APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4262

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE JOYA PARADA, a/k/a Calmado, a/k/a Little Jason, a/k/a Menor,

Defendant – Appellant.

A FORMER FEDERAL JUDGE AND SEVERAL UNITED STATES DEPARTMENT OF JUSTICE OFFICIALS; AMERICAN IMMIGRATION COUNCIL; NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, d/b/a National Immigration Project,

Amici Supporting Appellant.

No. 22-4281

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

OSCAR ARMANDO SORTO ROMERO, a/k/a Lobo,

Defendant – Appellant.

A FORMER FEDERAL JUDGE AND SEVERAL UNITED STATES DEPARTMENT OF JUSTICE OFFICIALS; AMERICAN IMMIGRATION COUNCIL; NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, d/b/a National Immigration Project,

Amici Supporting Appellant.

No. 22-4290

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MILTON PORTILLO RODRIGUEZ, a/k/a Little Gangster, a/k/a Seco,

Defendant – Appellant.

A FORMER FEDERAL JUDGE AND SEVERAL UNITED STATES DEPARTMENT OF JUSTICE OFFICIALS; AMERICAN IMMIGRATION COUNCIL; NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, d/b/a National Immigration Project,

Amici Supporting Appellant.

No. 22-4324

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUAN CARLOS SANDOVAL RODRIGUEZ, a/k/a Picaro,

Defendant – Appellant.

A FORMER FEDERAL JUDGE AND SEVERAL UNITED STATES DEPARTMENT OF JUSTICE OFFICIALS; AMERICAN IMMIGRATION COUNCIL; NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, d/b/a National Immigration Project,

Amici Supporting Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. James K. Bredar, Senior U.S. District Judge. (1:16-cr-00259-JKB-30; 1:16-cr-00259-JKB- 29; 1:16-cr-00259-JKB-10; 1:16-cr-00259-JKB-11)

Argued: January 30, 2025

Decided: April 9, 2025

Amended: April 10, 2025

Before DIAZ, Chief Judge, and AGEE and WYNN, Circuit Judges.

Affirmed by published opinion. Judge Agee wrote the opinion in which Chief Judge Diaz and Judge Wynn joined. Judge Wynn wrote a concurring opinion.

ARGUED: Andrew DeSimone, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellants. Anatoly Smolkin, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. **ON BRIEF:** Lauren M. McLarney, ROSENBERG MARTIN GREENBERG, LLP, Baltimore, Maryland, for Appellant Jose Joya Parada. Jeremy A. Thompson, Kimberly H. Albro, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Columbia, South Carolina, for Appellant Oscar Armando Sorto Romero. Stuart A. Berman, LERCH, EARLY & BREWER, CHARTERED, Bethesda, Maryland, for Appellant Milton Portilla Rodriguez. Jennifer C. Leisten, Jaclyn L. Tarlton, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant Juan Carlos Sandoval Rodriguez. Erek L. Barron, United States Attorney, David C. Bornstein, Assistant United States Attorney, Chief, Appellate Division, Kenneth S. Clark, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. Kathryn Ali, Meghan Palmer, ALI & LOCKWOOD LLP, Washington, D.C., for Amici American Immigration Council and National Immigration Project. Oren Kreps, San Francisco, California, Catherine E. Stetson, Frank Liu, Amanda NeCole Allen, John Dong, HOGAN LOVELLS US LLP, Washington, D.C., for Amici Former United States Department of Justice Officials and a Former Federal Judge.

AGEE, Circuit Judge:

Jose Joya Parada, Oscar Armando Sorto Romero, Milton Portillo Rodriguez, and Juan Carlos Sandoval Rodriguez (together, "Appellants") were charged in 2018 with various racketeering offenses related to their alleged involvement with MS-13. After several COVID-19-related delays, their case proceeded to trial. During jury selection, the Government used several peremptory strikes on Black venirepersons, including Jurors 217 and 138. Appellants raised *Batson* challenges to these strikes, which the district court rejected. Subsequently, a full jury was empaneled and the trial began.

Following a lengthy trial, the case was submitted to the jury. Two days into deliberations, Juror 9 tested positive for COVID-19. The district court advised the parties of this development and solicited feedback on how to proceed. Over Appellants' objection, the district court opted to proceed with an eleven-member jury under Federal Rule of Criminal Procedure 23(b). Shortly thereafter, the jury reached its verdicts, finding some of the Appellants guilty on all charges, and others guilty on only some charges.

On appeal, Appellants challenge the district court's denial of their *Batson* challenges as to Jurors 217 and 138, as well as the district court's decision to proceed with an eleven-member jury. Because we discern no reversible error in the district court's decisions, we affirm.

I.

In 2018, Appellants were charged in the District of Maryland with various racketeering offenses related to their alleged involvement with MS-13, a Central American gang. These offenses included conspiracy to participate in a racketeering enterprise, racketeering,

and several offenses involving violent crime in aid of racketeering ("VICAR") related to the murder of four individuals associated with a rival gang.

A.

The trial began on October 21, 2021, with jury selection, which spanned four days over two weeks. The venire panel consisted of seventy-eight prospective jurors which was narrowed to forty prospective jurors after the others were excused for cause. Twenty-eight were qualified as jurors and twelve were qualified as alternate jurors. Of the twenty-eight qualified jurors, eight were Black and twenty were white. And of the twelve alternates, nine were white, two were Black, and one was Asian-American.

At that point, the parties exercised their peremptory strikes. For their part, Appellants used all ten of their peremptory challenges to strike white jurors. They also struck two white alternate jurors and one Black alternate juror. The Government exercised its peremptory challenges to strike three white jurors and three Black jurors. It also struck three white alternate jurors. After the parties' respective peremptory strikes, seven white jurors and five Black jurors were selected for the jury. As for the alternates, four were white, one was Black, and one was Asian-American.

Appellants raised timely challenges to three of the Government's peremptory strikes—Jurors 217, 138, and 336—under *Batson v. Kentucky*, 476 U.S. 79 (1986). They argued that "three of the [Government's] six strikes were used to exclude . . . black Americans." J.A. 1411. To understand these challenges and the district court's eventual rejection thereof, we briefly

recount the relevant record as to the challenged jurors.[1]

1. Juror 217

Juror 217 was a Black United States citizen who was originally from Nigeria. He was a native English speaker, and by the time of trial, had lived in the United States for twenty-five years. Further, Juror 217 had answered "[n]o" to question thirty-nine on the jury questionnaire, which asked whether he had "any difficulty reading, writing or understanding the English language." J.A. 75, 550.

As it did with certain other jurors, the district court conducted an individual voir dire with Juror 217 to further inquire about his answers before jurors were excused for cause. Initially, the court had a "little difficulty hearing" his answers, and asked him to adjust his microphone. J.A. 551-52. Questioning then proceeded, and there are no explicit indications that any of Juror 217's subsequent answers were inaudible or incomprehensible to the court. However, Juror 217 was asked by the court to repeat or clarify his answers on numerous occasions to ensure that it was correctly understanding what he was saying.

After the court finished questioning Juror 217, the Government stated that "it may just be worth inquiring a little more about his language background or skills," as "[h]e's certainly a little bit hard to understand . . . and I have a little concern about his ability to deliberate." J.A. 559-60. The court declined

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[1] Appellants have not renewed their *Batson* challenge as to Juror 336 on appeal. Thus, we discuss the challenge as to that juror only insofar as it is relevant to understanding their arguments in the district court.

to follow up, stating, "I'm not sure what I'm going to ask him that better reveals the situation. . . . There's no doubt that he has what we would describe as a powerful Nigerian accent, but I haven't seen that he has any difficulty understanding me." *Id.* The court also acknowledged that while it "had some difficulty understanding [Juror 217]," "with some patience and clarification, I think it's all come through." *Id.*; *see also id.* ("I think that [his accent] is what it is, and I don't find that to be disqualifying.").

Following this exchange, the Government opted not to make a formal motion to strike Juror 217 for cause, but later exercised a peremptory strike to excuse him. The defense challenged that move under *Batson* based on race and national origin, noting that the Government had used "three of their six strikes . . . to exclude . . . black Americans. There's a Nigerian and then two African Americans, and we believe that's a prima facie case of a *Batson* violation." J.A. 1411. The court "reserve[d] on the question of whether there's a prima facie case," and asked the government to "nonetheless proceed" and discuss the rationale for its peremptory strike.

The Government began by explaining that Juror 217 "had a very thick accent [that] was very difficult to understand." J.A. 1415. In its view, this accent would make it "very difficult for him to deliberate," prompting it to exercise a peremptory strike. *Id.* This rationale was consistent with the concerns initially raised by the Government during the individual voir dire conducted two days prior. *See* J.A. 560. ("He's certainly a little bit hard to understand . . . and I have . . . concern about his ability to deliberate in light of how tough it is to understand him."). Defense counsel

responded that Juror 217 had "a lovely accent as a Nigerian, now an American, and I had zero difficulty understanding him." J.A. 1415.

