No.

In the Supreme Court of the United States

ROCKY DIETZ, PETITIONER

v.

HILLARY BOULDIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case.

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Rocky Dietz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 794 F.3d 1093.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case presents an expressly recognized circuit conflict on an important and recurring question regarding the propriety of recalling a discharged jury. After an automobile accident that left petitioner with significant injuries, petitioner brought suit against respondent in Montana state court, and the case was removed to the United States District Court for the District of Montana. Although respondent admitted responsibility for the accident and accepted liability for petitioner's medical expenses to date, the jury returned a verdict awarding petitioner $0 in damages. The judge discharged the jury, and the jurors left the courtroom; some of the jurors engaged in conversation with the court clerk, and at least one left the courthouse altogether. Upon realizing that the verdict was invalid in light of the facts and applicable law, the judge recalled the jurors, set aside their verdict, and instructed them to begin their deliberations anew. The reassembled jury returned a verdict awarding petitioner only $15,000 in damages.

The district court denied petitioner's motion for a mistrial, App., *infra*, 37a, and the Ninth Circuit affirmed, *id.* at 1a-17a. The Ninth Circuit recognized that a split of authority exists among the federal courts of appeals regarding whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case. *Id.* at 6a-10a. Joining the Second, Third, and Seventh Circuits and departing from the Fourth and Eighth Circuits, the Ninth Circuit held that the recall of discharged jurors in those circumstances was permissible. *Id.* at 10a-13a. Because this case presents an ideal vehicle for resolving that conflict, the petition for a writ of certiorari should be granted.

1. On August 9, 2009, petitioner was involved in an automobile accident with respondent at an intersection in Bozeman, Montana. Respondent ran a stoplight at the intersection and collided with the passenger side of petitioner's vehicle. The accident left petitioner with injuries to his lower back, resulting in severe back pain as well as radiating pain in his leg and hip. Petitioner required physical therapy, steroid injections, and prescription and non-prescription medications to address his injury. App., *infra*, 2a; Pet. C.A. Br. 6, 9-10; Resp. C.A. Br. 1.

2. On January 26, 2011, petitioner brought suit against respondent in Montana state court, asserting a claim of negligence. The case was removed to the United States District Court for the District of Montana on the basis of diversity jurisdiction.

The case proceeded to trial before a jury; with the parties' consent, a magistrate judge presided over the trial. Respondent admitted that he was at fault for the collision and that petitioner was injured as a result. Respondent also stipulated that petitioner's past medical expenses, in the amount of $10,136, were reasonable and related to the collision. App., *infra*, 2a; Pet. C.A. Br. 9, 11; Resp. C.A. Br. 4, 17.

The trial took place over two days. As a result of respondents' stipulations, the only disputed issue at trial was the amount of any *additional* damages that respondent owed petitioner, including future medical expenses. Petitioner presented evidence that he would continue to need regular physical therapy, injections, and medications to alleviate the pain he was experiencing; respondent argued that only some of petitioner's future medical expenses were related to the collision and that petitioner would not actually undertake all of the treatment he identified. In his closing argument, respondent's counsel suggested that the jury should award

petitioner an amount "somewhere between ten and $20,000" to account for the admitted amount of past medical expenses and for additional damages. App., *infra*, 2a; Pet. C.A. Br. 10-11; Resp. C.A. Br. 17-19.

During deliberations, the jury sent the judge a note asking: "Has the $10,136 medical expenses been paid; and if so, by whom?" App., *infra*, 2a-3a. The note caused the judge to question whether the jury understood that "their verdict may not be less than that amount," and the judge recognized that a verdict in less than the stipulated amount of damages "would be grounds for a mistrial." *Id.* at 3a. Despite that concern, the judge responded to the jury's note simply by informing the jury that the information it sought was not germane to the verdict. *Ibid.*

The jury returned a verdict in favor of petitioner but awarded him $0 in damages. App., *infra*, 3a, 22a, 24a. The judge promptly thanked the jury for its service and ordered it "discharged," telling the jurors they were "free to go." *Id.* at 25a. The court then recessed. *Ibid.*

3. After recessing, the judge realized that the verdict awarding petitioner $0 in damages was not "legally possible" in light of the stipulated amount of damages, and called the jurors back. App., *infra*, 26a. Having summoned counsel to chambers, the judge acknowledged the problem with the verdict and stated that "[a] motion[] for a new trial * * * very likely would be granted" on such facts. *Ibid.* To avoid doing that, the judge decided, over the strenuous objections of petitioner's counsel, to "send the jury back into deliberations" to reach a valid verdict. *Id.* at 26a-29a.

Between the time of their discharge and recall by the judge, the jurors left the courtroom and were permitted to mingle with non-jurors under no instructions or restrictions from the judge. App., *infra*, 25a. Some of the

jurors were seen speaking with the court clerk. *Id.* at 26a-27a. According to the clerk, at least one juror "left the building to go get his hotel receipt" and bring it back. *Id.* at 28a.

Upon the jurors' return to the courtroom, the judge asked the jurors as a group whether they "talked to anybody about the case outside [their] immediate numbers," to which the jurors answered no. App., *infra*, 31a. The judge did not question each juror individually or ask what each juror did after the discharge. *Ibid.* The judge then informed the jurors that, in order to "salvage the work and the expense that's gone on to this point," he was reempaneling the jury. *Ibid.* He instructed the jury that its verdict was "not possible" under "the law and the facts of this case," and further instructed that its verdict must be "$10,136.75 plus some other and additional reasonable amount as compensation for the injury." *Id.* at 30a. In response to those instructions, a juror protested that the jury had sought that information in its note during deliberations but had received no guidance in response. *Id.* at 32a. The judge disputed the clarity of the jury's note but ultimately "accept[ed] the blame" for "not making this more clear" before the jury delivered its verdict. *Ibid.*

The jurors returned the next morning to begin new deliberations in order to reach a different verdict. Petitioner's counsel renewed his objection to recalling the jurors after discharge and moved for a mistrial. App., *infra*, 35a. The court denied the motion. *Id.* at 37a.

The same day, the reassembled jury returned a verdict awarding petitioner only $15,000 in damages. App., *infra*, 38a, 40a. The district court entered judgment in favor of petitioner in that amount. *Id.* at 21a.

