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No. 80574-1

BY RONALD R. CARPENTER

IN THE SUPREME COURT OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

VASQUEZ DEPAZ,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable John P. Erlick, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PRESENTED IN SUPPLEMENTAL BRIEF

1. In State v. Elmore,¹ this court narrowly constrained a trial court's discretion to discharge a deliberating juror where the state alleged the juror was engaging in improper nullification. Here, based on alleged juror misconduct, the state moved to discharge a deliberating juror who was holding out for acquittal. Where discharge of a potentially nullifying juror raises the same concerns as discharge of a holdout juror, should trial courts apply Elmore in both situations?

2. Did the state fail to establish any prejudicial misconduct justifying the discharge of a holdout juror?

B. SUPPLEMENTAL STATEMENT OF THE CASE

The state charged Vasquez Depaz with four counts. CP 7-8. The jury found him not guilty of three and guilty of one. CP 36-39.

The jury started deliberating at 11:30 on Thursday, July 14, 2005. Supp. CP __ (sub no. 55, court minutes). The jury deliberated approximately seven hours. On July 15th at noon, the jury sent a note informing the court it was deadlocked.² Id. The court replied, "[t]he jury is instructed to continue its deliberations." CP 65.

¹ State v. Elmore, 155 Wn.2d 758, 123 P.3d 72 (2005).

² "We are deadlocked in our deliberation on all four counts. There are several people who will not change their votes and they are on opposite sides." CP 64.

At 1:45 p.m. the court received another inquiry asking whether the jury composition might change as a result of a phone conversation one juror overheard during lunch.³ The court stated it was inclined to question three jurors to determine whether misconduct had injected extrinsic evidence into the deliberations. Defense counsel objected, noting the juror already felt "badgered" and singling her out would further pressure her to change her mind. 9RP 9-10.⁴

The court questioned the three jurors. The court heard testimony showing Juror 3 spoke with her husband about their grandson's serious surgery that day. 9RP 21. Juror 14 overheard Juror 3 say "well, we're at lunch; the Judge says we have to keep deliberating; all the evidence is circumstantial; the badgering has started, and I will." 9RP 16.

Juror 3 explained the call. She told her husband she thought she was in the minority and he asked if she would "argue persuasively to convince others of her view." 9RP 22. She denied any substantive

³ "One of us overheard another juror at lunch talking on the phone saying, 'It's all circumstantial evidence. The judge said we have to continue to deliberate. We're at lunch now. I'm just being me, the badgering has begun.' Please advise if this requires a change in the composition of the jury or if we should keep going as we are." CP 40.

⁴ This brief refers to the post-trial transcripts as: 9RP – July 15, 2005; 10RP – July 18, 2005; 11RP – October 7, 2005.

conversation about the evidence or nature of the charges. She admitted she might have used the word "circumstantial." 9RP 22-23. She felt at that point "it was 11 to 1 and I was beginning to feel that I was being badgered by the others." 9RP 22. When she left in the morning he asked when she would be back, because both were very worried about their grandson. At that point she told him she was in the minority. 9RP 23.

She explained she said "I will" when he asked her to let him know when she was through. She explained her husband had said "if you feel strongly in that way, you know, in your view, if you feel strongly in that, stick to your guns." 9RP 24.

In response to the court's question, she said the jury was continuing to deliberate and discuss and she was participating in the conversation. 9RP 25. The other jurors were not asked this question. 9RP 15-20.

The prosecutor sought to discharge Juror 3 and the defense objected. Defense counsel pointed out she had neither disclosed nor received any extrinsic information about the case. 9RP 25-28.

The court denied the state's motion. The court first recognized there was no extrinsic evidence or taint to other jury members. 9RP 28. Rejecting the state's speculation it might cause a "marital rift" if

she changed her mind, the court stated, "I would conclude that this does not rise to the level of misconduct based on the information provided by the three jurors that we interviewed that would require disqualification of Juror 3 at this time based on the information that we have." 9RP 30.