He then accused the Government of "prod[ding] the [c]ourt to ask a bunch of questions to see if [it] could trip him for his English language impairments," despite the fact that in Nigeria, "he would have grown up being an English speaker." *Id.* Defense counsel continued by arguing, without elaboration, that the Government's proffered reason for its strike was "pretextual." *Id.*

The court then stated: "I'm not so concerned about race . . . as I am about national origin. How one speaks the English language is often very much tied up with their national origin. And we make a strong practice in our system of not discriminating against people as a function of their national origin." J.A. 1415-16. The court then stated that the Government's strike seemed "perilously close" to being "national origin" discrimination. J.A. 1416. The court nevertheless acknowledged that "if someone's facility with English is so strained or difficult that it truly would impair their capacity to deliberate, then even though that [accent] might be a product of national origin, it would still be a legitimate neutral, . . . justification or reason for excusing them," but that "you're going to have to persuade me that [your concerns] solely [relate to Juror 217's] accent, because I didn't detect a hint of a problem with his [] use of the language once I could penetrate and understand it." *Id.*

At that point, the Government expounded on its basis for the peremptory challenge: "I think the interaction with this gentleman . . . was difficult. . . . [T]here were repeated instances where the [c]ourt had

to ask him to repeat things, to clarify things that were unclear. And that is why we moved to strike him." J.A. 1416-17. The Government continued by emphasizing that its strike had "nothing to do with whether [Juror 217 was] from Nigeria or any other country." J.A. 1417. Instead, the strike stemmed from its concern that he "would have trouble deliberating." *Id.*; *see id.* (stating that Juror 217 "was . . . very difficult to understand and had . . . a lot of trouble communicating what he was trying to say, which required things to be repeated several times").

Before the court issued its ruling, defense counsel provided a final summary of the additional information learned about Juror 217 during voir dire: that he was a naturalized United States citizen; that he had received a college education in Nigeria; that he had worked at Jackson Hewitt doing tax returns; and that he had previously lived in New York, New York, and Randallstown, Maryland.

Ultimately, the district court held that there was no *Batson* violation. It first stated that it "disagree[d] with the [G]overnment in terms of [Juror 217's] suitability for jury service," before going on to find as follows:

> The question that I have to decide here is what's the [G]overnment's motivation in . . . exercising their peremptory challenge. And my conclusion is that, mistaken as I believe [the Government is], I believe that genuinely is their motivation here, that they do believe that his accent would be so substantial and so problematic as to interfere with his capacity to appropriately deliberate and confer with his

> colleagues on the jury and that it would impair their work.

J.A. 1418-19. The court continued, "I don't agree with that. But I don't think it's ridiculous. And I do not suspect that this is a proxy for a decision that [is] actually rooted in race or a desire to exclude [Juror 217] from serving on the jury because he has black skin or because he is a particular national origin." J.A. 1419. Having concluded that the Government's "objection, as articulated here, [was] genuine," the court declined to find a *Batson* violation. *Id.*

2. Juror 138

Juror 138 was a Black woman who lived with her husband, daughter, and two grandchildren. In reviewing Juror 138's voir dire answer sheet, the court observed that she failed to answer several questions. *See* J.A. 435 (informing Juror 138 that "with respect to some of the questions you have not provided an answer"). It then read each of the unanswered questions out loud. Each time, Juror 138 provided a short response, and the district judge marked (and initialed) corresponding answers on the voir dire sheet.

The court then discussed several answers in an individualized voir dire with Juror 138, who indicated that she was not employed, and spent her time babysitting her two grandchildren at home "five days a week while their mother works." J.A. 441. Juror 138 also stated that she had a spouse who was retired and "help[s] with the [grandchildren]," but did not elaborate any further. J.A. 443-44.

After the court was finished reviewing Juror 138's answer sheet with her, it spoke to all counsel

privately. During this exchange, defense counsel asked that the court query whether Juror 138 had any familiarity with MS-13 and also confirm that she would be available for the entirety of the nine-week trial. The court did so, with Juror 138 confirming that she had not heard of MS-13 and that she would have childcare covered if she was empaneled. *See* J.A. 445 ("THE COURT: If you're selected to serve on this jury of this trial, it's probably going to last about nine weeks. Is that okay? PROSPECTIVE JUROR: Yes. THE COURT: Somebody going to watch the kids? PROSPECTIVE JUROR: Yes.").

At the end of jury selection, the Government used a peremptory challenge to excuse Juror 138, to which Appellants raised a *Batson* objection. As it did with Juror 217, the district court reserved the question of whether Appellants established a prima facie case and instead inquired into the rationale underlying the Government's strike.

The Government explained that Juror 138 "actually missed responding to a number of questions," and that when the court went through each of the missed questions with her, "[h]er demeanor during the inquiry, she did not seem particularly interested." J.A. 1412. It further explained that "in terms of her addressing the questions, I think in the written questionnaire she had not answered several questions and required the [c]ourt to walk her through those." J.A. 1413. In the Government's view, Juror 138's "approach to those questions and/or her failure to respond to them just . . . displayed a general lack of interest in the process." *Id.* It continued by noting that "we have a 17-page verdict questionnaire that's going to require someone to pay pretty close attention to it,

so we thought that was certainly a concern for her." *Id.* The Government also flagged Juror 138's role as a caretaker as a secondary issue as it related to her availability for the lengthy trial.

The court asked if defense counsel wanted to be heard in response. Sandoval Rodriguez's counsel responded only by noting that Juror 138's husband would be able to babysit in the event she was unavailable. But none of Appellants' counsel said anything further in support of their *Batson* motion. They did not, for instance, argue that the Government's explanations were pretextual. Nor did they say anything to counter its arguments concerning Juror 138's demeanor or failure to respond to several questions on the questionnaire.

After hearing the Government's explanations and inviting Appellants' counsel to respond, the district court rejected the *Batson* challenge: "I accept the [G]overnment's explanation for why they struck the juror, less on the child care. . . . But I accept the [G]overnment's representations as to their reasons for excusing her based on her . . . performance on the questionnaire, . . . [and capacity] to follow[] along with somewhat complex issues and so forth." J.A. 1414. The court continued by noting that it was "[c]ertainly . . . not finding that [Juror 138] lacked the acuity or the ability to serve as a juror." *Id.* Rather, it was simply "prepared to accredit the [G]overnment's assessment to that effect, and that that is their justification for why they disfavored her [as a] juror and that their decision with respect to her was not rooted in race." J.A. 1414-15.

B.

With a jury empaneled, the trial began and lasted for roughly thirty-four days (excluding deliberations) over the next three months. This length stemmed, in part, from the COVID-19 protocols employed at that time by the court.[2] The case was sent to the jury on Thursday, January 20, 2022. The three remaining alternate jurors were conditionally excused that same day, with the district court advising them that, "[if] during the course of deliberations a juror were to become ill . . . or . . . otherwise unable to serve until the conclusion of deliberations . . . , then the [c]ourt would reach out and contact the next alternate in line and summon that person back to the courthouse to join the jury . . . to . . . resolve this case." J.A. 1454. The twelve-member jury proceeded to deliberate for two full days before breaking for the weekend.

On Sunday, January 23, 2022, Juror 9 contacted the Clerk of Court to report that she had tested positive for COVID-19. She reported that she started to feel poorly on Friday after the jurors were sent home, and that her "condition continued to deteriorate Saturday into Sunday, when she felt appreciably worse." J.A. 1496. Juror 9 nevertheless inquired whether "Zoom would be an option to allow us to close out," reporting that "we are so very close to the finish." J.A. 1497.[3] In

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[2] For instance, one juror and two defendants tested positive for the virus in December. And at the time, there was a Standing Order prohibiting anyone who had tested positive for COVID-19 from entering the courthouse within five days of their infection. These positive tests therefore necessitated an extension of the already-scheduled holiday break. The trial later resumed without incident.

[3] Pursuant to the district court's Standing Order on COVID-19, Juror 9 was instructed not to come to the courthouse. Assuming that she was symptom-free by then, she would have

response, the district court instructed the clerk to advise Juror 9 that her property at the courthouse would be secured and that the clerk would "be back in touch after the jury is excused in this case." J.A. 1497-98. The court also directed that all three alternate jurors return to the courthouse on Monday in case there were "additional positives . . . in light of No. 9 going positive." J.A. 1499. The eleven remaining jurors each took a COVID-19 test on Monday morning and all tested negative.

After confirming that there were no further COVID infections, the court sought input from the parties regarding the appropriate path forward. The various options given were: (1) "proceed under [Federal] Rule [of Criminal Procedure] 23[(b)] now with just eleven jurors"; (2) "proceed under Rule 24" by replacing Juror 9 with an alternate juror; (3) "postpone the continuation of deliberations until juror No. 9 is restored to health"; or (4) allow Juror 9 to participate via Zoom. J.A. 1516.

The Government argued in favor of proceeding with an eleven-member jury to avoid additional delay, highlighting the "significant deliberations and . . . work already done by the existing jury." J.A. 1501; *see id.* (noting that "the latest communication from juror No. 9 [indicated] that the jury has done significant work and made significant progress already in this case"). Appellants disagreed, arguing that Juror 9 should be given time to get well and resume in-person deliberations, or otherwise be replaced by an alternate. They did, however, acknowledge that the

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been permitted to return the following Saturday at the earliest—i.e., a week later.

district court had discretion to excuse Juror 9 and proceed with the eleven remaining jurors.

The district court weighed its options, and ruled that good cause existed to excuse Juror 9 and proceed under Rule 23 with the remaining eleven jurors. The court first observed that there was "great uncertainty" about when Juror 9 would test negative and be symptom-free for at least twenty-four hours, such that she could return to the courthouse to resume deliberations. It therefore concluded that "waiting for juror No. 9 to recover is not a practical option." J.A. 1514; *see* J.A. 1515 (noting that waiting for Juror 9 to recover would essentially "require the suspension of this deliberation for at least seven days," given COVID protocols). The court next rejected the possibility of deliberating via Zoom, concluding that it did not have "sufficient assurances that the deliberations would remain private," nor was it sufficiently assured that all jurors "would be on equal footing and have an equal opportunity to be heard and contribute" through such a medium. J.A. 1513. The court found that seating an alternate juror to replace Juror 9 was a "less attractive option," in view of the extensive deliberative process already undertaken by the current jury. J.A. 1514. And the court rejected the possibility of declaring a mistrial since there were "options available to it, short of that Draconian response, that are fully consistent with law and due process." J.A. 1515-16.

