**No. 16-4410**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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**UNITED STATES OF AMERICA,**

***Plaintiff-Appellee,***

**v.**

**KAREN NICHOLAS,**

***Defendant-Appellant.***

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On Appeal from the United States District Court
For the Eastern District of Pennsylvania
Honorable Harvey Bartle III

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# BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT AND URGING REVERSAL

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## CORPORATE DISCLOSURE STATEMENT

Amicus curiae National Association of Criminal Defense Lawyers ("NACDL") submits the following corporate disclosure statement, as required by Fed. R. App. P. 26.1 and 29(c): NACDL is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

DATED: August 14, 2017

Respectfully submitted,

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## INTEREST OF AMICUS CURIAE

Amicus Curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.[1]

NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and the courts of appeals, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. The removal of deliberating jurors--especially jurors holding out for acquittal--for an alleged failure to deliberate or follow the law is one such issue. NACDL has submitted

[1] Counsel for amicus state that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

amicus briefs addressing this practice in several cases, including *United States v. Edwards*, 303 F.3d 606 (5th Cir. 2002), and *United States v. Abbell*, 271 F.3d 1286 (11th Cir. 2001).

In accordance with Fed. R. App. P. 29(a), amicus states that all parties have consented to the filing of this brief.

## SUMMARY OF THE ARGUMENT

1. The Sixth Amendment guarantees the right to trial by jury. In federal criminal cases, Fed. R. Crim. P. 31(a) requires that the jury's verdict be unanimous. The district court violated these fundamental protections by launching an intrusive inquiry into jury deliberations on the basis of two ambiguous notes complaining that Juror 12 would not agree with the other jurors. It violated them again by removing Juror 12--the sole holdout for acquittal--when there plainly was a "reasonable possibility that the allegations of misconduct [against Juror 12] stem[med] from the juror's view of the evidence." *United States v. Kemp*, 500 F.3d 257, 304 (3d Cir. 2007).

2. The district court committed a second, closely related error: over defense objection, it sent multiple copies of the prosecution's 85-page speaking indictment into the jury room. As Juror 12 reported, the pro-conviction jurors used the indictment, contrary to the court's instruction, as a means of trying to convince

him to change his vote. No compelling reason justified submitting the indictment to the deliberating jury. The court committed a clear abuse of discretion in doing so.

## ARGUMENT

### I. THE REMOVAL OF JUROR 12 VIOLATED THE FUNDAMENTAL RIGHTS TO TRIAL BY JURY AND TO A UNANIMOUS VERDICT.

The Sixth Amendment guarantees the right to trial by jury. In federal criminal cases, Rule 31(a) requires that the jury's verdict be unanimous. The district court violated these fundamental protections by launching an intrusive inquiry into jury deliberations on the basis of two ambiguous notes complaining that Juror 12 would not agree with the other jurors. It violated them again by removing Juror 12--the sole holdout for acquittal--when there plainly was a "reasonable possibility that the allegations of misconduct [against Juror 12] stem[med] from the juror's view of the evidence." *Kemp*, 500 F.3d at 304.

#### A. The Applicable Legal Principles: "The No Reasonable Possibility" Standard

The Sixth Amendment right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). Given this "fundamental reservation of power," any judicial intrusion into jury deliberations must be carefully

circumscribed to ensure that the court does not undermine "the people's ultimate control."

Rule 23(b)(3) of the Federal Rules of Criminal Procedure permits a court to remove a deliberating juror for "good cause." To ensure that removals for "good cause" do not violate the defendant's Sixth Amendment right to trial by jury and the corresponding right under Rule 31(a) to a unanimous verdict, courts impose a strict evidentiary burden for such removals. A deliberating juror may only be removed "for bias, failure to deliberate, failure to follow the district court's instructions, or jury nullification when there is no reasonable possibility that the allegations of misconduct stem from the juror's view of the evidence." *Kemp*, 500 F.3d at 304; *see, e.g.*, *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001) ("In these kind of circumstances, a juror should be excused only when no 'substantial possibility' exists that she is basing her decision on sufficiency of the evidence."); *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999) ("[I]f the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror.") (emphasis in original); *United States v. Thomas*, 116 F.3d 606, 621-22 (2d Cir. 1997) ("'[I]f the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's

evidence, the court must deny the request.'") (emphasis omitted) (quoting *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987)).

