clarity before taking action. If the court could not satisfy that standard without impermissibly intruding into the secrecy of jury deliberations, it was not relieved of the requirement;⁹ its discretion was instead constrained by it.¹⁰ In that circumstance, the court simply could not remove the juror.

The government’s suggestion that the inability to inquire excuses ambiguity is antithetical to the principles that underpin the rule. Indeed, the inability to inquire into ambiguity is by design. The reason for requiring such a high evidentiary

⁹ See *Thomas*, 116 F.3d at 622 (2d Cir. 1997) (“We recognize that this standard— buttressing the core principle of the secrecy of jury deliberations—leaves open the possibility that jurors will engage in irresponsible activity that will remain outside the court’s powers to investigate or correct. . . . [But] we are compelled to err in favor of the lesser of two evils protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity.”).

¹⁰ See *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999) (“Under such circumstances, the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial.”).

standard is to “protect against overly intrusive judicial inquiries” in the first place. *See Thomas*, 116 F.3d at 622. “A lower evidentiary standard would encourage the court faced with ambiguous evidence of such impropriety to investigate further” *Id.* at 622. “To open the door to the deliberation room any more widely . . . would, in our view, destroy the jury system itself.” *Id.* at 623.

Ultimately, the trial court dismissed Juror 15 without any reference to *Shotikare* or consideration of what was reasonably possible. The trial court stated only that Juror 15 was “unavailable” and that it therefore had “no choice” but to replace him. If the court believed it was applying the “reasonable possibility” standard, it did not say so. If it understood that Juror 15 had to remain on the jury absent near certainty that his views of the evidence played no role in the circumstances prompting removal, it did not say so. If it believed that *Shotikare* applied to a juror it deemed “unavailable,” it did not say so. And if the court was aware of *Shotikare* at all, the record gives no indication of that awareness. Instead, the court appeared to assume that labeling Juror 15 “unavailable” to continue proceedings allowed it to bypass the constitutional issue. If that was the court’s assumption, it was incorrect. “When, as in this case, the Constitution precludes a particular application of a rule or statute, that is the end of the matter.” *See Brown*, 262 U.S. App. D.C. 183, 823 F.2d 591, 597 (1987). Courts may use the Rules of Criminal Procedure in many circumstances to discharge a juror. But if there is any reason to believe that the government has failed to persuade all of the jurors who

began deliberations of the adequacy of the government’s case, the Constitution controls, and on appeal, this court must reverse. *Id.*

B. The trial court did not make findings subject to deference

The government suggests that the trial court’s articulated permissible basis is a factual finding subject to deference. Fundamentally, however, the trial court made no factual findings regarding the issue at hand. Even if Juror 15 could properly be characterized as unavailable—in context a very doubtful proposition—the court could not avoid the *Shotikare* analysis, because this was the removal of a deliberating juror, not the substitution of a juror who became unavailable before deliberations began.

* * *

Absent a clear record to foreclose the possibility that Juror 15’s substantive views played some part in creating the situation and discord that brought him to the court’s attention, the trial court lacked the discretion to remove him.

II. The Trial Court Erred in Admitting Evidence That Mr. Jordan Took the Decedent’s Wallet, Keys, and Phone

In the instant case, the government argued that belongings of the decedent recovered from appellant or in his “flight path” were relevant to his connection to the murder and his leaving the scene of the crime; additionally, the government argued that appellant’s possession of the wallet, keys, and phone were somehow an

indication of consciousness of guilt. The defense objected strongly, noting that Jordan was acquitted of robbery after his first trial, and that the evidence was more prejudicial than probative.

The government argues that Mr. Jordan invited the evidence at trial, complaining that defense counsel opened the door by mentioning the items during Johnson’s cross-examination. USAO Br. at 38. Prior to that, however, the court had ruled the evidence would be admitted, despite extensive pretrial objections. Br. at 45. Moreover, prior to Johnson’s testimony, the court gave a limiting instruction highlighting the evidence. The issue was already in the open. The government suggests the defense invited the curative instruction, but it did not request the instruction—it relented to it. 11/15/23 Tr. 7 (THE COURT: “I reserved the ruling on the keys and the wallet, and I asked the parties to produce a curative instruction in the event that the Court decided that the wallet and the keys were going to be admissible.”). The defense never abandoned its initial position, objecting to its admission in its entirety.