Having rejected all other options, the court concluded that proceeding under Rule 23 with an eleven-person jury was the best course of action. In reaching this conclusion, it leaned in part on the fact that the jury was already "well along in the

deliberative process by virtue of the fact that they have spent essentially two full days deliberating . . . and [that] the nature of their questions suggests that they are deep into the process." *Id.*

When the jurors returned to the courtroom, the district court informed them that Juror 9 had been excused from the jury and that the remaining jurors were to continue their deliberations subject to the court's previous instructions. It also reiterated that the jury should "take the time that [it] need[s] to fairly consider the evidence that has been presented . . . , and to take the time necessary to render fair and accurate verdicts." J.A. 1524-1525. The jury then resumed deliberations.

Later that day, the jury notified the clerk that they had reached a verdict. It found Parada, Portillo Rodriguez, and Sandoval Rodriguez guilty of all charged offenses. It found Sorto Romero guilty of most offenses, but acquitted him of charges related to one of the predicate murders.

The court later sentenced Portillo Rodriguez, Sandoval Rodriguez, and Sorto Romero to life imprisonment, and Parada to fifty years' imprisonment. All four timely appealed, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II.

Appellants raise two main arguments on appeal. First, they argue that the district court clearly erred when it rejected their *Batson* challenges to the Government's peremptory strikes of Jurors 217 and 138. And second, they contend that the district court abused its discretion when it opted to proceed with an eleven-member jury. Before turning to the substance

of these arguments, we set out the applicable standards of review.

A.

A district court's *Batson* finding—i.e., its determination of whether a peremptory strike was exercised for a prohibited reason—is reviewed only for clear error. *United States v. Green*, 599 F.3d 360, 377 (4th Cir. 2010). Such ample deference is due because a district court's finding on discrimination turns largely on credibility determinations. *See Hernandez v. New York*, 500 U.S. 352, 364-65 (1991) (plurality opinion); *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (noting that trial courts play "a pivotal role in evaluating *Batson* claims," particularly because the "best evidence" of discriminatory intent "often will be the demeanor" and "credibility" of the attorney striking the juror).

A court reviewing for clear error may not reverse a lower court's findings simply because it would have reached a different outcome. *United States v. Charboneau*, 914 F.3d 906, 912 (4th Cir. 2019) (citation omitted). Instead, reversible clear error only exists where, after considering all evidence, the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *Id.* (cleaned up).

B.

We review a district court's decision to proceed with an eleven-person jury under Federal Rule of Criminal Procedure 23 for abuse of discretion. *United States v. Levenite*, 277 F.3d 454, 464 (4th Cir. 2002); *United States v. Acker*, 52 F.3d 509, 515 (4th Cir. 1995). "Under the abuse of discretion standard, this Court

may not substitute its judgment for that of the district court." *United States v. Vidacak*, 553 F.3d 344, 348 (4th Cir. 2009) (quoting *United States v. Mason*, 52 F.3d 1286, 1289 (4th Cir. 1995)). Rather, we must determine "whether the [district] court's exercise of discretion, considering the law and the facts, was arbitrary or capricious." *Id.* (quoting *Mason*, 52 F.3d at 1289).

III.

Armed with the applicable standards of review, we now turn to Appellants' first argument: that the district court committed clear error when it rejected their *Batson* challenges to the Government's peremptory strikes of Jurors 217 and 138. The Government disagrees, contending that the district court did not clearly err in crediting as neutral and legitimate its proffered reasons for these strikes. Cognizant of our limited role at this juncture, we agree with the Government as we do not discern any clear error on the record before us.

In *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), the Supreme Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race." When announcing this rule, the Supreme Court also outlined a three- step burden-shifting framework for use in determining whether that rule had been violated. *See id.* at 93-98.

First, the party alleging discrimination in the exercise of a peremptory challenge must establish a prima facie case of intentional discrimination. *Hernandez*, 500 U.S. at 358 ("[T]he defendant must [first] make a prima facie showing that the prosecutor has exercised peremptory challenges on" a prohibited

basis). Relevant circumstances may include a pattern of excluding jurors of a particular racial group, and the prosecutor's questions during voir dire. *See Batson*, 476 U.S. at 89.

Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race- and/or national origin-neutral explanation for striking the jurors in question.[4] *See Hernandez*, 500 U.S. at 358-59 (citing *Batson,* 476 U.S. at 97-98). This explanation need not be persuasive or plausible—just neutral. *United States v. Barnette*, 211 F.3d 803, 812 (4th Cir. 2000). An explanation will be "deemed . . . neutral" so long as "a discriminatory intent" is not "inherent in the prosecutor's explanation." *Hernandez*, 500 U.S. at 360. And like the other steps of the *Batson* inquiry, this Court affords "great deference to the trial judge in making the determination as to whether the proffered reason for the challenge is . . . neutral." *Barnette*, 211 F.3d at

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[4] While this Court has yet to explicitly extend *Batson* to prohibit peremptory challenges made on the basis of national origin, we have little issue finding that it does. *Batson* draws upon the Equal Protection Clause, which, in turn, has been held to prohibit national origin-based discrimination. *See Batson*, 476 U.S. at 89 (holding that the "State's privilege to strike individual jurors through peremptory challenges[] is subject to the commands of the Equal Protection Clause"); *see, e.g.*, *United States v. Stephens*, 514 F.3d 703, 709 (7th Cir. 2008) ("The Constitution prohibits the use of peremptory challenges to intentionally discriminate against jurors on the basis of protected characteristics such as race, national origin, and gender."); *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999) ("To state a claim for an equal protection violation, appellants must allege that a government actor intentionally discriminated against them on the basis of race, national origin, or gender.").

812; *see United States v. Blotcher*, 142 F.3d 728, 731 (4th Cir. 1998) ("The district court's determination of whether the proffered explanation for the use of a peremptory challenge is pretextual and whether there has been purposeful racial discrimination largely turn[s] on credibility" and is therefore owed "great deference").

And third, if the prosecutor offers a race- or national origin-neutral basis for the exercise of the peremptory challenges, the "trial court then has the duty of deciding whether the defendant has carried his burden [of] prov[ing] purposeful discrimination." *Barnette*, 211 F.3d at 812; *see Hernandez*, 500 U.S. at 362. This step often boils down to whether the district court is persuaded that the Government's proffered neutral reason for its strike is its *actual* motivation. *See United States v. Wiley*, 93 F.4th 619, 629 (4th Cir. 2024) (noting that at *Batson*'s third step, the defendant "had to show that [the government's legitimate] explanation was 'merely pretextual' and that the government's 'real reason' for striking the jurors was because of their race"); *United States v. Taylor*, 92 F.3d 1313, 1326 (2d Cir. 1996) ("In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed."). Given the fact-intensive nature of this inquiry, the district court's decision on this issue is again accorded substantial deference. *See Hernandez*, 500 U.S. at 364 (reiterating that "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact" subject only to clear error review); *Blotcher*, 142 F.3d at 731 (emphasizing the "great deference" owed to district

courts' determinations of "whether there has been purposeful racial discrimination").

One final point: once a prosecutor has offered a race- or national origin-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, "the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez*, 500 U.S. at 359. In other words, in cases where the prosecutor offers a neutral explanation for its peremptory strikes, the *Batson* analysis proceeds directly to steps two and three. *See Wiley*, 93 F.4th at 629 ("Because the government offered a race-neutral explanation in the district court, we assume, without deciding, that [the defendant] established a prima facie showing of discrimination at step one.").

With this framework in mind, we turn now to consider the district court's rejection of Appellants' *Batson* challenges.

A.

Beginning with Juror 217, the district court explicitly "reserve[d] on the question of whether [Appellants established] a prima facie case" of intentional discrimination. J.A. 1412. It instead "ask[ed] the [G]overnment . . . to nonetheless proceed" to the second step of the *Batson* inquiry—proffering a neutral reason for the strike. *Id.* This decision by the district court rendered moot "the preliminary issue of whether [Appellants] had made a prima facie showing." *Hernandez*, 500 U.S. at 359.[5]

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[5] The Government spills much ink arguing otherwise. *See* Resp. Br. 31-33. But it cannot avoid the plain, contrary language

Moving to the second step, the Government articulated the following reasoning for its strike of Juror 217: "He had a very thick accent, was very difficult to understand. As we said [before], we thought that it would be very difficult for him to deliberate. And as a result . . . we thought he should be stricken." J.A. 1415. After initially expressing some concern with this rationale, the district court went on to recognize that "if someone's facility with English is so strained or difficult that it would truly impair their capacity to deliberate, then even though that language situation might be a product of national origin, it would still be a legitimate neutral . . . justification . . . for excusing them." J.A. 1416. This exchange satisfied the Government's burden on step two of the *Batson* inquiry.