4. Petitioner appealed, contending that the recall of the discharged jurors was impermissible. The court of

appeals affirmed. App., *infra*, 1a-17a. It held that a judge may recall jurors for further service after discharging them as long as the judge "inquir[es] to determine that the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict." *Id.* at 12a.

a. At the outset, the court of appeals acknowledged that the circuits were divided on the question whether the recall of discharged jurors who have left the judge's presence was permissible. App., *infra*, 6a-10a. In particular, the court of appeals noted that the Eighth Circuit and some state courts had adopted a "bright-line rule prohibiting recall once the jurors have left the confines of the courtroom" after being discharged. *Id.* at 9a (citing *Wagner* v. *Jones*, 758 F.3d 1030, 1035 (8th Cir. 2014), cert. denied, 135 S. Ct. 1529 (2015)). By contrast, the court of appeals observed that other courts, including the Second, Third, and Seventh Circuits, had adopted a "totality of the circumstances" approach, under which discharged jurors could be recalled absent evidence that the jurors "were exposed to prejudicial outside influence before the recall." *Id.* at 6a (citing *United States* v. *Rojas*, 617 F.3d 669, 677 (2d Cir. 2010); *United States* v. *Figueroa*, 683 F.3d 69, 73 (3d Cir. 2012); and *United States* v. *Marinari*, 32 F.3d 1209, 1215 (7th Cir. 1994)).

The court of appeals adopted the latter rule and rejected the rule followed by the Eighth Circuit and other courts. App., *infra*, 10a-13a. The court of appeals acknowledged that "there are some advantages to the Eighth Circuit's rule": in particular, it "offers better guidance than an amorphous rule," "is more straightforward to apply," and "better protects against improper external influence." *Id.* at 10a, 11a (internal quotation marks and citations omitted). Yet the court of appeals declined to adopt that rule, on the ground that, while the

"potential for prejudicial influence" exists as soon as jurors have been discharged, that potential may not be realized between the time of discharge and recall in any given case. *Id.* at 11a.

In the court of appeals' view, allowing a judge to recall discharged jurors if the judge determined that the jurors were not exposed to outside influences after discharge struck a "sensible balance" between "fairness and economy" and provided "a cost-effective alternative to an expensive new trial." App., *infra*, 11a. The court instructed that, in evaluating whether recall is permissible, a judge should determine "whether recalling the jury would result in prejudice to the [parties] or undermine the confidence of the court—or of the public—in the verdict." *Id.* at 13a (alteration in original) (quoting *Rojas*, 617 F.3d at 677).

Applying that rule to this case, the court of appeals concluded that recalling the discharged jurors to deliberate anew and reach a different verdict was permissible because the judge's collective questioning of the jurors had revealed "no evidence the jury had been tainted by improper influence" during its dismissal. App., *infra*, 16a. At the same time, the court cautioned that recall should be "the exception rather than the convenient rule, lest the sanctity of untainted jury deliberations be compromised." *Id.* at 12a.[1]

b. Judge Bea concurred in the judgment. App., *infra*, 18a-20a. He agreed that discharged jurors could be recalled absent evidence of prejudice, but he disagreed

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[1] The court of appeals rejected other grounds for reversal advanced by petitioner in an unpublished opinion. See 610 Fed. Appx. 637 (9th Cir. 2015). Petitioner does not renew any of those grounds in this petition.

that the judge was affirmatively obligated to inquire into prejudice *sua sponte*. *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

This case presents a mature conflict on an important and recurring question regarding whether (and, if so, under what circumstances) a judge may recall discharged jurors for further service in a case. In the decision under review, the Ninth Circuit expressly recognized a conflict in the federal courts of appeals on whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case. The Ninth Circuit's decision conflicts with decisions of the Fourth and Eighth Circuits but is consistent with decisions of Second, Third, and Seventh Circuits. What is more, state courts of last resort are deeply divided on the question, with the clear majority of the state courts to have considered the issue holding that the recall of discharged jurors is impermissible under such circumstances.

The conflict on the question presented warrants the Court's review in this case. The question presented is one of substantial practical and legal importance. And this case is an optimal vehicle for consideration and resolution of that question, because it involves ideal facts for establishing a rule regarding the recall of discharged jurors. The petition for certiorari should therefore be granted.

A. The Decision Below Deepens A Conflict On The Question Presented

In this case, the Ninth Circuit expressly recognized the existence of a conflict on the question whether a judge may recall jurors for further service after the judge has discharged the jury and the jurors have left

the judge's presence. See App., *infra*, 6a-10a. This Court's review is warranted to resolve that conflict.

1. a. As the Ninth Circuit noted, see App., *infra*, 9a-10a, the Eighth Circuit has categorically held that a judge may not recall jurors to "render, reconsider, amend, or clarify" a verdict after the judge has discharged the jury and the jurors have "left the courtroom." *Wagner* v. *Jones*, 758 F.3d 1030, 1035-1036 (8th Cir. 2014), cert. denied, 135 S. Ct. 1529 (2015).

In *Wagner*, the plaintiff sued the defendant on two claims of employment discrimination under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, respectively. See 758 F.3d at 1032. After the jury repeatedly informed the presiding magistrate judge that it could not reach agreement, the judge declared a mistrial and discharged the jury, and the jurors dispersed. See *id.* at 1032-1033. Two minutes later, however, the judge reassembled the jurors in the courtroom; the record did not indicate the jurors' location or conduct during the intervening moments. See *id.* at 1033 & n.5. The judge then inquired whether the jury's inability to reach a verdict applied to both counts—which he had failed to do before discharging the jury. See *id.* at 1033. The jurors informed the judge that they had reached a verdict for the defendant on the First Amendment claim but had been unable to agree on the Fourteenth Amendment claim. See *ibid.* The judge duly entered judgment on the First Amendment claim and limited his previous mistrial ruling to the Fourteenth Amendment claim. See *ibid.*

The Eighth Circuit reversed, holding that the plaintiff was entitled to a mistrial on both counts because the judge could not recall the jury after discharge. See 758 F.3d at 1037. The Eighth Circuit acknowledged that other courts of appeals had applied a "case-specific anal-

ysis" to determine "whether the jurors became susceptible to outside influences * * * once discharged." *Id.* at 1034 (internal quotation marks and citation omitted). But it rejected that approach and adopted the rule that, "[w]hen the court announces [the jury's] discharge, and they leave the presence of the court, their functions as jurors have ended, and neither with nor without the consent of the court can they amend or alter their verdict." *Ibid.* (alterations in original) (quoting *Melton* v. *Commonwealth*, 111 S.E. 291, 294 (Va. 1922)).

The Eighth Circuit based its "bright line rule" on the concern that jurors would have the "opportunity" to encounter outside influences when no longer bound by their oath, regardless of whether such an encounter had actually occurred and influenced a juror before recall. 758 F.3d at 1035 & n.9. According to the Eighth Circuit, its rule was "more faithful to precedent"; better accounted for "this age of instant individualized electronic communication"; and "offer[ed] better guidance than an amorphous rule that turns on whether jurors in fact became available for or were susceptible to outside influences." *Id.* at 1035. Under the Eighth Circuit's rule, this case would plainly have come out the other way, because the judge had discharged the jury and the jurors had left the courtroom before the judge recalled them. See pp. 4-5, *supra*.

b. In the progenitor of federal decisions on the subject, the Fourth Circuit adopted a rule under which a jury may not be recalled after discharge once the jurors have left the judge's presence. See *Summers* v. *United States*, 11 F.2d 583, 586 (4th Cir.), cert. denied, 271 U.S. 681 (1926).