At 3:30, after hearing testimony, the court responded to the jury's written inquiry, "[y]ou should keep going as you are." CP 41. No other findings were entered.

At 4:20 the jury sent another inquiry.

None of us has changed our opinion since this morning.
(enough to get any closer to a verdict).

Several of us have various medical & other commitments for next week. One juror has a commitment for Monday she cannot get out of and another has an out of town business trip set for Tuesday through Thursday. We were asked to commit up to July 15. Where do we go from here?

CP 42. The prosecutor renewed the motion to discharge Juror 3. 9RP 32-34. The defense objected, noting the court's instructions directed jurors not to change their opinion just to reach a verdict. 9RP 36.

The court called out the jury and asked if there was a reasonable probability of reaching a unanimous verdict within a reasonable amount of time. The jurors said no. 9RP 38.

The state renewed its motion to dismiss Juror 3. The defense objected, noting it looked "even more suspect, if the Court now removes her." 9RP 42. The court admitted, "if the misconduct jumped out and I could say this is clear misconduct, and it has nothing to do with this being a hold-out juror, then I would do it." 9RP 39. The court also admitted "there's nothing different now than there was an hour ago in terms of why I would excuse her." 9RP 42. The court recognized the husband's statement was nothing more than "a form of moral support." 9RP 43.

When the prosecutor suggested the court said it would have dismissed her if they had not learned she was the holdout, the court immediately corrected him, "[n]o, I really didn't." 9RP 45. The court noted there was no prejudice to either side from a statement that the case was "circumstantial," and everyone knew at 11:00 in the morning that they had "a hung jury on our hands, . . . before this conversation." 9RP 47. The court was unable to find any prejudice, even if it was misconduct for Juror 3 to speak to her husband. 9RP 47-49.

The court confirmed Juror 6 was unable to attend on Monday and excused her. The court planned to find out on Monday whether either of the two alternate jurors were still able to serve. The court

deferred its final decision on whether to excuse Juror 3 until Monday morning. 9RP 51, 53.

On Monday morning, July 18, the court determined both alternates were able to serve. 10RP 10. The court heard no other evidence. The court then announced it would reverse its decision and discharge juror 3 because she had spoken about the case with her husband. The court now concluded she made a commitment to her husband to "stick to her guns," which was "inconsistent" with WPIC 1.04, RCW 2.36.110, and the case law. The court concluded Juror 3 had been "improperly influenced by outside sources." 10RP 13-14.

The court then instructed the reconstituted jury, including the two alternates, to disregard all previous deliberations and to begin deliberations anew. 10RP 16. The new deliberations began at 9:48. After taking a break for lunch, the jury returned a guilty verdict on one count, and three not guilty verdicts, at 2:58. 10RP 19-20; Supp. CP ___ (sub no. 55, court minutes). At sentencing the court denied the defense motion for a new trial, essentially repeating its Monday morning analysis. 11RP 3-7.

C. SUPPLEMENTAL ARGUMENT

1. INTRODUCTION

The trial court's discharge of a holdout juror denied Depaz of his right to due process and to a unanimous and impartial verdict. This Court's decision in Elmore should control.

In its answer opposing review, the state claims Elmore is narrow and does not apply where a trial court discharges a holdout juror. Answer at 7-10. The state also claims the trial court properly discharged Juror 3 for "misconduct." Answer at 10-14. This supplemental brief responds to both claims.

2. A TRIAL COURT MUST, AT A MINIMUM, FOLLOW THE ELMORE STANDARD BEFORE DISCHARGING A DELIBERATING JUROR WHO IS HOLDING OUT FOR ACQUITTAL.