As previously noted, the explanation itself need not be persuasive or plausible—just facially neutral. *Barnette*, 211 F.3d at 812. And here, the district court deemed facially neutral the Government's concern that Juror 217's accent could impact his ability to effectively deliberate. Its decision to do so was not clearly erroneous. To be sure, there is nuance to the question of whether accent-based peremptory strikes are permissible. And the answer to that question will necessarily vary based on the specifics of any given case. *Hernandez*, 500 U.S. at 364-65 (emphasizing the fact- and credibility-intensive nature of the *Batson* inquiry). But where, as here, the accent-based

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of *Hernandez*. 500 U.S. at 359; *see also United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989) ("[T]his Court will not address the question of whether the defendant established a prima facie showing to satisfy *Batson* where the prosecutor articulated reasons for his strikes.")

peremptory strike stems from otherwise legitimate concerns—i.e., a juror's ability to effectively deliberate and interact with the other jurors—we are satisfied that it facially qualifies as race- and national origin-neutral. Other circuit courts to address this issue have recognized the same. *See United States v. Changco*, 1 F.3d 837, 840 (9th Cir. 1993) ("If the prosecutor had doubts about the [juror's] ability . . . to . . . deliberate effectively with the other jurors, she had ample grounds for striking them."); *cf. Iyoha v. Architect of the Capitol*, 927 F.3d 561, 567 (D.C. Cir. 2019) (noting that, while "a foreign accent and national origin are often intertwined," an employee's accent might nevertheless "be a legitimate basis for an employment action" if it "interfere[s] with their ability to do their job"); *Carino v. Univ. of Okla. Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) (suggesting that accent or "language difficulties that interfere with performance of [an employee's] duties may be legitimately considered in employment decisions").

Turning to *Batson*'s final step, the district court was required to decide the ultimate question of "whether the defendant . . . carried his burden [of] prov[ing] purposeful discrimination." *Barnette*, 211 F.3d at 812; *see Purkett v. Elem*, 514 U.S. 765, 768 (1995) ("[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."). As previously noted, this step frequently centers on whether the district court finds that the Government's *proffered* neutral reason for its strike is its *actual* motivation. *See Wiley*, 93 F.4th at 629; *United States v. Taylor*, 92 F.3d 1313, 1326 (2d Cir. 1996) ("In the typical peremptory challenge inquiry, the decisive question will be

whether counsel's race-neutral explanation for a peremptory challenge should be believed."). After grappling with the issue, the district court credited the Government's race-neutral explanation. *See* J.A. 1419 ("I do not ascribe [an improper] motivation to [the Government's attorneys] in these circumstances."). A review of the record establishes that this decision was not clearly erroneous.

To begin, the district court—on numerous occasions—had to repeat Juror 217's answers back to him to ensure it understood him correctly. The transcript also reflects various instances in which the district court had to ask Juror 217 to repeat his answers. But perhaps most tellingly, the district court expressly acknowledged that "[t]here's no doubt that [Juror 217] has what we would describe as a powerful Nigerian accent . . . . I have had some difficulty understanding him as he spoke with his accent, but *with some patience and clarification*, I think it's all come through." J.A. 560 (emphases added). The court then reiterated this point on multiple occasions. *See* J.A. 1416 ("I didn't detect a hint of a problem with his actual use of the language *once I could penetrate the accent and understand it*." (emphasis added)); J.A. 1418 ("I didn't find his accent so strong and so powerful as to interfere with *my* ability to understand him, *particularly* if I was *prepared to make an effort to really try hard to listen to him*." (emphases added)).[6] These exchanges lend support to the Government's

[6] Also notable is that the Government's concerns with Juror 217 remained consistent. Indeed, it flagged the potential accent/communication concern immediately, *see* J.A. 560, and provided the same as the rationale for its peremptory strike, *see* J.A. 1415.

purported rationale for its strike—that Juror 217's accent could have impeded his ability to thoroughly participate in deliberations. And it is a dubious proposition to suggest that Juror 217's co-jurors would have the district court's "patience" or willingness to "make an effort to really try hard to" "penetrate [his] accent and understand [him]." J.A. 1416.

Ultimately, this case is no exception from the general rule that there is seldom much evidence on the "decisive question" of the *Batson* inquiry—i.e., whether counsel's "neutral explanation for [its] peremptory challenge should be believed." *Hernandez*, 500 U.S. at 365. This rule holds particularly true on appeal, as "the best evidence often will be the demeanor [and credibility] of the attorney who exercises the challenge." *Id*. For that reason, courts have repeatedly emphasized that evaluation of "the prosecutor's state of mind based on demeanor and credibility lies peculiarly within the trial judge's province." *Id.* (cleaned up). Here, the district court thoughtfully weighed such considerations before issuing its ruling: "I believe that genuinely . . . is their motivation here, that [Juror 217's] accent would be so substantial . . . as to interfere with his capacity to appropriately deliberate and confer with his colleagues on the jury and that it would impair their work." J.A. 1419. This finding largely ends this Court's inquiry on appeal. *See Hernandez*, 500 U.S. at 364 (explaining that "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal").[7]

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[7] Contrary to Appellants' argument, it is immaterial that the district court *personally* disagreed with the Government's

And in any event, we find unpersuasive Appellants' bases for arguing that the Government's strike of Juror 217 was pretextual.

First, Appellants press aspects of Juror 217's personal background demonstrating that Juror 217 was proficient in English. But whether Juror 217 was proficient in English doesn't impact other jurors' ability to understand him.

Second, Appellants observe that the transcript of the proceedings below lacks notations from the court reporter indicating that Juror 217 was "incomprehensible." Yet, we wouldn't expect such notations when the presiding judge frequently repeated Juror 217's statements. Appellants also note that one of their lawyers asserted that he had no difficulty understanding Juror 217, but this self-serving statement doesn't persuade us that there weren't issues understanding Juror 217 given other statements in the record.

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assessment of Juror 217's accent. In fact, the district court explicitly acknowledged as much: "I disagree with the [G]overnment in terms of his suitability for jury service…. But that doesn't determine the issue. The question that I have to decide here is what's the [G]overnment's motivation." J.A. 1418; *Hernandez*, 500 U.S. at 364 (noting that *Batson*'s third step involves determining whether the proponent of a strike "intended to discriminate"). The critical point is instead that, even though the district court disagreed with the Government, it found that the Government lacked the requisite discriminatory intent. *See* J.A. 1419 ("I don't agree with [the Government's rationale]. But I don't think it's ridiculous. And I don't suspect that this is a proxy for a decision that is actually rooted in race or a desire to exclude [Juror 217] . . . [on the basis of his] national origin. I do not ascribe that motivation to [the Government].").

Third, Appellants insist that the strike was pretextual since Defendants and Juror 217 are all foreign-born and members of racial or ethnic minority groups. But Appellants paint with too wide a brush. There is no evidence that the Government thought that Juror 217 would be biased toward Appellants simply because he was from Nigeria and they were from El Salvador.

Fourth, Appellants point to the Government asking the district court to conduct additional voir dire into Juror 217's language abilities. We view this fact not as signaling the Government's discriminatory intent, but as indicating the Government's desire to understand better Juror 217's ability to participate effectively in jury deliberations. We similarly don't see discrimination in the Government's erroneous passing assertion that it made a for-cause strike. The assertion came after several days of jury selection proceedings, and the prosecutor appears to have been speaking from memory.

Lastly, Appellants suggest that Black venirepersons were struck at a rate two-and- a-half times greater than that of white venirepersons. This statistic is "both selective and uninformative." *Allen v. Lee*, 366 F.3d 319, 330 (4th Cir. 2004) (en banc). Seventy-eight people participated in voir dire, and 27% of those venirepersons were nonwhite. After for- cause challenges, there were 27.5% nonwhite venirepersons. The government struck 27% of qualified nonwhite venirepersons. And the empaneled jury had 41.7% Black jurors. The stable percentage of nonwhite representation at each stage of the jury selection process cuts against Defendants' statistical argument. *See United States v. Runyon*, 994 F.3d 192, 212 (4th

Cir. 2021); *United States v. Mitchell*, 877 F.2d 294, 303 (4th Cir. 1989).

Even considered holistically, the indicia of discrimination Appellants ascribe to the Government don't convince us that the district court erred. Therefore, because the record simply does not leave us "with [a] definite and firm conviction that a mistake has been committed," *Charboneau*, 914 F.3d at 912, we affirm the district court's rejection of Appellants' *Batson* challenge as to the Government's peremptory strike of Juror 217.

B.

We turn now to consider Appellants' *Batson* challenge to the strike of Juror 138. Just as it did with Juror 217, the district court "reserve[d] on the question of whether [Appellants established] a prima facie case" of intentional discrimination, J.A. 1412, and instead directed "the [G]overnment . . . to nonetheless proceed" to the second step of the *Batson* inquiry. *Id.* In doing so, it again mooted "the preliminary issue of whether [Appellants] had made a prima facie showing" of discrimination. *Hernandez*, 500 U.S. at 359; *see Lane*, 866 F.2d at 105.

At step two, the Government indicated that it struck Juror 138 out of concerns over (1) her interest level in the proceedings and (2) her ability to find alternate childcare arrangements, particularly given that she was the primary caregiver for her grandchildren on weekdays.[8] And at step three, the district court

[8] Appellants largely declined to challenge either rationale as pretextual, noting only that Juror 138 seemed to have coverage for her childcare responsibilities should she be empaneled as a juror. We conclude that Appellants forfeited their

"accept[ed] the government's explanation for why they struck [Juror 138]." J.A. 1414. It did so "less on the childcare," and instead "accept[ed] the government's representations . . . based on [Juror 138's] . . . performance on the questionnaire, her capacity to answer the questions, follow along with somewhat complex issues and so forth." *Id.* The court then clarified that it was not "finding that [Juror 138] lacked the . . . ability to serve as a juror," rather, that it was simply "accrediting the government's assessment to that effect," and "that that is their justification for why they disfavored her." J.A. 1414-15.