The "no reasonable possibility" standard protects the federal criminal defendant's right under the Sixth Amendment and Rule 31(a) to be convicted only by a unanimous jury. As this Court has observed, "If the Government is able to remove a holdout juror because of ambiguous allegations of improper behavior during deliberations, and replace this holdout with a more amenable juror, then the defendant's constitutional right to a unanimous verdict has been violated." *Kemp*, 500 F.3d at 304 n.26.

The concerns that undergird the "no reasonable possibility" standard inform both the dismissal of a deliberating juror and the decision to investigate alleged juror misconduct in the first place. "Protecting the deliberative process requires not only a vigilant watch against external threats to juror secrecy, but also strict limitations on intrusions from those who participate in the trial process itself, including counsel and the presiding judge." *Thomas*, 116 F.3d at 620. Courts have recognized that "the very act of judicial investigation can at times be expected to foment discord among jurors." *Id*. In addition, by focusing the questioning on a sole holdout for acquittal--as the district court did here--the judge can send a powerful signal that the juror should surrender his honestly held views, and that the other jurors are free to disregard his opinions of the evidence. *See id*. at 622. Judicial scrutiny of the

holdout also chills other jurors who might be considering switching their votes from guilty to not guilty. Accordingly, "a district court should be more cautious in investigating juror misconduct during deliberations than during trial, and should be exceedingly careful to avoid any disclosure of the content of deliberations." *United States v. Boone*, 458 F.3d 321, 329 (3d Cir. 2006).

### B. The District Court Violated Defendants' Rights Under the Sixth Amendment and Rule 31(a).

The district court in this case transgressed these limits. First, the court launched its investigation of Juror 12 in response to two notes that it received on the second day of deliberations. The first, from the foreperson, complained that Juror 12 "will not, after proof, still change his vote. His answer will not change." JA 5916. The second, from a number of jurors, asserted that Juror 12 "is argumentative, incapable of making decision." JA 5916-17.

These notes suggested only that, a few hours into deliberations after an 18-day trial, Juror 12 was not prepared to accede to the other jurors' view of the evidence. The notes did not provide "substantial evidence of jury misconduct--including credible allegations of jury nullification or refusal to deliberate," the predicate this Court requires for judicial investigation of a deliberating jury. *Boone*, 458 F.3d at 329. Nonetheless, over repeated defense objection, the district court began a highly intrusive inquiry into the jurors' deliberations. It interviewed Juror 12 twice over the course of two days; it interviewed the foreperson; and it

interviewed three other jurors. That judicial inquiry never should have occurred. It directly undermined the defendants' right to a unanimous verdict.

Second, having conducted an impermissible investigation of a deliberating jury, the district court further erred in dismissing Juror 12, the lone holdout juror. The court could not rationally conclude, on the record before it, that "there is no reasonable possibility that the allegations of misconduct stem from the juror's view of the evidence." *Kemp*, 500 F.3d at 304. In particular, Juror 12's comments about the likelihood of a hung jury did not justify his removal from the jury. *See, e.g., United States v. Vartanian*, 476 F.3d 1095, 1099 (9th Cir. 2007) (juror's alleged comment that "I think the jury is going to be hung up" "could not be a basis for removing the juror").