In the Court of Appeals, Depaz primarily relied on this Court's decision in State v. Elmore to support his claim the discharge of Juror 3 denied him his right to due process and a unanimous and impartial verdict.⁵ In Elmore, this Court stated:

⁵ Brief of Appellant (BOA) at 16-27; State v. Elmore, 155 Wn.2d 758, 771, 123 P.3d 72 (2005). Depaz's claims are based on the state and federal constitutions. U.S. Const. amends. 6, 14; Const. art. 1, §§ 3, 21, 22; Duncan v. Louisiana, 391 U.S. 145, 177, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984); see also, United States v. Symington, 195 F.3d 1080 (9th Cir. 1999); United States v. Thomas, 116 F.3d 606 (2nd Cir. 1997); United States v. Brown, 823 F.2d 591 (D.C. Cir. 1987); People v. Garcia, 997

where a deliberating juror is accused of refusing to follow the law, that juror cannot be dismissed when there is any reasonable possibility that his or her views stem from an evaluation of the sufficiency of the evidence.

155 Wn.2d at 778, accord, State v. Johnson, 125 Wn. App. 443, 457, 105 P.3d 85 (2005).

As explained in Depaz's opening brief, the trial court failed to apply this rule and erred in several ways. First, it simply cited RCW 2.36.110 to dismiss Juror 3 for alleged "misconduct" without applying the "any reasonable possibility" standard. For that reason, no deference is owed the trial court's decision. BOA at 19-20; Elmore, at 779-80.

Second, the trial court erred because the record shows at least a reasonable probability Juror 3 was dismissed based on her view of the evidence. BOA at 20-22. Although the trial court's oral ruling stated a significant possibility Juror 3 had been "tainted" by her contact with her husband, this is simply not sufficient to withstand the strict requirements of Elmore.⁶ Because the record shows Juror 3 had

P.2d 1 (Colo. 2000); People v. Gallano, 290 Ill. Dec. 640, 821 N.E.2d 1214, 1224 (2004).

⁶ See Elmore, 155 Wn.2d at 779 (despite finding that complaining jurors were credible and dismissed juror was not credible, the trial court should have applied the heightened evidentiary standard to the conflicting evidence and allowed the juror to continue deliberating where there was a reasonable possibility the dismissed juror's views

a valid disagreement about the sufficiency of the evidence, her dismissal could not meet Elmore's "any reasonable possibility" standard. Juror 3's dismissal was reversible error.

Third, the court erred in discharging a holdout juror. BOA at 22-24. Elmore held a trial court's discretion to remove a deliberating juror is very narrowly limited. That limited discretion is further constrained when the parties or the court are aware a juror is holding out for acquittal. Elmore, 155 Wn.2d at 772 (citations omitted).

There is no doubt the trial court and the parties knew Juror 3 was holding out for acquittal. The foreman had already informed the court the jury was deadlocked. CP 64. Juror 3 expressly revealed she was the lone holdout. 9RP 22 ("we were at a point where it was 11 to 1 and I was beginning to feel that I was being badgered by the others"). The trial court noted it was "pretty evident" the state wanted to remove Juror 3 because she was voting to acquit. 9RP 34. The prosecutor

were based on the sufficiency of the evidence); see also Symington, 195 F.3d at 1083-84 (reversal required even though other jurors informed the court that dismissed juror was unable to understand and maintain focus, and unable and unwilling to deliberate); Thomas, 116 F.3d at 611, 613-14 (reversal required even though juror had been the subject of numerous complaints about pre-deliberation distractions and had stated that drug dealing was commonplace and done out of economic necessity); Brown, 823 F.2d at 594 (reversing conviction based on erroneous dismissal of a juror who by his own admission said he disagreed with and could not go along with the RICO law).

recognized it too, citing the "circumstantial case" comment to argue Juror 3 did not believe Depaz was guilty. 9RP 44.

Despite these facts, this Court's decision in Elmore, and Division Two's decision in Johnson, Division One affirmed. Citing pre-Elmore authority, the court reasoned a trial court has the duty to excuse a juror who has committed misconduct. Slip op. at 7 (citing RCW 2.36.110 and State v. Jordan, 103 Wn. App. 221, 227, 11 P.3d 866 (2000)). But Jordan involved the pre-deliberation discharge of a juror who slept during substantial parts of the testimony. Jordan, at 224-26. Jordan simply shows a trial court has discretion to dismiss a juror who fails to pay attention during testimony and who therefore cannot fairly try the case, before deliberations start. Jordan predates Elmore, is factually distinguishable, and applies the wrong standard.