On the limited record before us, we once again discern no clear error in the district court's conclusion. Certainly, the transcript does reflect that Juror 138 gave many curt answers during voir dire. The transcript likewise reflects that she failed to properly fill out the juror questionnaire. Beyond that, however, we are largely left with the district court's assessment of whether counsel's "race-neutral explanation for [its] peremptory challenge should be believed."[9] *Hernandez*, 500 U.S. at 365. As already noted, this assessment is primarily based on factors that are not easily reviewable on appeal. *See id.* And for reasons

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ability to argue that the Government's motives as to Juror 128 were pretextual and decline to exercise our discretion to revive this forfeited issue. *United States v. Laffitte*, 121 F.4th 472, 484 (4th Cir. 2024).

[9] On this point, it is also worth reiterating the actual racial composition of the jury: seven white jurors and five Black jurors. This—and the other statistical evidence provided by the Government—lend further support to the district court's findings that the Government did not discriminate in its use of peremptory strikes.

like those stated with respect to Juror 217, we simply have no reason to doubt the district court's findings on this matter, particularly given its crucial role in making credibility- related determinations. *See id.* Accordingly, we find no clear error and thus affirm the district court's rejection of Appellants' *Batson* challenge to the Government's peremptory strike of Juror 138.

* * *

On appeal, we are tasked with the limited role of deciding whether the district court clearly erred in its *Batson* analysis. And here, it avoided any such error by carefully considering the issues and providing thoughtful reasons for rejecting Appellants' *Batson* challenges. So, while a venireperson's accent *could* potentially be wielded as an impermissible proxy for race or national origin, we find no clear error in the district court's contrary finding on this record. We thus affirm the district court's rejection of Appellants' *Batson* challenge to the Government's peremptory strikes of Jurors 217 and 138.

IV.

The second issue on appeal relates to the district court's decision to dismiss Juror 9 and proceed with an eleven-member jury. Appellants argue that this decision was an abuse of discretion. The Government disagrees, emphasizing that the district court thoroughly considered all alternative options and reasonably concluded that proceeding with an eleven-member jury was the best approach. Having reviewed the record, we agree with the Government and therefore affirm the district court's decision.

Federal Rule of Criminal Procedure 23 governs this issue. It provides, in relevant part, that "[a]fter the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror." Fed. R. Crim. P. 23(b). We have applied Rule 23 on various occasions to affirm the excusal of a single juror during deliberations. *See, e.g.*, *Levenite*, 277 F.3d at 464-65 (permitting an eleven-person jury under Rule 23 where a juror fell ill with the flu during deliberations); *Acker*, 52 F.3d at 515-16 (permitting an eleven-person jury under Rule 23 where a juror was excused for an injury and it was unclear when she would be able to return); *United States v. Green*, 260 F. App'x 550, 551 (4th Cir. 2007) (permitting an eleven-person jury where a juror was excused for the death of her grandmother). We see no reason to stray from that precedent here.

To begin, Rule 23(b)—and our case law—explicitly permit the course of action taken by the district court. *See* Fed. R. Crim. P. 23(b); *see, e.g.*, *Levenite*, 277 F.3d at 464¬65. The more relevant question, then, concerns whether the district court sufficiently considered and explained its decision. *See Vidacak*, 553 F.3d at 348 (noting that the determinative question on abuse of discretion review is "whether the [district] court's exercise of discretion . . . was arbitrary or capricious"). A review of the record confirms that it did. To that end, the district court found good cause to dismiss Juror 9 and proceed with an eleven-person jury only after soliciting the opinions of counsel and thoroughly considering all possible alternatives. *See* J.A. 1499 ("I'll take counsel's views on the appropriate way forward and then . . . we'll make a decision about

which way we're going to go."); *see also* J.A. 1499-1511 (discussion with counsel regarding potential paths forward).

Specifically, the court considered: (1) "proceed[ing] under Rule 23 with just [eleven] jurors," J.A. 1516; (2) "proceed[ing] under Rule 24" by replacing Juror 9 with an alternate juror, *id.*; (3) "postpon[ing] the continuation of deliberations until [Juror 9] is restored to health," *id.*; and (4) allowing Juror 9 to participate via Zoom. The court then ranked these in terms of desirability, noting the pros and cons of each. *See* J.A. 1514-16. After considering all these avenues, it concluded that "[t]he best option [was] to proceed with [eleven] jurors" under Rule 23. J.A. 1516; *see* J.A. 1518 ("Taking the circumstances of our case and our situation into specific account, I conclude that not only do I have the discretion to proceed [under Rule 23(b)], but that this is the correct way forward among the various options that are available."). Nothing about the process the district court undertook, or its explanation, strikes us as "arbitrary or capricious." *Vidacak*, 553 F.3d at 348. We therefore affirm its decision to excuse Juror 9 and permit an eleven-member jury to continue deliberations.

V.

For the foregoing reasons, the district court's judgment is

AFFIRMED.

WYNN, Circuit Judge, concurring:

I concur in the majority opinion but write separately to point out that our circuit stands alone by employing deferential review at *Batson*'s step two.

At step two of *Batson*, the trial court determines whether the proffered reason for a peremptory strike is facially race- and national-origin-neutral. As a Supreme Court plurality put it, this question is "a matter of law," *Hernandez v. New York*, 500 U.S. 352, 359-60 (1991) (plurality opinion), which suggests that appellate courts should review *Batson*'s second step de novo. Accordingly, all of the other federal courts of appeals that have addressed this question review step two de novo. *See United States v. Williams*, 264 F.3d 561, 571 (5th Cir. 2001) ("We analyze the Government's proffered racially neutral explanation as a legal issue de novo."); *Paulino v. Harrison*, 542 F.3d 692, 699 (9th Cir. 2008) ("At *Batson*'s second step, the question whether the state has offered a race-neutral reason is a question of law that we review de novo." (quotation marks omitted)); *United States v. Sneed*, 34 F.3d 1570, 1580 (10th Cir. 1994) ("We review de novo whether the prosecutor's explanation is facially race neutral.").

Our outlier stance arises from our decision in *United States v. Barnette* where we said that we should grant "great deference to the trial judge in making the determination as to whether the proffered reason for the challenge is race neutral" at step two. 211 F.3d 803, 812 (4th Cir. 2000). But in so holding, we relied on a *step three* case. *See id.* (citing *United States v. Blotcher*, 142 F.3d 728, 731 (4th Cir. 1998) (holding that we grant deference to the trial judge's "credibility determinations" at step three)). It makes good sense to exercise deference at step three because that step requires the trial court to make a credibility determination when it assesses whether the government's proffered reasons are pretextual. But

that reasoning does not carry over to the *legal* question posed at step two.

Nevertheless, we are bound by *Barnette* which requires us to grant deference to the trial judge at step two. Majority Op. at 19. Though I think that the result here would be the same regardless, this is a correction that we should consider—summarily—in an en banc proceeding.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
NORTHERN DIVISION

CRIMINAL NO.: JKB-16-0259
Jury Trial: Day 41

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MILTON PORTILLO-RODRIGUEZ, JUAN CARLOS SANDOVAL-RODRIGUEZ, OSCAR ARMANDO SORTO-ROMERO, JOSE JOYA-PARADA
Defendants.

Transcript of Proceedings
Before the Honorable James K. Bredar
Monday, January 24th, 2022
Baltimore, Maryland

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(9:23 a.m.)

PROCEEDINGS

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[pp. 3:1-32:25]

* * *

THE COURT: Good morning. Be seated, please. All defendants are present. All counsel are present, except Mr. Curlett who was excused.

Let's bring the record up to speed. Counsel are aware of much of what I'm about to disclose because of informal communications last evening.

Last evening, about dinnertime, juror No. 9 reached out by e-mail or text to the Clerk of Court herself, Catherine Stavlas, and advised that Friday, after the jurors were sent home, she began to feel poorly. That Saturday she was feeling worse, with cold symptoms, feverish and so forth. Tested herself for the COVID-19 virus, in relation to the pandemic that is otherwise afflicting our community. She tested negative. Her condition continued to deteriorate Saturday and into Sunday, when she felt appreciably worse, although still not terrible but clearly ill by her description. She tested again Sunday afternoon and tested positive by rapid antigen test, consistent with standing instructions that the jurors have in that regard.

She reached out to Court staff and in her case, reached out directly to Ms. Stavlas, the Clerk of Court, and advised as to her condition. Ms. Stavlas explained that she was grateful for the notification and that she would contact the presiding judge. Ms. Stavlas did so. I instructed Ms. Stavlas to instruct juror No. 9 not to return to the courthouse today, consistent with the

standing order that forbids persons who have been recently -- who have recently tested positive for COVID from entering our courthouses.

This then led to some further interchange between the clerk and the afflicted juror, most of which is pro forma relating to not coming in. And then there came a dialogue about her jury note -- juror notes and wondering if they could be secured. And her unspecified personal belongings in the jury room, asking that they be secured. And then the clerk responded to that by indicating that those personal belongings would be secured and that the clerk would mail them to her after the conclusion of proceedings.

This then sparked a query from juror No. 9 along the following lines: This is from juror No. 9. Also, since we are so very close to the finish, I don't know if Zoom would be an option for me to allow us to close out, question mark. I am moving about and would be fine to participate. The clerk did not initially respond to that and instead relayed that information to me.

I then instructed the clerk as follows: Instruct juror No. 9 that she is not to say anything to you about where the jury stands. Advise her that you will secure her personal property and that you will be back in touch after the jury is excused in the case. And then I told the clerk, and keep a copy of these e-mails.

And the clerk then followed through with that response. The clerk is present.

Good morning, Ms. Stavlas. You've heard me recount what transpired last evening. And then to just pick up the end of the story, did you then advise juror No. 9, consistent with my instructions to you?

THE CLERK: Yes, Judge.

THE COURT: Thank you.

Okay. The further developments this morning, I instructed the clerk yesterday to advise all three of the alternate jurors to return to the courthouse. They are in the courthouse. They are being held in a separate location within the courthouse in the jury assembly area. They have all three been tested.