The government’s next argument is that the wallet, keys, and phone were properly admitted to prove identity and intent. USAO Br. at 40. Those arguments were not made below as the government argued that the decedent’s cellphone, keys, and wallet were evidence of appellant’s “consciousness of guilt,” and also important to explain to the jury his movements and location after the offense. 7/3/23 Tr. 12.

Nor did the items possess a substantial, legitimate purpose. *See Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964). The issue at trial was not a legitimate issue of

‘identity.’ The identity of each person in the apartment was without question. Nor was their probative information contained in the items regarding intent, particularly given that Jordan had already been acquitted of the robbery. To the extent that any legitimate purpose could be gleaned from this record, its probative value was substantially outweighed by the danger of unfair prejudice. *Johnson*, 683 A.2d at 1099; *Bacchus v. United States*, 970 A.2d 269, 273 (D.C. 2009).

Contrary to the trial court’s conclusion that the evidence “squarely fits” as *Johnson* evidence because it was necessary to complete the government’s “storyboard,” the evidence was not needed. Instead, it introduced an additional crime—and a motive—for the jury to consider, notwithstanding limiting instructions. The evidence did not complete the story of the offense; it altered it.

Jordan’s possession of the decedent’s keys, the cellphone found along the route where Jordan was seen walking, and the wallet later mailed to the decedent’s father did not demonstrate consciousness of guilt, contrary to the government’s argument. Nor did the fact that the decedent’s cellphone was not used to call 911 impeach Jordan, where his prior trial testimony regarding a 911 call was not admitted in this trial and he made no statements to police here concerning his possession or use of the phone. The trial court therefore erred in admitting evidence of the decedent’s belongings found on or along Jordan’s alleged “flight path.” That error was not harmless. The evidence invited the jury to infer criminality and motive from conduct of which Jordan had already been acquitted, and it became a recurring theme in the government’s narrative of guilt.

III. The Trial Court Abused Its Discretion in Admitting Evidence That Mr. Jordan Falsely Claimed He Had Cancer

At the time of his arrest, Mr. Jordan made an offhand comment to police that he had cancer. Subsequent medical records confirmed that he did not. In closing argument, the government emphasized this remark as one of several “lies” Mr. Jordan allegedly told to hinder the investigation. 12/5/23 Tr. 145.

This evidence was irrelevant. To be admissible, evidence must be both material to an issue in the case and probative of a fact that is of consequence. (*Lamont*) *Jones v. United States*, 739 A.2d 348, 350-51 (D.C. 1999). The cancer statement fails both prongs.

The government is wrong to characterize Mr. Jordan’s false statement that he had cancer as evidence of consciousness of guilt. USAO Br. at 47. While a false exculpatory statement may be probative of guilt, it must be *exculpatory* to be in any way probative. *See e.g., Bassil v. United States*, 147 A.3d 303, 308 (D.C. 2016). That is, the statement must be capable of advancing the defendant’s innocence or deflecting blame *in relation to the charged offense*. Mr. Jordan’s remark did neither. Claiming to have cancer did not deny involvement in the incident, shift responsibility to another person, explain incriminating evidence, or otherwise tend to exonerate him. It was unrelated to the offenses and incapable of influencing the investigation in any way material to guilt or innocence. It was wholly immaterial.

The government's reliance on cases permitting the admission of false exculpatory statements or self-serving lies, therefore, misses the mark. Those cases involve statements that, if believed, would have helped the defendant avoid arrest or criminal liability. A false claim about having cancer does not fit. The statement was not exculpatory and its falsity cannot logically support an inference of consciousness of guilt.

Nor does the government's broader argument—that the statement was part of a pattern of post-incident deception—salvage its admission. The remark was isolated, trivial, and unrelated to any investigative step. It did not impede the police, shape the investigation, or explain any evidence. Treating such an offhand and immaterial falsehood as proof of guilt collapses the distinction between evidence bearing on the charged crimes and impermissible character evidence, suggesting that the defendant is simply a bad person.

CONCLUSION

This court should reverse and vacate Mr. Jordan's convictions.

February 12, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2025, I caused the foregoing to be served via the Court's electronic filing and service system, upon all counsel of record.

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