RCW 2.36.100 has been cited in six published cases. Other than Elmore, none involve the discharge of a deliberating juror.

As Elmore shows, it is always a delicate matter, and rarely an easy one, when a trial court tries to separate claims of juror misconduct from legitimate juror disagreement about the evidence. Elmore, at 767-75. The opportunity to avoid a mistrial and lengthy retrial via the expedient discharge of a holdout juror may appear tempting, but it unquestionably denies the accused of the right to due

process and a unanimous jury. See generally, Elmore, at 771-73; see also, Symington; Thomas; Brown, supra.

Despite Elmore's broad analysis and rationale, the state contends it is narrowly constrained and applies only when a trial court investigates a claim of misconduct involving a juror who allegedly is engaging in "nullification, refusing to deliberate, or refusing to follow the law." Answer at 10 (quoting Elmore, at 778). This narrow focus overlooks Elmore's broad rationale prohibiting discharge of a juror who holds out for acquittal. Elmore, at 771-73 (citing, inter alia, 12 ANGRY MEN (Orion-Nova Productions 1957)).

The state's effort to distinguish the discharge of a holdout juror from the discharge of a potentially nullifying juror is meritless. Both involve the same concerns.

It is difficult to fairly investigate both claims because jurors in the majority may develop hostilities toward holdout and nullifying jurors. One juror's legitimate belief the state failed to meet its burden becomes a second juror's conclusion the first is refusing to follow the court's instructions. Elmore, at 771 (citing United States v. Abbell, 271 F.3d 1286, 1302 (11th Cir. 2001)); see also, Commonwealth v.

Rodriguez, 63 Mass.App.Ct. 660, 828 N.E.2d 556, 559-61 (2005) (describing hostile interactions where a juror held out for acquittal).⁷

Protecting the sanctity of deliberations is equally paramount in both situations. Elmore, at 770-73 ("The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system.") (quoting Thomas, 116 F.3d at 618).

In both situations, where a jury can infer a juror was discharged because of her evaluation of the evidence, it suggests to the remaining jurors the trial court favors a guilty verdict and violates the right to an impartial verdict. Elmore, at 772; Sanders v. Lamarque, 357 F.3d 943, 944 (9th Cir.2004) ("Removal of a holdout juror is the ultimate form of coercion.").

Given these parallels, the state's request to give the trial court broader discretion should be denied. The state's position also defies logic. According to the state, a trial court should have more authority to dismiss a juror it knows is holding out than a juror who might be engaging in nullification. Nothing in Elmore supports this. Elmore

⁷ Here, for example, the jury knew Juror 3 had a different view of the evidence and was holding out. The carefully worded inquiry asked the court if her phone call "requires a change in the composition of the jury[.]" CP 40.

instead shows a trial court has less authority when the state moves to discharge a holdout juror. Elmore, at 772-73.

For these reasons, this Court's Elmore rationale and rule should be the minimum that governs a trial court's discharge of a holdout juror. For the reasons stated above and in Depaz' opening brief, the court's failure to apply that standard is error requiring reversal. BOA at 19-27.

3. NO MISCONDUCT JUSTIFIED DISCHARGE.

The state argues the trial court and Court of Appeals properly relied on RCW 2.36.110 to discharge Juror 3 for "misconduct." Answer at 10-11. Existing Washington law, however, requires not just proof of misconduct, but also prejudice. When the state moves to discharge a deliberating juror, the state must show the juror's inability to continue deliberating fairly. Simple extrinsic communication is not enough. Even if Juror 3's contact with her husband was technically misconduct, this record does not show the kind of prejudicial misconduct necessary to justify discharge.

In State v. Kell, 101 Wn. App. 619, 5 P.3d 47, rev. denied, 142 Wn.2d 1013 (2000), several jurors used cell phones to contact family members from the jury room to alert them deliberations were ongoing and they would be home late. The Court of Appeals held this was not

misconduct because sequestration is no longer required under CrR 6.7(a). The court also held Kell failed to establish prejudice. The jurors all said they had not discussed the case other than to alert their families to the ongoing status of deliberations. Kell, at 621-22.