And what are their results, Ms. Stavlas, do we know yet?

THE CLERK: They're negative, Judge.

THE COURT: All three alternates have tested negative. I also instructed the clerk to notify the remaining 11 deliberating jurors that I requested that they all test this morning here at the court testing center. And of course my decision was made in light of the circumstances with juror No. 9, although the deliberating jurors have not been told about juror No. 9. All 11 remaining deliberating jurors did appear for testing this morning and all 11 are negative.

THE CLERK: Correct. They're all present in the jury room.

THE COURT: And they're also all now present in the jury room.

So my fear was that we would have additional positives this morning in light of No. 9 going positive and accordingly, brought the alternates in to be proactive in case we needed to substitute them in. But as it has happened, no -- we have no additional positives.

I directed my law clerk last evening to send an e-mail to counsel, just generally advising them of the situation that one of the jurors had tested positive. We

later followed up and indicated that it was juror No. 9 who had tested positive. And then asked counsel to be prepared to discuss the Court's options, the appropriate way forward in light of these circumstances. And I had my clerk direct counsel's attention to Rule 23(b)(3) of the Federal Rules of Criminal Procedure as well as Rule 24(b)(3) of those same rules.

I'll take counsel's views on the appropriate way forward and then we will advise the -- well, we'll make a decision about which way we're going to go.

Mr. Carrick, it occurs to me that there is one additional step that should be taken immediately, and that is for you to go to the jury room, greet the jurors or offer them a good morning, remind them that not all of the jurors are present and accordingly, they may not resume deliberations until they have a further communication from you and that they're not to resume deliberations yet.

THE CLERK: Okay.

THE COURT: And please return when you've completed that task.

I'll hear from the government first on your thoughts.

MR. CLARK: Yes, Your Honor, thank you. The -- I think our position in this case is that in light of the fact that we have 11 jurors who are -- who have tested negative who can proceed, the appropriate path here is to proceed under Rule 23, allow those 11 jurors to continue to deliberate and move forward.

I think there are a couple of reasons. Obviously the law and the rules that the Court cites under Rule 23 and Rule 24 certainly permit for two -- two different approaches, either proceeding with 11 jurors under

Rule 23, or paneling one of the alternates and restarting the deliberations entirely. The case law and some of the -- that addresses this does seem to indicate preference for proceeding with the 11 jurors, particularly in a situation such as this, where there have been significant deliberations and significant substantial work already done by the existing jury. So we think that's the appropriate approach here.

There are certainly cases where -- and 4th Circuit cases, the *Levenite* case and the *Acker* case in the last 15 or 20 years in which the 4th Circuit has approved of the Court going that route. In this case, I think in addition to what is -- as has been clear from the questions and also, frankly, from the more recent -- the latest communication from juror No. 9, that the jury has done significant work and made significant progress already in this case, we think it does not make sense to restart those deliberations anew, and certainly the law -- the case law expresses concerns about the potential prejudice of doing so.

In addition, the additional delay that would cause, I think is of concern. Particularly in light of the pandemic, in light of the potential for additional infection. Specifically, the *Levenite* case addresses a situation where there was an intestinal flu, and one of the concerns that the Court expressed in that case and resulted in proceeding with 11 was that this was an infectious disease and could, you know, further delay, could result in additional infections and additional problems with ensuring that the jury could actually finish its work.

So we think that's the case. Certainly – certainly we think moving forward with 11 is supported under the rules and appears to be the preferred approach if

possible. So we think that's what the Court should do. And of course there is, as the Court I know has talked a little bit about the facts, and as the Court is well aware, there is certainly good cause to discharge No. 9 in light of her illness, her positive test, the likely delay that the stretch of time, which would certainly be at least this whole week in which she wouldn't be able to sit. So we think discharging her, proceeding with 11 is the appropriate response in this case.

THE COURT: Thank you, Mr. Clark.

Mr. Carrick, you've returned from the jury room.

Did you confirm to the jurors that they are not to resume deliberations until they receive further instructions?

THE CLERK: Yes.

THE COURT: Thank you.

Mr. Biddle, are you going to speak for Mr. Portillo-Rodriguez?

MR. BIDDLE: Yes, thank you, Your Honor. And thanks to the Court for giving the attorneys the head's up last night.

THE COURT: Yes.

MR. BIDDLE: There are no easy answers in this situation. It is discretionary with the Court. In most circumstance there are some cases that do address abuse of discretion, which I'll touch on, but, you know, the Court seems to have a pretty open set of options here. But there's no perfect or ideal outcome. It's really a dilemma. And I'd suggest it's really a question of what's the least undesirable alternative under the circumstances.

First of all, we're, for Mr. Portillo-Rodriguez, in favor of having 12 deliberating jurors. And let me first start with a question of whether the jury could be asked to go home and we could wait for juror No. 9 to get well. Juror No. 9 hasn't been discharged yet. There are a couple of cases, *Araujo*, A-R-A-U-J-O, 62 F.3rd 930, that was a 7th Circuit case in 1995, and *Tabacca*, 924 F.2d 906, 9th Circuit 1991. Now, these were both back before the rule was changed that allowed alternate jurors to be substituted, but there were cases where the district court was called out on abuse of discretion standard for prematurely excusing a juror and then proceeding to an 11-person verdict.

Now, the facts were different, but it's still a principle here. And I'll explain why. In *Araujo*, it was a roadside assistance case. Basically a juror got car trouble, and the Court excused the juror and went to an 11-person. And in *Tabacca*, the record apparently showed that it would be a one-day delay.

Now, these may seem completely in opposite here, but we've had a case already where there's been a three-week delay -- well, almost three weeks. I think it was two weeks and six days or five days, but it was quite a delay over Christmas. And of course this wasn't when the jury was deliberating, but the jurors have shown that they can handle these delays. They've come back in, they've been intact, they appear to be alert and paying attention, so a delay, percentagewise, of a couple of more days, say till next Monday, we submit, for Mr. Portillo-Rodriguez, would not be extraordinary.

The other advantage of keeping the juror in is that it wouldn't require -- if the Court were to go to the Rule 24 approach, that wouldn't require restarting the

deliberations, and it has the advantage of having 12 jurors deliberate, including one that's participated, obviously to date.

Secondly, we believe that the juror's suggestion that Zoom is an option shouldn't be dismissed out of hand. I can imagine if the parties did not agree on that, it would be very problematic, but if the Court found cause it was possible technically, and the government and all defendants consented, it would seem to us that a Zoom deliberation would be feasible, legally and practically.

The third option in our view is the Rule 24 approach, which would require beginning deliberations anew. But that could be done. The substitute juror could be instructed to read the notes that were delivered, the jurors could be given the missing items that were removed that had the soundtracks on them, and hopefully the government has versions that don't have sound, and the jurors could be told to go back to square one. Again, if that was the approach, there's only been two days of deliberations and in a trial that's taken two and a half months, that's not a huge amount of time. And a lot of the cases involve, you know, short trials, 924(c) gun cases, two or three days, that kind of thing.

The last option, which we oppose, is the 11-person jury. I understand the government's thinking, but we also think there's a problem going with 11 because if the jury doesn't reach an immediate verdict, there's a possibility that the 11 could become 10 and then what does the Court do at that point, put two alternate jurors on and have them restart?

So there are risks all around. The preference for a 12-person jury in this defense team is strong, and we ask the Court to proceed as proposed.

THE COURT: Thank you, Mr. Biddle.

Mr. Ruter.

MR. RUTER: Your Honor, we adopt, on behalf of Mr. Sandoval-Rodriguez, the arguments made by Mr. Biddle. It does -- I know, Your Honor, that the Court has the discretion, of course, in finding the definition of good cause to replace juror No. 9 per the rule. We would -- our position is also that the Court may not be able to find good cause in this case.

Juror No. 9, obviously from her exchange by e-mail with the clerk, very much desires to remain a participant in this trial. She's shown no reason other than the testing positive that would demonstrate the need to exclude her. And in that regard, as Mr. Biddle indicated, she could simply continue for the period necessary per the COVID protocol, and then begin deliberations after she has cleared that protocol. I'm not clear what the exact day might be, when that would begin, but it is not any more than several days. She has spent three months in this case, and it's obvious she very much would like to remain.

I also agree with Mr. Biddle that Zoom most likely is a possibility, although it may pose its own difficulties in terms of the Court having the kind of control it might deem necessary to assure that the deliberations are totally private. It's much more difficult, I believe, to guarantee that per Zoom. If you were to find, Your Honor, that good cause has been shown for her being excused, then we also join that this is a case where the Court ought to bring in the

first available alternate to assume the role of juror No. 9. That person is already here, that person's already tested negative, that person clearly was advised by this Court, very clearly when excused but not discharged last Thursday, that the very thing that has happened might happen. And the Court admonished the three alternates not to review anything, not to discuss the case with any of the other jurors. The Court even mentioned that it was a possibility because of the length of their relationship, they may talk with each other, but if they were to do so, they should not engage in any conversation concerning the case itself. And the Court indicated, my recollection is, is that they might very well be called in to duty in the event that some juror may become incapacitated or unable to continue, exactly as the rule contemplates was the admonition that this Court gave to the alternates.

It is true, Your Honor, that the rule also indicates that should an alternate replace another juror, that they are to begin their deliberations anew. I think government counsel posited that the jurors had, quote, made progress, unquote. I think that's what Mr. Clark said. I'm not too sure where that comes from. I know that the jurors had sent out notes. We're aware of that. I don't think those notes have indicated, one way or the other, where they are in their deliberations, and there's nothing to prevent, in an orderly fashion, the deliberations to begin anew. And that's what we think the Court should do.