The district court faulted Juror 12 because "[t]here's no way in the world he could have reviewed and considered all of the evidence in the case and my instructions on the law." JA 5994. But exactly the same could be said of the other eleven jurors, who appear to have decided on a guilty verdict every bit as swiftly as Juror 12 concluded that the evidence was insufficient to prove guilt beyond a reasonable doubt. For the court to dismiss the lone juror for acquittal, while leaving in place the equally adamant jurors favoring conviction, represents a direct judicial intrusion into deliberations.

The district court's treatment of Juror 12 reflects another fundamental error. As the court instructed the jury, the defendants entered deliberations clothed in the presumption of innocence. It was the jurors' sworn duty to acquit the defendants unless the government proved guilt beyond a reasonable doubt. After just four hours of deliberations, "[t]here's no way in the world [the pro-conviction jurors] could have reviewed and considered all of the evidence in the case and [the court's] instructions on the law." JA 5994 (district court's comment concerning Juror 12). Nonetheless, after that brief interval eleven jurors were prepared to cast aside the presumption of innocence and vote to convict. *Those* are the jurors who had not performed their duty, not the juror who adhered to the presumption of innocence until convinced of guilt beyond a reasonable doubt. But the district court had no criticism of the pro-conviction jurors. It found fault only with the sole juror who had not yet been persuaded of the defendants' guilt.

The district court encountered a common circumstance in complex federal criminal cases: jurors weary after a lengthy trial, eager to conclude their service, and frustrated that they cannot reach a quick verdict and go home. What was needed was not an intrusive inquiry into the holdout juror or dismissal of that juror to facilitate a verdict. Instead, the court should have instructed the jurors to continue their deliberations and to consider each other's views without surrendering their own honestly held beliefs. *See, e.g.*, Third Circuit Model Criminal Jury Instructions,

Instruction 3.16 (fifth paragraph) (2017). With that calm directive, the jurors would have resumed their deliberations and either reached a unanimous verdict or ended in a deadlock.

By intruding into jury deliberations without the predicate this Court required in *Boone* and dismissing the sole holdout juror when there was far more than a "reasonable possibility that the allegations of misconduct stem[med] from the juror's view of the evidence," *Kemp*, 500 F.3d at 304, the district court undermined "the people's . . . control in the judiciary," *Blakely*, 542 U.S. at 305-06. The court's rulings violated defendants' rights under the Sixth Amendment and Rule 31(a). The convictions should be reversed.

## II. THE DISTRICT COURT SHOULD HAVE REFUSED TO SEND THE SPEAKING INDICTMENT TO THE JURY DURING DELIBERATIONS.

The district court committed an additional, closely related error: over defense objection, it sent multiple copies of the prosecution's 85-page speaking indictment into the jury room. As Juror 12 reported, the pro-conviction jurors used the indictment, contrary to the court's instruction, as a means of trying to convince him to change his vote. The court committed a clear abuse of discretion in submitting the indictment to the jury.

Rule 7(c)(1) of the Federal Rules of Criminal Procedure requires that an indictment provide a "plain, concise, and definite written statement of the essential

facts constituting the offense charged." For many offenses, the indictment can merely track the elements of the offense. In more complex cases, "it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,--it must descend to particulars." *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 558 (1876) (quotation omitted); *see, e.g.*, *Russell v. United States*, 369 U.S. 749, 765 (1962). Even in the most complicated cases, however, there is no requirement that an indictment contain a detailed recitation of the government's case. Instead, to the extent an indictment sufficient under Rule 7(c)(1) and the Fifth and Sixth Amendments does not adequately inform the defendant of the charges she faces or allow her to assert the protections of the Double Jeopardy Clause, the court can order the government to provide a bill of particulars under Rule 7(f). *See, e.g., United States v. Addonizio*, 451 F.2d 49, 64 (3d Cir. 1971).