In *Summers*, after the jury rendered its verdict in a criminal case and the judge announced it was discharged, but while the jurors were still in their seats, de-

fense counsel moved to set aside the verdict on the ground that the defendant had been absent when a supplemental instruction was read to the jury, in contravention of his right to be present for every stage of the proceedings. See 11 F.2d at 585-586. The judge agreed and set aside the verdict. See *id.* at 586. The judge proceeded to read the relevant instruction in the presence of the defendant and sent the jury to deliberate again; the jury then returned a verdict identical to the previous verdict. See *ibid.*

The Fourth Circuit affirmed on the ground that, although the judge had pronounced the jury discharged, the jury remained an "undispersed unit, within control of the court." 11 F.2d at 586. Citing decisions on the subject from state courts, the Fourth Circuit observed that, as long as the jury remains "in the presence of the court," the order of discharge may be revoked. *Id.* at 587. The Fourth Circuit further explained that a jury has been "irrevocably discharged" when jurors are "allowed to disperse and mingle with the bystanders, with time and opportunity for discussion of the case, *whether such discussion be had or not*." *Id.* at 586 (emphasis added). Under the Fourth Circuit's rule, therefore, this case plainly would have come out the other way as well, because the jurors had left the courtroom (and mingled with non-jurors outside the judge's control) before the judge recalled them. See pp. 4-5, *supra*.

2. By contrast, as the Ninth Circuit expressly recognized in the decision below (and as the Eighth Circuit recognized in *Wagner*), other courts of appeals have held that a judge may recall jurors after the judge has discharged the jury from service and the jurors have left the judge's presence. See App., *infra*, 7a-9a; *Wagner*, 758 F.3d at 1034.

a. In *United States* v. *Figueroa*, 683 F.3d 69 (2012), the Third Circuit affirmed the judge's recall of the jury to hear evidence, deliberate, and render a verdict on an additional count of the indictment, which had been bifurcated from the other counts. See *id.* at 72. The jury found the defendant guilty on two counts and hung on the third count; the judge declared a mistrial on the third count and discharged the jury. After the jurors left the courtroom, the government requested that the jurors be held so that the fourth, bifurcated count could be discussed. See *ibid.* The judge then sent a court employee to reassemble the jurors, and the judge ultimately reempaneled them for further proceedings. See *ibid.*

The Third Circuit held that, because the discharged jurors did not "interact with any outside individuals, ideas, or coverage of the proceedings," the recall of the jurors was permissible. 683 F.3d at 73. The Third Circuit recognized that, upon their release, jurors are no longer within the "protective shield" imposed by the judge throughout the proceedings to protect them from outside influences. *Ibid.* But the Third Circuit reasoned that the "pivotal inquiry" was "whether the jurors became susceptible to outside influences." *Ibid.* Because the discharged jurors were not "subject * * * to outside influence" while they were discharged, the Third Circuit upheld the jurors' recall. *Ibid.*

b. Although they have not gone as far as the Third Circuit in *Figueroa* (or the Ninth Circuit in this case), the Second and Seventh Circuits have both permitted the recall of discharged jurors even after the jurors have left the judge's presence. In *United States* v. *Marinari*, 32 F.3d 1209 (7th Cir. 1994), the judge denied the defendant's request to poll the jury after it had delivered its verdict and been officially discharged; the jurors had left the courtroom but remained in the jury room await-

ing a security escort to the parking lot. See *id.* at 1210, 1212. The Seventh Circuit held that the judge erred in denying the request because, until the jurors dispersed, "the verdict remain[ed] subject to review." *Id.* at 1214 (citing *Putnam Resources* v. *Pateman*, 958 F.2d 448, 459 (1st Cir. 1992)).[2] The Seventh Circuit reasoned that it was only when the jurors "separat[ed] and dispers[ed]" that they could actually be "exposed to outside contacts" and thus could not be recalled. *Ibid.*

Similarly, in *United States* v. *Rojas*, 617 F.3d 669 (2d Cir. 2010), the courtroom deputy misread the jury's verdict form, omitting the word "base" from the jury's specific finding that the drug involved was cocaine base. See *id.* at 673. The jury was polled and stated its agreement with the verdict as read. See *ibid.* The judge then discharged the jury, and the jurors returned to the deliberation room to await the judge, who was going to thank them for their service. See *ibid.* After realizing the error, the judge recalled the jurors to have the verdict form reread correctly and the jurors repolled. See *ibid.*

The Second Circuit upheld the conviction, stating that, in determining whether recall of discharged jurors was permissible, a court "must evaluate the specific scenario presented" to determine whether recall would prejudice the parties or undermine confidence in the verdict. 617 F.3d at 677. The Second Circuit determined that the jurors had not been "exposed to outside factors" and that it could "be confident that no further delibera-

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[2] In *Putnam Resources*, the First Circuit stated in dicta that "[r]eassembly [of the jury] was a distinct possibility" where the jury had not dispersed. 958 F.2d at 457. But the First Circuit ultimately held that, by failing to request recall of the jury, the plaintiff had waived his objection to a potential deficiency in the verdict form. See *ibid.*

tion took place" during the short time that the jurors had been discharged. *Id.* at 678. Accordingly, the Second Circuit held that the recall was permissible, at least for the limited purpose of allowing the jury to clarify its previously issued verdict. See *id.* at 678 & n.3.

3. Beyond the conflict among the federal courts of appeals, state courts of last resort have long been intractably divided on the question presented. Almost half of the state courts of last resort have addressed the question, with the clear majority of those courts adopting a bright-line rule similar to the Eighth Circuit's.

Fifteen state courts of last resort have held that a judge may not recall discharged jurors once they have left the judge's presence and control, with many of those courts expressly stating that it is irrelevant whether the jurors were exposed to outside influences or otherwise prejudiced during the period of discharge. See *T.D.M.* v. *State*, 117 So. 3d 933, 938-940 (Ala. 2011); *Spears* v. *Mills*, 69 S.W.3d 407, 410-414 (Ark. 2002); *People* v. *Hendricks*, 737 P.2d 1350, 1358-1360 (Cal. 1987); *Montanez* v. *People*, 966 P.2d 1035, 1036-1037 (Colo. 1998); *Lahaina Fashions, Inc.* v. *Bank of Hawaii*, 319 P.3d 356, 367-368 (Haw.), cert. denied, 134 S. Ct. 2826 (2014); *State* v. *Fornea*, 140 So. 2d 381, 383 (La. 1962); *Nails* v. *S&R, Inc.*, 639 A.2d 660, 665-667 (Md. 1994); *Pumphrey* v. *Empire Lath & Plaster*, 135 P.3d 797, 802-805 (Mont. 2006); *Harrell* v. *State*, 278 P. 404, 406 (Okla. Crim. App. 1929); *Commonwealth* v. *Johnson*, 59 A.2d 128, 130 (Pa. 1948); *Newport Fisherman's Supply Co.* v. *Derecktor*, 569 A.2d 1051, 1052-1053 (R.I. 1990); *State* v. *Myers*, 459 S.E.2d 304, 305 (S.C. 1995); *State* v. *Nash*, 294 S.W.3d 541, 550-553 (Tenn. 2009); *Webber* v. *State*, 652 S.W.2d 781, 782 (Tex. Crim. App. 1983); *Melton* v. *Commonwealth*, 111 S.E. 291, 293-294 (Va. 1922). An additional three state courts of last resort have gone even further

and drawn the line at the point at which the judge announces the jury's discharge. See *West* v. *State*, 92 N.E.2d 852, 855 (Ind. 1950); *Sargent* v. *State*, 11 Ohio 472, 473-474 (1842); *Yonker* v. *Grimm*, 133 S.E. 695, 697-698 (W. Va. 1926).