As the Kell court recognized, not all extrinsic communication with nonjurors is prohibited. Communication may occur unless the jury is sequestered. Kell, 101 Wn. App. at 622.

The Kell holding makes sense in a world where jury sequestration is the exception. In Washington, sequestration is presumed unnecessary.⁸ Extrinsic contact will occur.

Despite Kell, the Court of Appeals cited State v. Brenner, asserting "[a] juror's communication with a third party about the substance of the case constitutes misconduct." Slip op. at 7 (citing State v. Brenner, 53 Wn. App. 367, 768 P.2d 509 (1989), overruled on other grounds, State v. Wentz, 149 Wn.2d 342, 68 P.3d 282 (2003). Brenner did not involve dismissal of a holdout juror. As

⁸ See CrR 6.7 and RCW 4.44.300, amended by Laws 2003, ch. 407, § 17, allowing jurors to separate unless "good cause is shown." Under the former statute, sequestration was presumed and the failure to properly supervise the jury was presumptively prejudicial. State v. Smalls, 99 Wn.2d 755, 665 P.2d 384 (1983). CrR 6.7 was amended in 1983, K. Tegland, 4A Wash. Prac., Rules Practice CrR 6.7 (7th ed.), effectively overruling Smalls.

argued above, that very different dynamic is governed by Elmore. Brenner should be irrelevant to this inquiry.

Assuming arguendo Brenner might apply, it still does not support a finding of misconduct. In Brenner, the court found a juror's daily lunch meetings with a police officer were not misconduct justifying discharge. The court recognized the juror – a former officer himself – had answered defense questions about his police friends narrowly and accurately, without volunteering additional information. No evidence showed the juror had discussed the case with the officer, so there was no misconduct. Brenner, 53 Wn. App. at 371-73.

As in Brenner, this record shows no communication about the "substance" of the case. Juror 3's contact was like the contact in Kell. She spoke with her husband about her grandson's surgery and updated him on the potential length of deliberations. She did not discuss the charge or the evidence. Although she mentioned she was in the minority and he responded with moral support, this is neither extrinsic evidence nor misconduct.

Even if there had been a showing of technical misconduct, it would not justify dismissal of a juror without prejudice. As Kell shows, Washington requires more than simple extrinsic communication to

justify discharge.⁹ The United States Supreme Court has similarly recognized there is no knee-jerk duty to discharge a juror who might have been subjected to a minor outside influence that has no effect on the juror's ability to hear the evidence and try the case fairly.

"[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable.... [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote."

United States v. Olano, 507 U.S. 725, 738, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (quoting Smith v. Phillips, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)).¹⁰ The state failed to make any such showing here.

⁹ See also, State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968); State v. Barnes, 85 Wn. App. 638, 668-69, 932 P.2d 669 (1997) (allegations that juror was seen in a restricted area insufficient to justify dismissal of juror and mistrial); State v. Carpenter, 52 Wn. App. 680, 685-86, 763 P.2d 455 (1988) (error for jury to receive prosecutor's highlighted copy of an exhibit, but no prejudice shown); State v. Wilmoth, 31 Wn. App. 820, 644 P.2d 1211 (juror's communication with complaining witness during a break did not require mistrial where no prejudice was shown), rev. denied, 97 Wn.2d 1034 (1982).

¹⁰ See People v. Ward, 371 Ill.App.3d 382, 308 Ill.Dec. 899, 862 N.E.2d 1102, 1124-26 (2007) (discussing the case law regarding extrinsic communication with jurors. Prior to Smith and Olano, the case law recognized a presumption of prejudice. Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954). After Smith and Olano, that presumption no longer exists).