We understand, Judge, that there's no constitutional right to 12 jurors, but this process today started -- this case started in October with 12 jurors, and I don't think that we can make a due process

argument. I think it's been done in the past as it relates to going from 12 to 11 jurors. But nonetheless, in order to keep this process as sacrosanct as we can, we believe that the Court should empanel juror No. -- actually alternate into the place of juror No. 9 and allow deliberations to begin anew. Thank you, Judge.

THE COURT: Thank you, Mr. Ruter.

Ms. McLarney.

MS. MCLARNEY: Your Honor, we adopt Mr. Biddle and Mr. Ruter's arguments and their preferred courses of action. Our preferred course of action would be, as Mr. Biddle and Mr. Ruter said, waiting for juror No. 9 to get well, clear protocol and then resume deliberations when she's well. We would also agree to allowing juror No. 9 to deliberate via Zoom if it was technically feasible and if the other parties consent.

As my colleagues said, the rules and the case law make it clear that the Court has broad discretion in selecting the best course of action. It does not appear that there's any limitation to just the two options set forth in the rules, meaning going forward with an 11-panel jury or seating an alternate.

This jury has not only sat here for three months, but it seems that they've built a momentum in their deliberations. They've submitted five different questions. So as the rule requires, seating an alternate would cause them to have to start their deliberations anew. That creates the same delay that would be created by just waiting for juror No. 9 to get better. So I think that that cancels out whatever benefit would come from seating an alternate and beginning deliberations anew, cancel it out by the fact that we would have the same outcome but with the

original jury if we just waited for juror No. 9 to get well.

As for going forward with an 11-panel jury, we object to that course of action. I think even juror No. 9, it sounds like, wants her voice to continue to be part of this process. But also I think there's a concern that the 11 other members of the jury would be eager to hurry up and be done in light of the fact that they may be exposed to someone -- they may have a positive exposure. And as juror No. 9's communication indicated, perhaps they have very little incentive to slow down and go through the process if they're allowed to proceed with just 11. So we urge the Court to adopt the process of waiting for juror No. 9 to get better. Thank you.

THE COURT: Thank you, Ms. McLarney.

Who speaks for Mr. Sorto-Romero?

MR. ADAMS: I think I will.

THE COURT: Mr. Adams, good morning.

MR. ADAMS: Good morning, Your Honor. We join the request of co-defendants' counsel, in particular, Ms. McLarney. Of course, the other option that has not been raised is where do you fit the notion of a mistrial into the pecking order of potential options. I think at least for us, it's not option No. 1. Option No. 1 we believe would be to wait on juror No. 9 to be well and cleared to return for in-person deliberation.

I do agree and want to re-emphasize, not to be repetitive, but to re-emphasize Ms. McLarney's statement about the specter of illness, of COVID illness and how that could impact or be coercive upon the jurors to rush hastily to a decision now that one of their own has been infected. Of course this whole trial

has been set under the backdrop of COVID. We did jury selection during the rise of Delta, and we now finish, or close to being finished, during the rise or the peak. Maybe we're on the downside of Omicron.

THE COURT: Let me stop you right there, Mr. Adams. We selected a jury during the rise of Delta?

MR. ADAMS: When the Delta numbers were -- when Delta had increased.

THE COURT: I think the record will reveal that the state of the virus in September and October was in a very different place from where it is now --

MR. ADAMS: Yes.

THE COURT: -- certainly, but also different from where it had been in early September, when Delta was peaking in this district. And the decision to go forward in October, made in consultation with the Court's epidemiologist long before Omicron had surfaced anywhere in the world, including in South Africa, actually was made in the reasonable hope and expectation that the virus overall was subsiding. And when the Court had to make a difficult choice, balancing on the one hand the possibility that another variant could emerge and create difficulties against the fact that these defendants had been held as long as they had been on these charges with prior postponements, and that was the calculation that was made that caused the trial to commence.

Go ahead.

MR. ADAMS: Yes, sir, well, that was basically it. I add that in to say that it's different than the *Levenite* case where a seasonal intestinal flu circulated. This is something that the Court has been working very diligently to try to protect us all from and against a

difficult backdrop and now we have a juror who has tested positive. Our preference is to wait for her to return in health to the jury room and to deliberate in person. Thank you.

THE COURT: Thank you. I'm prepared to rule.

The Court now excuses juror No. 9 for cause.

There's a worldwide pandemic underway, of which the Court takes judicial notice. The jurors, during the course of this trial, have been tested regularly. Extraordinary measures have been taken to protect the health of the jurors and all participants in this proceeding. Those measures have largely succeeded, even in the face of the rise of the Omicron variant, which swept over this district with amazing vigor, beginning in early December.

Juror No. 9, the record should reflect, has reported that she has become ill. I indicated the sequence of that a few minutes ago when we started this hearing. In general, she reports cold symptoms and fever, and most significantly, has tested positive by COVID-19 antigen rapid test, one of the tests that the Court has liberally supplied to jurors and other participants in these proceedings, exactly so that jurors and others could take these tests and isolate themselves and limit the consequences of any one of them becoming infectious.

This is the situation we find ourselves in now with juror No. 9. The question is where do we go. There's a standing order of the Court entered previously to protect public health and the health of other persons who are in and out of this courthouse. And that standing order forbids persons, such as juror No. 9, who has recently tested positive for the COVID-19

virus from entering or being present in this courthouse. And she's under that restriction for a minimum of five days from today. She tested positive yesterday. That's day zero. Today is day one. Friday would be day five. Saturday would be the first day that she could re-enter the courthouse. But even then, she would still have to test negative and have been symptom free for at least 24 hours. And of course at this point there's great uncertainty about that. We have no idea when juror No. 9 will become symptom free. We don't know that she will test negative at the first opportunity, which would be Saturday morning. Those are great uncertainties.

I note also that this jury has already deliberated for two days. That five questions have been posed to the Court by the jury and answered by the Court. Some relatively simple, some quite complex. I find good cause to excuse juror No. 9. She's ill with COVID-19. She cannot re-enter the courthouse for at least five days and possibly longer depending how long her symptoms persist. Her prospects in that regard are uncertain. I find that ensuring totally private and effective deliberations over Zoom or some other virtual or remote access platform, as some have suggested here, does not afford the Court sufficient assurances that the deliberations will remain private. Nor does it provide the Court with sufficient assurances that all of those participating in the deliberative process would be on an equal footing and have an equal opportunity to be heard and to contribute. In short, I am not satisfied that a hybrid procedure of the sort proposed would sufficiently ensure the integrity of the deliberative process. Accordingly, I reject that option.

The Court has the option of seating an alternate juror to replace juror No. 9. The Court could do so under Rule 24. Now, this would require deliberations to begin anew. But that said, the alternates are present right here in the courthouse because I summonsed them and required them to come in this morning. I also asked them to test again. All three have tested, and all three have tested negative. So that's a viable option for the Court to pursue.

Ultimately, though, I conclude that it's a less attractive option, when a jury such as this one is clearly well along in the deliberative process. And if I added the alternate at this point, the jury would be instructed that they must stop, go back to the beginning and begin their deliberations anew. I conclude that they're well along in the deliberative process by virtue of the fact that they have spent essentially two full days deliberating at this point, and then the nature of their questions suggests that they are deep into the process. One of their questions even revealed focus on one of the verdict forms in the case.

If I haven't made a sufficient finding on this point, I'll reiterate that waiting for juror No. 9 to recover is not a practical option as far as the Court's concerned. That would require the suspension of this deliberation for at least seven days, effectively. We're not going to bring them back on the weekend. So we would be suspending that deliberation until next Monday. Yes, we have previously had postponements in the midst of the trial, one for the holidays, and then that one extended because of a COVID-positive situation with two different defendants and one juror. By no means was that an ideal circumstance, but there was no

option, no practical or reasonable option. And I concluded that those postponements, while not ideal, were by no means fatal to the process of delivering a fair and complete trial consonant with due process for the defendants in this case.

In this case, could the Court suspend deliberations for seven days and ask the jury to come back? Potentially I could, without fatally damaging the fairness of the deliberative process and the overall trial that has been conducted here. But is that the best scenario? No, it's not. It's not the best scenario when we have the other options that are available, which include a possibility of continuing on with just 11 jurors and the possibility of continuing on with 12 jurors, an alternate having been substituted in, and the jury instructed to begin deliberations anew.

I find there's no basis for granting a mistrial. I'm not sure I heard a motion for a mistrial at this point, but to the extent there was such a motion, it's denied. And there's no basis for granting a mistrial at this point as the Court has options available to it, short of that Draconian response, that are fully consistent with law and due process. So I don't -- I reject a mistrial as even a viable option.

Ultimately, at the end of the day, there's three ways we can go. We can proceed under Rule 23 now with just 11 jurors, we can proceed under Rule 24, substitute in an alternate and instruct the jury to begin their deliberations anew, or we can stop and postpone the continuation of deliberations until juror No. 9 is restored to health, is symptom free, is testing negative, and has passed the requisite isolation period which would effectively be at least one week.

My conclusion is that the options can be ranked. The best option is to proceed with 11 jurors. The second best option is to substitute in an alternate, proceed with 12, but instruct the jury to begin deliberations anew, and the third best option is to grant the postponement and wait for juror No. 9 to recover. That has got an uncertain -- an uncertainty associated with it for sure, but one assumes that at some point she would recover.

Given how I have ranked the options, we will proceed now under Rule 23 and instruct the jury that they are to recommence their deliberations with only 11 jurors now participating.