By contrast, five state courts of last resort have held that a judge may recall discharged jurors even if the jurors have left the judge's presence and control, as long as the jurors were not exposed to outside influences during the period of discharge. See *Lapham* v. *Eastern Massachusetts Street Railway Co.*, 179 N.E.2d 589, 591 (Mass. 1962); *Anderson* v. *State*, 95 So. 2d 465, 467-468 (Miss. 1957); *Sierra Foods* v. *Williams*, 816 P.2d 466, 467 (Nev. 1991); *Drop Anchor Realty Trust* v. *Hartford Fire Insurance Co.*, 496 A.2d 339, 345-346 (N.H. 1985); *State* v. *Rodriguez*, 134 P.3d 737, 739-741 (N.M. 2006).

4. As matters currently stand, therefore, judges across the country are subject to inconsistent rules concerning the circumstances under which they are permitted to recall discharged jurors. Federal judges in the Fourth and Eighth Circuits may not recall discharged jurors after they have left the judge's presence, but judges in the Second, Third, Seventh, and Ninth Circuits are permitted to do so. Indeed, in the instant case, the Ninth Circuit adopted arguably the most permissive standard of any of the federal circuits, because it approved the recall of jurors who, according to the uncontroverted record, had not only left the judge's presence but also mingled with non-jurors outside the judge's control. The entrenched conflict on the propriety of recalling discharged jurors warrants this Court's review.

B. The Question Presented Is An Important And Recurring One That Warrants Review In This Case

The question presented here—whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case—is a frequently recurring question of fundamental importance to the operation of jury trials in this country. That question is ripe for the Court's consideration in this case.

1. The question presented is a recurring one of substantial legal and practical importance. The recall of discharged jurors raises concerns about the basic fairness of jury trials in both civil and criminal cases. As then-Chief Judge Cardozo put it, when a jury has been discharged from its duties and is no longer under the judge's supervision, "it has ceased to be a jury, and, if its members happen to come together again, they are there as individuals, and no longer as an organized group, an arm or agency of the law." *Porret* v. *City of New York*, 169 N.E. 280, 280 (N.Y. 1929). Upon discharge, jurors are no longer bound by their oath or the judge's instructions and may be exposed to outside opinions and evidence. See *Marinari*, 32 F.3d at 1214. Even if jurors are not subject to outside influences, moreover, they may simply change their minds after delivering the verdict and being discharged from service in the case. See *Wagner*, 758 F.3d at 1036.

The question whether (and, if so, under what circumstances) a judge may recall discharged jurors thus directly implicates the "fundamental guaranty of a fair trial," as embodied in the constitutional right to a jury trial as well as the broader right to due process. *Nash*, 294 S.W.3d at 553; see *Hendricks*, 737 P.2d at 1358. Put another way, the question presented by this case is what level of protection is necessary to preserve that right. As

noted above, a majority of the courts nationwide to have addressed the question have determined that a bright-line rule forbidding recall after discharged jurors have left the judge's presence and control "strikes the proper balance between the pursuit of substantive justice and the need to maintain confidence in the sanctity of jury verdicts," *Pumphrey*, 135 P.3d at 804, in light of the "paramount consideration * * * that the jury be free from even the appearance of taint or outside influences," *Spears*, 69 S.W.3d at 413. Such a bright-line rule promotes the finality of jury verdicts instead of fostering protracted post-trial litigation. If a jury could be reempaneled after discharge, jurors "would be harassed and beset by the defeated party," *McDonald* v. *Pless*, 238 U.S. 264, 267 (1915), with "serious potential for confusion, unintended compulsion and, indeed, coercion," *Wagner*, 758 F.3d at 1036.

It should go without saying, moreover, that the practical consequences of recalling discharged jurors are enormous. In cases such as this one, the result of applying the conflicting rules concerning the recall of discharged jurors is the difference between a potentially tainted verdict and a new trial. Indeed, this case is a particularly egregious example, because the potentially tainted verdict was issued by the same jury that had previously issued a verdict so unfavorable to petitioner as to be invalid. The question presented thus has significant implications for litigants, courts, and the public perceptions of fairness of the judicial system.

The question whether judges may recall discharged jurors also arises with remarkable—and unfortunate—frequency. As one court observed almost a decade ago, there are a "surprising number of cases" in which judges have sought to reempanel discharged juries to amend or clarify earlier verdicts. *Rodriguez*, 134 P.3d at 739 (in-

ternal quotation marks and citation omitted). In fact, since that observation was made, the question presented has been addressed by four additional federal courts of appeals (and three additional state courts of last resort). See App., *infra*, 10a-13a; *Wagner*, 758 F.3d at 1036; *Figueroa*, 683 F.3d at 73; *Rojas*, 617 F.3d at 676-677; *Lahaina Fashions*, 319 P.3d at 358; *T.D.M.*, 117 So. 3d at 935; *Nash*, 294 S.W.3d at 543. The Court should grant review to resolve that important and recurring question.

2. a. The question presented is ripe for the Court's consideration, and this case constitutes an optimal vehicle in which to resolve it. The decisions from six federal courts of appeals (and at least 23 state courts of last resort) have fully developed the relevant arguments on both sides of the question, and further percolation is exceedingly unlikely to be of any benefit.

This case, moreover, is the ideal vehicle for deciding the question presented because it raises that question in particularly clean and stark terms. It is undisputed that the jury's initial verdict in this case was invalid. See App., *infra*, 28a. And the invalidity of the verdict was not the result of a mere clerical error; as the court of appeals observed, in order to reach a valid verdict, the recalled jurors were required to "deliberate anew upon a substantive matter." *Id.* at 16a. In addition, by the time the judge recalled the jurors, they had already dispersed. All of the jurors had left the courtroom; some of the jurors had engaged in conversation with the court clerk; and at least one had apparently left the courthouse altogether. See *id.* at 25a-28a. When the judge asked the reassembled jurors as a group what had happened during the period between their discharge and recall, they assured the judge that they had encountered no prejudicial influences. See *id.* at 31a. This case thus squarely presents the Court with the opportunity to de-

cide whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence (and, indeed, are outside the judge's control), the judge may recall the jurors for further service in the same case—here, for the purpose of reopening their deliberations and issuing a new verdict.

b. To the best of our knowledge, despite the frequency with which the question presented arises in the lower courts, the Court has had only one previous opportunity since the conflict has arisen to consider a version of that question, in *Wagner*, *supra*.[3] Although the Court denied the petition in *Wagner*, this case is a vastly superior vehicle for further review, for three reasons.