This also is not a case where a deliberating juror received any extrinsic evidence. A trial court might have more discretion in that situation because the evidence "is not subject to objection, cross examination, explanation or rebuttal." State v. Pete, 152 Wn.2d 546, 553, 98 P.3d 803 (2004) (reversal required where jury received two exhibits that were not admitted at trial). A trial court has broader leeway to review claims of extrinsic evidence because they generally can be investigated "without direct discussion of the juror's views about the merits of the case." Elmore, 155 Wn.2d at 770 (citing, inter alia, United States v. Edwards, 303 F.3d 606, 630 (5th Cir. La. 2002), cert. denied, 537 U.S. 1192 (2003)).

Viewing the case from the opposite perspective also reveals the trial court's error. If the jury deliberated to a guilty verdict and defense counsel had then learned of Juror 3's phone call, the trial court would have been completely justified in denying a defense motion for new trial. This is not prejudicial "misconduct" that would require the juror's discharge. Kell, Lemieux, Carpenter, supra.

Two similar cases from other jurisdictions compliment this Washington authority. Both held it was reversible error to discharge a juror based on extrinsic communications where the state failed to show an effect on the juror's ability to deliberate. Assuming *arguendo*

the communication was "misconduct" or a failure to follow the court's instructions, some such failures are essentially harmless.

In Commonwealth v. Rodriguez, a jury deliberated then informed the court it was deadlocked. One juror was holding out. The jury sent the judge several inquiries and the judge responded by instructing it¹¹ and repeating the jurors' oath. Rodriguez, 828 N.E.2d at 662-64.

Shortly thereafter, the foreperson informed the court that Juror 13 was on her cell phone during lunch talking with someone else about the deliberations. The court questioned Juror 13, who admitted talking with her mother and her cousin. She denied talking with them about the deliberations. Rodriguez, 828 N.E.2d at 561.

The court also questioned other jurors. Juror 2 overheard Juror 13 say she was going to be in trouble because the foreperson was going to talk to the judge. Juror 5 said she overheard Juror 13 complaining about the deliberations. Rodriguez, 828 N.E.2d at 562.

¹¹ The judge gave the Massachusetts version of an "Allen" charge to prompt a verdict. Allen v. United States 164 U.S. 492, 17 S.Ct. 154, 41 L. Ed. 528 (1896); Commonwealth v. Rodriguez, 364 Mass. 87, 98-99, 300 N.E.2d 192 (1973). Washington has rejected the "Allen" charge as unduly coercive. CrR 6.15(f)(2); State v. Boogaard, 90 Wn.2d 733, 738, 585 P.2d 789 (1978).

The trial judge found Juror 13 had violated her oath and the court's orders not to discuss deliberations with anyone. The court found Juror 13 not credible and discharged her. Rodriguez, 828 N.E.2d at 563-64.

The defense requested a mistrial and the prosecution argued to continue deliberations with an alternate. Deliberations continued to a guilty verdict. Id.

On appeal, the state asserted a statute permitted the trial judge to discharge any juror "unable to perform his duty for any . . . good cause shown." Id. at 564. Case law had construed the "good cause" standard as synonymous with "compelling reason" and "in the interests of justice." Id. The statute permits discharge only for "reasons personal to the juror, having nothing to do with the issues of the case or with the juror's relationship to his fellow jurors." Id. (citation omitted).

Although the trial judge had found Juror 13 not credible, the appellate court still reversed. None of the jurors had described her "discussing trial evidence, the substance of deliberations, or other issues separate and apart from her poor relations with other jurors." Id., at 565. She was not questioned about her ability to be fair and impartial. Id., at 566.

The appellate court recognized the concerns about discharging a holdout juror following information that deliberations were at an impasse. Rodriguez, at 566. The court also recognized it was impossible to separate the juror's views on the case from her relations with her fellow jurors. Her problems derived directly from the deadlocked jury. The only technical violation was her communication of this to her mother and cousin. Where the trial judge did not apply the correct standard and did not find the violation had nothing to do with her views on the case, the appellate court refused to infer it. Id., at 565.