I do want to make a brief record on a point that was touched on by counsel, and that is that under *Florida versus Williams*, which is reported at 399 U.S. 78, a Supreme Court opinion from 1970, the tradition of a 12-man panel -- and they say man, so I'll say it -- a 12-man panel is not a necessary ingredient of a trial by jury. That there is no violation of the 6th Amendment to afford a defendant a trial by a jury of less than 12. We have had recent Supreme Court activity in the neighborhood of this issue, but nowhere directly on point.

I direct your attention to the opinion in 2020 deciding *Ramos versus Louisiana*, where the Supreme Court concluded that less-than-unanimous verdicts did not comport with due process, and the Louisiana long tradition of allowing juries to convict on 11:1 votes for guilty -- it might even have been 10:2 down there, in my recollection, but this one was 11:1. The Supreme Court said that's a no-go, but there's nothing in that that casts doubt on the appropriateness of going forward with juries less than 12. *Ramos* is a case

about nonunanimous verdicts, it's not about the size of juries. So *Ramos* is not applicable. The governing law remains that which is set out in *Florida versus Williams*.

Counsel have referred to the *Levenite* decision of the 4th Circuit, one of the opinions where the 4th Circuit has affirmed that it was reasonable for a district court to move forward with 11 jurors, rather than add an alternate when a deliberating juror became ill with a contagious disease. That opinion is reported at 277 F.3d 464, is the pincite. The -- the full cite is 277 F.3d 454, the pincite 464, 4th Circuit 2002.

I've also read and been influenced by the opinion decided in *United States versus Longwell*, reported at 410 Fed. Appx. 684, pincite 689, 4th Circuit 2011.

Taking all of that authority into account, I conclude that I have the discretion to take the action that I'm going to take under Rule 23. Taking the circumstances of our case and our situation into specific account, I conclude that not only do I have the discretion to proceed as I'm going to, but that this is the correct way forward among the various options that are available.

In light of that, counsel, I propose to bring the jury into the courtroom, because this is a changed circumstance, and very briefly advise them that juror No. 9 has been excused because she's ill. And I am going to tell them, subject to the views of all of you, that she tested positive for COVID. I don't want to do anything to disrupt the deliberative process more than I must, but at the same time, you know, they're -- they were in proximity to her on Friday, and I just think it's a matter of basic human rights to know what's going on with other people's health when

there's an infectious disease present in the community.

At the same time, I will share with them the advice of our court epidemiologist, which is that with 98 percent efficacy, our rapid antigen tests do accurately measure when a person is infectious or not infectious. And I will let them know that juror No. 9 tested on Saturday when she was feeling poorly, and she tested negative. I'm no virologist or epidemiologist, but my layman's understanding from consultations with the experts are that viral load typically grows with time. People can become symptomatic when their viral load is relatively low and they're not necessarily infectious. And then as things worsen, their afflicted condition shows up on the rapid antigen test. Those are my plans.

Mr. Clark.

MR. CLARK: Your Honor, we have no objection to that. We think that advisement makes sense.

THE COURT: Mr. Biddle.

MR. BIDDLE: Just a couple of points, Your Honor, just to preserve the record, we're -- the Court made reference to no mistrial motion being filed; if one was made, it's denied, but we are making one under *Aruajo* and *Tabacca* with an 11-person jury.

THE COURT: That's denied for the same reasons indicated. Go ahead.

MR. BIDDLE: Understood. And then we'd ask the Court, with the 11 jurors, to remind them -- reinstruct them, repeating the language the Court provided initially about essentially don't rush your deliberations, take the time that you need, listen to other jurors' views, be respectful and so forth, because

I think there is a concern under the circumstances, when the jurors are being told that their colleague did test positive, that they would try to rush and get out of the courthouse as quickly as possible.

THE COURT: Thank you, Mr. Biddle.

Mr. Ruter, comments or views on how I plan to proceed?

MR. RUTER: Your Honor, no disagreement at all with your manner you're going to proceed in. We also join in the motion for a mistrial, and we also agree, Your Honor, that the Court ought to make some comments consistent with those that Mr. Biddle has offered.

THE COURT: Thank you.

Ms. McLarney.

MS. MCLARNEY: I join my colleague's motion for a mistrial, and I also agree that Your Honor should instruct the jury to deliberate carefully.

THE COURT: Okay. Got it, Ms. McLarney. Thank you. Mr. Adams.

MR. ADAMS: Yes, sir, Judge, I join the request of co-defendants' counsel. And, Judge, I took it from your taking our comments as our actual legal position and ruling against it, so I think we're preserved on those, if I read the Court properly. I think you --

THE COURT: Let me make that record now. To the extent that counsel were arguing effectively in sort of a narrative way with respect to their proposals as to how we go forward, I took those comments to be specific requests that the Court do as counsel suggested, and to the extent that I have not honored those requests and do not intend to follow the

suggestions, that each of the defense lawyers have made, I'm effectively denying those requests.

MR. ADAMS: Thank you, Judge. I have one additional thing to perfect the record on, and I accept and believe that the Court stated *Florida versus Williams*, completely accurately. There has been some scholarship that I ran across last night that has criticized that holding from 1970, and has made academic arguments for going back to the historical standard of 12-person juries. So to the extent that I just want to constitutionalize that objection, I think the Court is 100 percent accurate in the current state of the law, says 12 -- a 12-person jury is not a constitutional requirement. We object under the 6th Amendment saying that it -- the Supreme Court got it wrong in 1970. And if this is -- becomes a vehicle for them to revisit that, we just want to make sure we noted that objection. Thank you.

THE COURT: The record will reflect that objection, and your view that *Florida versus Williams* was wrongly decided should be reconsidered. Of course, the Court is -- I don't know if it's quite right to say bound by *Florida versus Williams* but authorized by *Florida versus Williams* to take the action that it's going to take, not to mention the plain text of Rule 23. Accordingly, that request is denied.

Okay. Let's bring them in.

MR. CLARK: Your Honor, just --

THE COURT: Yes, Mr. Clark.

MR. CLARK: I would just note that I think we'd object to sort of selectively at this point rereading portions of the jury instructions to the jury. We think they were properly instructed. They clearly have been

diligently deliberating, and I think pointing out specific jury instructions again at this point is unnecessary and potentially prejudicial.

THE COURT: Thank you, Mr. Clark.

Bring them in.

(Jury entered the courtroom.)

THE COURT: Be seated, please. Good morning, ladies and gentlemen. Thank you for returning this morning to continue your deliberations in this case. First I want to thank you all for agreeing to be rapid tested for COVID-19 viral load this morning. And I'm happy to report what you probably all know, which is that all 11 of you tested negative.

I want to further advise you that juror No. 9 has been excused from this jury, and she will no longer be sitting with you and she will no longer be deliberating in this case. This is now a jury of 11 persons, not a jury of 12 persons. Other than that change, nothing changes, and you are to continue on with your deliberations just as you were previously directed and instructed.

I do want to advise you that juror No. 9 began to feel some cold symptoms after she left the courthouse on Friday. On Saturday, those conditions worsened and as a consequence, she tested by rapid antigen test for the COVID-19 virus on Saturday. On Saturday, she tested negative. Her condition continued to get worse. Although it was never terrible, she developed a fever, that, by her reports, went up to 100.5. She tested herself again yesterday afternoon, just before dinnertime, and at that time she tested positive for the COVID-19 virus. She contacted the Court and was tentatively instructed not to return to the courthouse

today till the Court had the opportunity to further address this matter. Now, she will not be returning because I have made the determination that she should be excused from the jury.

I want to talk to you a little bit more about our testing regimen. As you know, we test aggressively here in the U.S. District Court. You have been participants in that aggressive testing system. All of this is being done under the supervision of and with the advice of an epidemiologist from Johns Hopkins, Dr. Jonathan Zenilman. Dr. Zenilman advises us that the rapid testing system that we are using is very effective for our methods. These rapid tests do not detect with absolute certainty whether or not a person has the COVID-19 virus or whether they're carrying it in their system, but these rapid tests do determine, with 98 efficacy, whether or not a person has infectious COVID.

In other words, when juror No. 9 tested negative on Saturday, with 98 percent probability, even on Saturday she was still not infectious. Evidently her viral load continued to grow as she became sicker. And then by Sunday, when she tested yet again, her viral load was sufficient to cause her to have a positive test. None of this is risk free, none of this is absolutely certain, but probably when she was last with us on Friday, and even on Saturday when she tested, she was herself not yet infectious. By yesterday afternoon, when she tested positive, she was infectious.

Ladies and gentlemen, now that you are once again constituted as a jury, this time as a jury of 11, as I say, you should continue on, consistent with the instructions previously given to you. As always, I urge you to take the time that you need to fairly consider

the evidence that has been presented to you, and to take the time necessary to render fair and accurate verdicts with respect to all of the parties, the government and the defendants, in this matter. You will now return to the jury room, and once all 11 of you are there assembled and the doors have been shut and the clerk is no longer present, you may recommence your deliberations.

Take the jury out.

(Jury left the courtroom.)

THE COURT: Take the defendants out.

MR. BIDDLE: Your Honor.

THE COURT: Mr. Biddle.

MR. BIDDLE: What's the Court's plan with the alternates, that they're in the courthouse, are they going to be dismissed or still on standby?

THE COURT: I haven't decided yet. I'm going to talk with the clerk about that now that we've decided that we're going to go ahead. Probably I'm going to send them home, but I haven't decided yet.

MR. CLARK: Your Honor.

THE COURT: Mr. Clark.

MR. CLARK: Yes, just one thought. There was significant discussion specifically about juror No. 9's health issues.

THE COURT: Let the record reflect the defendants are still present in the courtroom.

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