First, to state the obvious, the Ninth Circuit's decision in this case deepens the conflict that existed at the time of the petition in *Wagner*. The Ninth Circuit expressly acknowledged the conflict, see App., *infra*, 9a-10a, and proceeded specifically to reject the rule adopted by the Eighth Circuit in *Wagner*, see *id.* at 10a-13a. To the extent there was any doubt about the existence of a conflict at the time of *Wagner*, therefore, the Ninth Circuit's decision dispels it.

Second, the petitioners in *Wagner* took issue with the Eighth Circuit's characterization of the facts of the case, arguing that the jurors remained an undispersed unit within the judge's control (and, for that reason, that the jurors' recall was permissible). See Pet. at ii, *Wagner*, *supra* (No. 14-615). As a result, the respondent in *Wagner* was able to argue that, as a result of the asserted

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[3] While a petition for certiorari was also filed in *Lahaina Fashions*, *supra*, it presented distinct questions focusing on the validity of the *initial* verdict. See Pet. at 20-24, *Lahaina Fashions*, *supra* (No. 13-1295).

ambiguity in the record, it was not clear whether there was a conflict between the Eighth Circuit's decision and the decisions cited by the petitioners. See Br. in Opp. at 8, *Wagner*, *supra*. Here, by contrast, it is indisputably the case that the jurors had left the courtroom (and had mingled with non-jurors outside the judge's control) before they were recalled. See pp. 4-5, *supra*. For that reason, the Ninth Circuit's decision in this case unambiguously conflicts with the Eighth Circuit's decision in *Wagner*, which announced a "bright-line rule prohibiting recall once the jurors have left the confines of the courtroom." App., *infra*, 9a.

Third, *Wagner* raised a complication that is not present here. Applying its rule, the Eighth Circuit remanded the case for a new trial on the ground that the recall of the discharged jurors was impermissible. 758 F.3d at 1037. The Eighth Circuit, however, proceeded to question whether the district court had properly instructed the jury on the burden-shifting framework applicable to the plaintiff's First Amendment claim, and it "direct[ed] the district court to revisit th[o]se instructions" on remand. *Ibid.* As the respondent in *Wagner* pointed out, therefore, it was "almost certain[]" that the Eighth Circuit would have granted a new trial anyway on that independent ground. See Br. in Opp. at 20, *Wagner*, *supra*. Here, the Ninth Circuit denied petitioner a new trial, and the judgment below is in all respects final.

This case thus cleanly and squarely presents the question whether a judge may recall discharged jurors for further service after the jurors have left the judge's presence. And it cannot be disputed that there is a circuit conflict on that important and recurring question. Accordingly, the Court should grant the petition for certiorari and answer that question here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2015

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-35377

Rocky Dietz, Plaintiff-Appellant

v.

Hillary Bouldin, Defendant-Appellee

July 24, 2015

Before: FISHER, BEA, and MURGUIA, Circuit Judges.

OPINION

FISHER, Circuit Judge.

We consider, as a matter of first impression in this circuit, whether a jury can be recalled shortly after it has been ordered discharged. Joining the majority of circuit courts to have decided the issue, we hold a district court may re-empanel a jury shortly after dismissal, but only if, during the period of dismissal, the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict.

BACKGROUND

Hillary Bouldin's vehicle collided with Rocky Dietz's in August 2009. Dietz subsequently filed a negligence complaint in Montana state court against Bouldin for "injuries including to his low back" and "physical pain, suffering, grief, anxiety and a loss of course of life" stemming from the accident. The case was subsequently removed to federal court.

Before trial, Bouldin admitted he was at fault and that Dietz was injured as a result of the accident. The parties stipulated to $10,136 in past expenses Dietz incurred as a result of the accident. The only disputed issue at trial was the amount of future damages Bouldin owed Dietz. Dietz presented evidence he would need regular physical therapy, medication and injections to alleviate the pain he was experiencing following the accident. Bouldin emphasized that Dietz had a long list of medical conditions predating the collision, that only some of his medical expenses were related to the accident and that he was exaggerating the amount of treatment he would actually seek.

During closing argument, Bouldin's counsel reminded the jury of the stipulated amount of past damages and explained that its award additionally had to include the reasonable value of necessary care, treatment and services received and those reasonably probable to be required in the future. He suggested the jury award Dietz an amount "somewhere between ten and $20,000, depending on what you feel his relief is, what level of pain he has, and how his condition has been affected by this automobile accident."

During deliberations, a juror sent the following question to the judge: "Has the $10,136 medical expenses

been paid; and if so, by whom?" The court responded that the information was not germane to the jury's verdict. Speaking to the parties' counsel, the court then observed:

> What I'm wondering—[l]et's just do a little speculating on our own. If we end up with a verdict in less than that amount, and I can't believe that would happen, but if this is what we're heading toward, that would be grounds for a mistrial and I don't want a mistrial. Do you think they understand clearly, after the argument and the instructions, that their verdict may not be less than that amount?

Bouldin's counsel said he had made the point "crystal clear," and the court agreed. Accordingly, the court took no further action to instruct the jury to award at least $10,136 in damages. The jury returned with a verdict, finding for Dietz but awarding him damages in the amount of $0. The court asked counsel if they would like the jury polled, and both declined. The court then thanked the jurors for their time, told them they were "free to go," discharged them and recessed. Realizing the verdict was a legal impossibility given the stipulated damages exceeded $10,000, the court quickly called back the jurors, noting for the record it was doing so "moments after having dismissed them." It told the jurors their verdict violated the stipulation, inquired whether any of them had experienced undue outside influence in the period following dismissal and, when they collectively responded they had not, ordered them to reconvene the following morning to issue a new verdict consistent with the stipulation. Dietz objected to this procedure and moved for a mistrial, arguing recall was not appropriate because the jury had been dismissed. The jury again

found for Dietz and awarded him damages in the sum of $15,000. Dietz timely appealed.