The New Hampshire Supreme Court reached the same conclusion in State v. Sullivan, 949 A.2d 140 (N.H. 2008). In Sullivan, Juror 13 repeatedly asked questions of the trial court, despite the court's contrary instruction. The juror was observed sleeping on several occasions. The prosecutor discovered correspondence between the juror and the Attorney General's office relating to an investigation that had led to a "strong reprimand" of the juror's prior service in the state legislature, which the juror did not reveal in voir dire. During deliberations he brought a copy of Black's Law Dictionary into the jury room and briefly looked up the word "conspiracy" before other jurors reminded him of the court's instruction to accept the law

as stated by the court. The trial court found the cumulative evidence showed Juror 13 had violated the oath and granted the state's motion to disqualify him. Sullivan, 949 A.2d at 147-50.

The New Hampshire Supreme Court reversed. "Given the sensitive nature of the decision to remove a deliberating juror, a juror's "inability to perform must appear in the record as a demonstrable reality." Sullivan, 949 A.2d at 150-51 (quoting People v. Williams, 25 Cal.4th 441, 106 Cal.Rptr.2d 295, 21 P.3d 1209, 1213 (2001)). "To 'perform,' in this context, means to carefully consider the evidence presented at trial, and to deliver a fair and true verdict on the charges against the defendant in accordance with the law outlined by the trial court." Sullivan, at 151.¹²

Citing cases from a wide variety of jurisdictions, the court noted a juror's failure to follow court instructions does not automatically justify discharge. Citing Rodriguez, the court concluded a telephone call where the juror noted poor relations with other jurors and a hold-out position did not justify dismissal where there were no findings "the juror was unable to be fair and impartial or unable to continue deliberating." Sullivan, 949 A.2d at 152. In general, those cases

¹² Washington similarly describes each jurors' task as "to decide the case fairly based solely on the evidence and [the court's] instructions on the law." WPIC 4.61.

show discharge may be warranted where a failure or refusal to follow instructions will likely have some impact on the juror's impartiality and ability to decide the case in question, or on the deliberative process as a whole. Id.

Therefore, we hold that a failure to follow the court's instructions constitutes a meritorious reason to disqualify a deliberating juror, see RSA 500-A:13, V, only if it is more likely than not that the juror's disobedience will have a relevant demonstrable impact on the deliberative process. Relevant impacts include, most pertinently, an effect on the individual juror's ability to impartially consider the evidence presented at trial, or to apply the law as outlined by the trial court. Absent these types of impacts, the necessity of dismissing a deliberating juror is lessened considerably, and should not be done over a defendant's objection. Indeed, where it is the defendant who opposes the discharge of a particular juror, disqualification for more general disobedience will likely amount to an unsustainable exercise of discretion and grounds for reversal.

Sullivan, 949 A.2d at 152-53. Applying this rule to the facts, the court reversed Sullivan's conviction. Sullivan, 949 A.2d at 153-54.

Rodriguez and Sullivan further reveal the trial court's error in discharging Juror 3. As in Rodriguez and Sullivan, no evidence showed Juror 3's contact with her husband had any impact on her ability to impartially consider the evidence or apply the law. Rodriguez, at 565-66; Sullivan, at 153. The state admitted and the trial court found there was no impact on any of the other jurors. She continued to deliberate. 9RP 25, 27, 51. As in Rodriguez, the court

could not and did not find the alleged "misconduct" had nothing to do with her views on the case. Rodriguez, at 565. The court instead recognized it could not make that finding.¹³

Although the state may renew its theory that Juror 3 could be discharged because she responded to her husband's supportive "stick to your guns" statement, no evidence shows she would not be fair and impartial. Where no one asked her that question the trial court could not find it as fact. Instead, the undisputed evidence shows she continued to deliberate and participate in the discussion. 9RP 25, 30, 51. She simply had a different view of the evidence.

As Elmore recognized, this is not misconduct. Every case brings the possibility of juror disagreement. Holding out is not misconduct. By offering "stick to your guns" as colloquial moral support, Juror 3's husband simply paraphrased instruction 2.¹⁴

¹³ "[I]f the misconduct jumped out and I could say this is clear misconduct, and it has nothing to do with this being a hold-out juror, then I would do it." 9RP 39.