Over the past two decades, however, the government has found a use for indictments beyond merely informing the defendant of the charges and permitting her to assert the protections of double jeopardy. The government now routinely uses "speaking" indictments to serve as an advocacy tool in the jury room. Courts permit this practice based on the assumption that the prejudice from a speaking indictment can be cured by instructing the jury that the indictment is not evidence. *See, e.g.*, Third Circuit Model Criminal Jury Instructions, Instruction 3.07 (2017) ("An

indictment is not evidence of anything, and you should not give any weight to the fact that [the defendant] has been indicted in making your decision in this case."). But the efficacy of such instructions is doubtful. No one would think that an instruction of this kind would cure the prejudice to the prosecution if, for example, a transcript of the defense closing argument were placed in the jury room during deliberations. There is no more reason to think that it cures the prejudice to the defense from placing a speaking indictment in the jury room.

This case confirms the inadequacy of instructions to prevent jurors from giving evidentiary weight to an indictment. Juror 12 told the Court, "I brang up evidence. They [the other jurors] said, that doesn't mean anything. They pointed to the indictment. I said, the indictment is not evidence." JA 5940. In other words, the pro-conviction jurors disregarded the court's instruction and urged the holdout juror to consider the indictment as evidence.

Rule 7(d) of the Federal Rules of Criminal Procedure permits the defense to move to strike surplusage from the indictment. On its face, this rule might seem a useful tool to mitigate the prejudice from a speaking indictment. In practice, however, Rule 7(d) provides scant protection. Allegations may be stricken from the indictment only if they are "*both* irrelevant (or immaterial) and prejudicial." *United States v. Hedgepeth*, 434 F.3d 609, 612 (3d Cir. 2006) (emphasis added). Under this

standard, a district court will refuse to strike even the most inflammatory and prejudicial allegations, as long as they meet the broad relevancy standard.

The district court took precisely that approach here. The defense moved pretrial under Rule 7(d) to strike surplusage from the indictment. *E.g.*, Docs. 122, 130, 131, 137. The court denied the motions. It found that "language that is relevant to the matters to be proven at trial is not 'surplusage,' even if it is merely 'in a general sense relevant to the overall scheme charged.'" Doc. 192 at 1-2 (quoting *United States v. Yeaman*, 987 F. Supp. 373, 376-77 (E.D. Pa. 1997)). The court emphasized that "[r]elevant language 'cannot be considered surplusage no matter how prejudicial it may be.'" Doc. 192 at 2 (quoting *Yeaman*). Applying these principles, the court found nothing in the 85-page indictment that constituted surplusage under Rule 7(d). Doc. 192 at 2. It thus submitted the entire indictment to the deliberating jury, with a few minor redactions to accommodate *Braswell* act of production concerns.

A speaking indictment in the jury room thus presents a significant risk of misuse--a risk that became reality here, as Juror 12 revealed. The means available to prevent that misuse--jury instructions and motions to strike under Rule 7(d)--proved inadequate in this case and are likely inadequate in most cases. No compelling need warrants incurring this risk. *See, e.g., United States v. Roy*, 473 F.3d 1232, 1237 n.2 (D.C. Cir. 2007) (the practice of submitting the indictment to the jury "often carries significant risks and has few corresponding benefits"). The

district court can convey the nature of the charges to the jury through jury instructions. *See, e.g., United States v. Esso*, 684 F.3d 347, 351 n.5 (2d Cir. 2012) ("In most cases, the judge's instructions regarding the issues to be addressed by the jury and the elements of the offenses charged, which may include a reading of the legally effective portions of the indictment, will more than suffice to apprise the jury of the charges before them."). Submitting the government's detailed statement of its version of the case, devoid of exculpatory evidence or any defense perspective, serves no purpose, is unfair to the defendant, and constitutes an abuse of the court's discretion.

## CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court and remand for a new trial.

DATED: August 14, 2017

Respectfully submitted,

*/s/ Alan Silber*
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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 3008 words. I further certify that undersigned counsel is a member of the Bar of this Court.

*/s/ Alan Silber*
Alan Silber
Attorney for Amicus Curiae
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/ Alan Silber*
Alan Silber