DISCUSSION

Dietz argues the district court erred by recalling the jury after it had already been dismissed. Given the circumstances here, where the court promptly recalled the jurors, questioned them and found they were not exposed to prejudicial influence during the brief duration of their dismissal, we conclude the recall was not an abuse of discretion. We thus affirm the judgment.[1]

I. Standard of review

We first address the correct standard of review for a district court's decision to re-empanel discharged jurors. Dietz argues "the judgment is void because the district court acted in a manner inconsistent with due process of law," so we must review de novo the district court's decision to re-empanel the jurors. Bouldin counters that the correct standard should be abuse of discretion because Dietz requests a new trial based on an alleged error committed by the district court.

Federal Rule of Civil Procedure 60(b)(4) provides relief from a final judgment if it is void as a matter of law. The list of such judgments is "exceedingly short," and "Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United*

[1] We address Dietz's remaining arguments in a concurrently filed memorandum disposition.

Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 271 (2010).

Here, Dietz does not allege that the court lacked jurisdiction to enter the judgment or that he was deprived of notice or an opportunity to be heard. Instead, he argues the court should have granted his motion for a mistrial because the verdict did not comply with the stipulated damages. Denials of motions for mistrial are reviewed for abuse of discretion. *See United States v. Hagege*, 437 F.3d 943, 958–59 (9th Cir. 2006). Therefore, that is the standard of review we apply here.

II. Legal standard

Our circuit has not yet addressed when a district court abuses its discretion by recalling jurors after dismissing them.[2] Therefore, we must decide what legal standard governs our analysis.

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[2] We have upheld the district court's decision to reconvene a jury five weeks after trial to clarify an ambiguous verdict. *See E.F. Hutton & Co. v. Arnebergh*, 775 F.2d 1061, 1063–64 (9th Cir. 1985). In that case, however, we did not need to reach the issue of whether such a recall was permissible because the parties had stipulated to the procedure. *See id.* at 1064.

We have also encountered the question of jury reassembly in other contexts. *See, e.g.*, *Harrison v. Gillespie*, 596 F.3d 551, 574–75 (9th Cir. 2010) (refusing to allow jury to be reconvened three years after death penalty trial), *rev'd on other grounds en banc*, 640 F.3d 888 (9th Cir. 2011); *United States v. Boone*, 951 F.2d 1526, 1532 (9th Cir. 1991) (rejecting proposal to reconvene a jury for polling over two years after the trial had ended); *United States v. Washington*, 819 F.2d 221, 224–25 (9th Cir. 1987) (refusing to recall jury two years after trial to question individual jurors about potential prejudice).

Typically, a jury is no longer an entity after the court discharges it, and its duties "are presumed to be at an end when its verdict has been rendered, received, and published." *Summers v. United States*, 11 F.2d 583, 586 (4th Cir. 1926). When the jury has "been discharged altogether and relieved, by the instructions of the judge, of any duty to return . . . . it has ceased to be a jury, and, if its members happen to come together again, they are there as individuals, and no longer as an organized group, an arm or agency of the law." *Porret v. City of New York*, 169 N.E. 280, 280 (N.Y. 1929) (opinion of Cardozo, C.J.). Correspondingly, the "protective shield" imposed by the district court, which prevents jurors from being subjected to prejudicial outside influences, is removed upon dismissal. *United States v. Figueroa*, 683 F.3d 69, 73 (3d Cir. 2012); *see also United States v. Marinari*, 32 F.3d 1209, 1214 (7th Cir. 1994) (observing that "after discharge, the jurors are quite properly free to discuss the case with whomever they choose").

Nevertheless, several courts have recognized that in certain limited circumstances, a district court may recall a jury immediately after dismissal to correct an error in its verdict. *See Figueroa*, 683 F.3d at 73; *United States v. Rojas*, 617 F.3d 669, 677 (2d Cir. 2010); *Marinari*, 32 F.3d at 1215. These courts look at the totality of circumstances to determine whether the jurors were exposed to prejudicial outside influence before the recall. *See Wagner v. Jones*, 758 F.3d 1030, 1034 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 1529 (2015) ("One line of authority . . . requires a case-specific analysis of 'whether the jurors became susceptible to outside influences and [were] beyond the control of the court once discharged.'" (quoting *Figueroa*, 683 F.3d at 73)). This line of cases appears to originate from *Summers v. United States*, 11 F.2d 583.

In *Summers*, immediately after the district court pronounced the jury discharged but before the jurors dispersed, the court realized it had read one of the charges to the jury outside the presence of the defendant. *See* 11 F.2d at 586. Because the jurors had not yet left their seats, the court set aside the verdict, reread the charge in the presence of the defendant and sent the jurors to deliberate anew. *See id.* The defendant objected, contending this process was improper because the jury had been discharged. *See id.* The court observed it would be "guilty of a very technical ruling" if it held the jury was dismissed before it had even left the box. *See id.* The Fourth Circuit sustained the court's actions, holding that a jury

> may remain undischarged and retain its functions, though discharge may have been spoken by the court, if, after such announcement, it remains an undispersed unit, within control of the court, with no opportunity to mingle with or discuss the case with others, and particularly where, as here, the very case upon which it has been impaneled is still under discussion by the court, without the intervention of any other business.

Id.

Other circuits have extended the *Summers* rule to situations where the jurors have been released but effectively remained under control of the court.[3] For example,

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[3] In *Summers*, the jurors had not yet left the jury box and therefore had no "'opportunity' to encounter an outside influence." *Wagner*, 758 F.3d at 1035 n.9 (quoting *Summers*, 11 F.2d at 586). As the Eighth Circuit explained, "[i]n any meaningful sense, once a juror leaves direct judicial supervision in the courtroom, he or she virtual-

the Third Circuit upheld a district court's decision to re-empanel a jury where the court "immediately sent a court employee to hold the jury" after initially releasing it. *Figueroa*, 683 F.3d at 72. The court considered the "pivotal inquiry" to be whether the jury "became susceptible to outside influences" during the dismissal. *Id.* at 73 (noting "[t]he jurors did not disperse and interact with any outside individuals, ideas, or coverage of the proceedings").

Similarly, the Second Circuit upheld a district court's decision to reconvene a dismissed jury to clarify a technical error in the verdict. *See Rojas*, 617 F.3d at 677. The court was informed of the error six minutes after the jurors had been discharged, at which point they had returned to the deliberation room. *See id.* at 673, 678 n.3. The circuit court noted the jurors had not been "exposed to outside factors" during the brief discharge, so recall was proper. *See id.* at 678 (internal quotation marks omitted).