¹⁴ Instruction 2 stated:

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. . . . However, you should not change your honest belief as to the weight or effect of the evidence solely because of the questions of your fellow jurors, or for the mere purpose of returning a verdict.

CP 48 (WPIC 1.04).

This case also mirrors Sullivan in the trial court's curious Monday morning change-of-heart. It initially found nothing rising to the level of misconduct that would require disqualification. 9RP 30, 39. No evidence was heard between that ruling and the later discharge. The only new fact was that deliberations had to start over with an alternate on Monday because of Juror 6's absence. Cf. Sullivan, at 153 (refusing to give deference to the trial court's similar change-of-heart where no new evidence justified it). The remaining jurors could not help but infer Juror 3 was discharged in some part for her view of the evidence, denying Depaz' right to an impartial jury. Elmore, at 772.

The state's answer overlooks these cases, relying instead on federal cases. The state cites Stockton v. Virginia, 852 F.2d 740 (4th Cir. 1988), for the proposition that "any discussion between jurors and third parties about the substance of the case or the status of the deliberations is clear misconduct that brings any resulting verdict into question." Answer at 12. This statement overlooks contrary Supreme Court cases and contrary Washington law.

In Stockton, the sentencing jury was deliberating in a death penalty case. The foreman and two jurors were having lunch in a local diner when the diner owner discussed the case and said he

hoped "they fry that son of a bitch[.]" Stockton, 852 F.2d at 743. The court presumed this was prejudicial, citing Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954). As noted previously, the Remmer presumption has since been abandoned.¹⁵

The state also cites Mattox v. United States, 146 U.S. 140, 150, 13 S.Ct. 50, 36 L.Ed. 917 (1892), for the proposition that all private contacts with third persons are "absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." Answer, at 11-12.¹⁶ While Mattox's broad presumption may have been the shining light in 1892, it has, like Remmer, dimmed considerably since.

The state also relies on United States v. Warner, 498 F.3d 666, 686 (7th Cir. 2007). According to the state, Warner permits a trial court to remove a juror who committed misconduct in failing to

¹⁵ See note 10, *supra*, citing Alano v. United States and Smith v. Phillips; accord, People v. Ward, 862 N.E.2d at 1124-26 (discussing the retreat from the presumption of prejudice rule of Mattox and Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954). A large body of federal case law requires a showing of prejudice before discharge. See, e.g., *Thirty-Second Annual Review of Criminal Procedure, Influences on the Jury*, 91 *Geo. L. J.* 513, 516-17 & nn. 11647-51 (2003) (citing cases).

¹⁶ The errors in Mattox were both obvious and prejudicial: the bailiff informed the jury Mattox had killed two other people and the jury received a newspaper article strongly praising the prosecution's case. Mattox, 146 U.S. at 142-43.

disclose criminal history during voir dire, even if the juror might have been holding out for acquittal. Answer at 13. The state does not mention the nondisclosed criminal history would have justified the juror's removal for cause. Warner, 498 F.3d. at 685-88. Warner only shows a juror with criminal history – who would have been removed for cause in voir dire – may later be discharged when the history is discovered before the verdict.¹⁷ That is not this case.

E. CONCLUSION

This Court should reverse the Court of Appeals, reverse Depaz' conviction, and remand for a new trial.

DATED this ____ day of July, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

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¹⁷ Warner also was the appeal from a lengthy and highly controversial Chicago RICO trial involving former Illinois Governor George Ryan and an associate. Whatever else may be said of the trial, it was a debacle. See, United States v. Warner, 506 F.3d 517, 518-20 (7th Cir. 2007) (Posner, Kaane and Williams, JJ., dissenting from denial of rehearing en banc), cert. denied, 128 S.Ct. 2500 (2008).

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Attached for filing is petitioner's motion to extend time and for leave to file 26-page brief.

Thank you for your consideration and assistance.

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