The Seventh Circuit has also recognized that "[u]ntil the jury is actually discharged by separating or dispersing (not merely [by] being declared discharged), the verdict remains subject to review." *Marinari*, 32 F.3d at 1214. In that case, defense counsel requested a poll of the jury after the jurors had left the courtroom, but while they remained sequestered in the jury room await-

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ly always has the 'opportunity' to encounter outside influences." *Id.* *Summers* did not address whether jurors who had briefly left the courtroom could validly be recalled. Later cases have relied on *Summers* for the more basic proposition that a jury may be recalled shortly after it has been discharged if it was not exposed to prejudicial outside influences during dismissal, even where jurors have left the courtroom. *See, e.g.*, *Figueroa*, 683 F.3d at 73.

ing a security escort to the parking lot. *See id.* at 1215. The court concluded that, although the jurors had been declared dismissed, they "had not dispersed and they remained untainted by any outside contact." *Id.* Thus, they were available to be recalled and polled. *See id.*

By contrast, a handful of state courts and, most recently, the Eighth Circuit, have eschewed this case-specific analysis and instead adopted a restrictive bright-line rule prohibiting recall once the jurors have left the confines of the courtroom. *See Wagner*, 758 F.3d at 1035 ("[W]here a court declares a mistrial and discharges the jury which then disperses from the confines of the courtroom, the jury can no longer render, reconsider, amend, or clarify a verdict on the mistried counts."); *see, e.g.*, *Spears v. Mills*, 69 S.W.3d 407, 413 (Ark. 2002) (noting the "strict" and "absolute" rule that a jury may not be recalled once it has "left the presence and control of the court").

In *Wagner*, the Eighth Circuit case, the jurors, who were deliberating on two counts, told the court they were deadlocked after two and a half days of deliberations. *See* 758 F.3d at 1032. The court declared a mistrial and thanked the jurors for their service. *See id.* at 1033. Two minutes later, the court reassembled the jurors because it had failed to ask whether they were deadlocked on one or both counts. *See id.* The foreperson said the jury had reached a verdict for the defendant on Count I, and the court accordingly amended the previous mistrial ruling over the plaintiff's objection. *See id.* The Eighth Circuit

reversed, holding the error in the verdict was "beyond correction after the jury left the courtroom." *Id.* at 1036.[4]

We recognize there are some advantages to the Eighth Circuit's rule. As that court observed, it "offers better guidance than an amorphous rule," *id.* at 1035, and it is more straightforward to apply than the totality-of-circumstances approach. In addition, by foreclosing the possibility of recall after jurors have left the courtroom, it is theoretically more protective of litigants' right to a jury untainted by improper external influence. *See id.* at 1036 n.10 (observing that "even in civil cases, both the litigants and the public must have the utmost confidence that verdicts remain untainted"); *see also Lahaina Fashions, Inc. v. Bank of Hawaii*, 297 P.3d 1106, 1118 (Haw. Ct. App. 2013) (opining that forbidding recall once jurors have left the courtroom "offers the greatest protection against the erosion of public confidence in juridical impartiality"). The Eighth Circuit emphasized that, "[i]n this age of instant individualized electronic communication and widespread personal control and manage-

[4] The facts in *Wagner* were much more suggestive of prejudicial influence than the facts here. There, the court had declared a mistrial on the very charges the jury was then recalled to deliberate. As the Eighth Circuit noted, "nothing indicate[d] that the jury understood that the case was being placed back in their hands, and that they were being re-polled essentially to rescind the mistrial." 758 F.3d at 1036. Furthermore, the judge had provided the jurors with "letters" to complete and send back to the court as a post-trial assessment as to which the judge specifically told them: "If there's something about this case that we need to know about, this is your opportunity to tell us." *Id.* (alteration omitted). At this point, the admonition not to discuss the case with others had been lifted, and there was no information in the record about the jurors' conduct once they had dispersed from the courtroom. *See id.*

ment of pocket-sized wireless devices," such a restrictive rule better protects against improper external influence. *Wagner*, 758 F.3d at 1035.

Precisely because we live in an age of instant electronic communication, however, there is nothing talismanic about the courtroom door. For that reason, we should not adopt such a rigid rule. Jurors can easily send messages and communicate with outside parties before stepping out of the jury box, let alone the courtroom. Once a court has discharged the jurors, thus lifting the "protective shield" and enabling them to discuss the case with others, it triggers the potential for prejudicial influence.

But at the same time, just because jurors may potentially engage in improper outside contacts the moment they are dismissed does not mean they actually do. Regardless of whether the dismissed jurors have remained in the courtroom or left, before deciding to recall them, district judges must conduct a proper inquiry into the circumstances to ensure jurors were not exposed to prejudicial influences during the brief period of dismissal. The court—and, if permitted by the court, counsel—can specifically question the jurors about what they did during the moments they were dismissed, and through its evaluation of their responses and observations of the courtroom, determine whether recall is appropriate.

Such a rule strikes a sensible balance between considerations of fairness and economy and allows for a cost-effective alternative to an expensive new trial. In the somewhat analogous context of resubmission of special verdict questions, we explained that "[a]llowing the jury to correct its own mistakes conserves judicial resources and the time and convenience of citizen jurors, as well as those of the parties" and "best comports with

the fair and efficient administration of justice." *Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1058 (9th Cir. 2003).[5] We give weight to those same principles by adopting the totality-of-circumstances approach here. That said, recall should be the exception rather than the convenient rule, lest the sanctity of untainted jury deliberations be compromised.

In sum, we hold that, in limited circumstances, a court may recall a jury shortly after it has been dismissed to correct an error in the verdict, but only after making an appropriate inquiry to determine that the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict.[6, 7] *See Figueroa*, 683 F.3d at 73 (holding the "piv-

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[5] An important factual difference between *Duk* and this case is that the jury in *Duk* had not been declared discharged, nor had it dispersed. *See id.* at 1058. Nevertheless, the policy considerations underlying *Duk* are relevant here, where the jury was dismissed for a matter of moments and was still available to be recalled.

[6] We presume for purposes of this holding that one party objects to the recall procedure. Such an inquiry may not be necessary where the parties have explicitly stipulated to the recall procedure. *Cf. E.F. Hutton & Co., Inc. v. Arnebergh*, 775 F.2d 1061, 1063–64 (9th Cir. 1985) (upholding court's recall of jurors five weeks after they were discharged to interview them about the verdict because parties had stipulated to the procedure).

[7] The concurrence contends such an inquiry is "inconsistent with our system of adversarial justice." In the context of jury management, however, the district court regularly engages in such inquiries, as the cases the concurrence itself cites reveal. *See, e.g.*, *United States v. Vartanian*, 476 F.3d 1095, 1098–99 (9th Cir. 2007) (describing district court's "careful interview" of jury members before dismissing juror for good cause); *United States v. Symington*, 195 F.3d 1080, 1086 (9th Cir. 1999) (explaining the trial court's "investigative power . . . puts it in the best position to evaluate the jury's ability to

otal inquiry is whether the jurors became susceptible to outside influences"). In deciding whether recall is proper, the district court "must evaluate the specific scenario presented in order to determine whether recalling the jury would result in prejudice to the [parties] or undermine the confidence of the court—or of the public—in the verdict." *Rojas*, 617 F.3d at 677.

III. Application

Having concluded the totality of circumstances analysis is proper, we next consider whether the jurors here were in fact exposed to prejudicial outside influences during the brief period of the dismissal. Because the record supports the district court's finding they were not, recalling them was not an abuse of discretion.

When the court called back the jurors, it noted for the record that it was doing so "moments after having dismissed them." In *Figueroa*, the district court had "retained control of the jury at all times after it informed the jurors they were released," 683 F.3d at 73, because it had "immediately sent a court employee to hold the jury" after initially releasing it, *id.* at 72. Similarly, here, the record reflects that the court "just stopped the jury from leaving the building when [it] told them they were dismissed," because "in a fairly quick second thought," the court realized the verdict was "not legally permissible." Given the court was able to recall the jurors promptly after dismissal, it appears they had not yet dispersed. *Cf.*

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deliberate" (quotation marks omitted)). Our holding here is entirely consistent with the principle that, once a district court has been made aware of a problem relating to jury deliberations, it must investigate the problem. Of course, the details of the investigation remain within the district court's discretion.

id. at 73 (noting that, although jury had been "momentarily released," they had not "disperse[d]"); *Rojas*, 617 F.3d at 678 & n.3 (six minutes between jury discharge and reassembly suggested jury had not "dispersed").

Dietz argues the jury had dispersed because at least one juror had left the floor, or possibly the building, to get his hotel receipt and other jurors were observed talking to the clerk of court in the courtroom.[8,9] After Dietz's counsel voiced this concern, the court asked the jurors whether "anything occurr[ed] during the . . . few minutes after you were discharged where you talked to anybody about the case outside your immediate numbers." The jurors responded they had not:

> JURY PANEL VOICES: No, sir. No.
>
> THE COURT: Did we get everybody stopped in time for that not to occur?
>
> JURY PANEL VOICES: (Heads nod) Uh-huh, yes.
>
> JUROR: I didn't. You did. Most of us were just outside the door here. And there was only two that went down the—

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[8] The record is inconsistent as to whether the juror who left exited the building or just the floor. The clerk of court noted for the record that "there was one [juror] that left the building to go get his hotel receipt." When the court quizzed the jurors, it asked if any of them had gone to the "first floor," "maybe to get a hotel receipt," and one juror responded, "I did that, but I didn't talk to anybody."

[9] While registering this objection, Dietz's counsel said he had observed certain jurors talking to the clerk of court but conceded he was "not at all" suggesting that there was substantive discussion about the case.

> THE COURT: That's what I tried to do. I understand one juror had gone to the first floor and it was maybe to get a hotel receipt.
>
> JUROR: I did that, but I didn't talk to anybody.
>
> THE COURT: You didn't talk to anyone. So, in terms of you being contaminated by any outside information, that is not a factor.
>
> JUROR: No.
>
> JURY PANEL: No.

This colloquy supports the conclusion the jury had not "disperse[d] and interact[ed] with any outside individuals, ideas, or coverage of the proceedings." *Figueroa*, 683 F.3d at 73. Importantly, the district court specifically asked the jurors whether they had spoken to anyone about the case. It also asked them whether they had been "contaminated by any outside information." The jurors responded they had not. The court was in the best position to evaluate the jurors' responses, including the credibility of those responses.

Because the right to an impartial, untainted jury is of utmost importance, we do note that an individualized examination would be preferable to the collective questioning employed here—whether by asking jurors to respond individually or by questioning each juror separately.[10] During such an inquiry, the court or counsel could ask specific questions to discern whether any juror was susceptible to prejudicial influence, such as what the ju-

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[10] The extent of questioning required may depend on the length and complexity of the case. Those involving longer trials or more complex issues may require a more searching, individualized examination.

rors did during the dismissal; whether they spoke to anyone, and, if so, the content of their conversations; whether they overheard discussions about the case; whether they used cell phones or other devices to communicate; and whether they were influenced by any discussions they had or overheard.[11]

That the jurors were recalled to deliberate anew upon a substantive matter rather than simply to correct a technical error does not change our conclusion. *Cf. Rojas*, 617 F.3d at 678 & n.3 (limiting holding to correction of technical errors). There was no evidence the jury had been tainted by improper influence during the momentary dismissal. *Cf. Figueroa*, 683 F.3d at 73 (upholding district court's decision to recall jury after momentary dismissal to deliberate on an additional count it had not initially considered). Furthermore, the jury's initial verdict appears to have resulted from a misunderstanding regarding the effect of the legal stipulation.[12] *Cf. Sierra*

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[11] The court, in its discretion, may also afford counsel an opportunity to voir dire the jurors along these lines as well. Plaintiff's counsel did not request that opportunity here nor object to the group questioning.

[12] This misunderstanding could have been avoided altogether had the parties submitted the written stipulation into evidence and proposed a jury instruction on the issue. During the first round of deliberations, the jury sent a note asking the court if the stipulated $10,136 in medical expenses had been paid and by whom. The court responded that this consideration was irrelevant. At this juncture, the court could have instructed the jury that it needed to award at least the stipulated damages plus some additional amount. Unfortunately, it did not do so. However, after realizing the error in the verdict and recalling the jurors, this is exactly what the court did. It explained to the jurors:

> There was never any dispute, it was admitted from the beginning in this case, that the medical bills of

Foods v. Williams, 816 P.2d 466, 467 (Nev. 1991) (upholding recall of jury to correct a damages award that failed to account for its contributory negligence finding).

In conclusion, the district court did not abuse its discretion by recalling the jurors in lieu of declaring a mistrial. First, and importantly, the recall occurred very shortly after the dismissal. Although the court might have conducted an individualized and more detailed inquiry, its questioning adequately confirmed the jurors had not been exposed to prejudicial influences during the brief period between dismissal and recall. The court's decision to recall the jurors was thus not an abuse of discretion.

AFFIRMED.

> $10,136.75 were caused by this collision. . . . It doesn't matter by whom or to whom. That was the admission in the case. So the verdict as a starting point has to be at least $10,136.75. . . . Secondly, it was admitted by the Defendant that some injury occurred in this accident. . . . That being the case, your verdict had to be $10,136.75 plus some other and additional reasonable amount as compensation for the injury which you find was inflicted.

Thus properly instructed, the jury was quickly able to come to a verdict consistent with the legal stipulation.

BEA, Circuit Judge, concurring in the judgment:

I agree with the majority that the district court judge did not err in re-empaneling the jury in this case. I further agree with the majority's conclusion that the district court judge may re-empanel a jury only if he finds that the jury was "not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict." Maj. Op. at 14. I do not agree, however, that the district court *judge* should be required to undertake "an appropriate inquiry" into whether prejudicial influences have tainted the jury. *Id.* Because the majority's adoption of this duty of inquiry is inconsistent with our adversarial system of justice, I concur only in the judgment. I also note the majority cites no statute, case, or regulation that imposes such a duty of inquiry on the district court.

Our system of justice is an adversarial one. "What makes a system adversarial rather than inquisitorial is not the presence of counsel," but "the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the bases of facts and arguments pro and con adduced by the parties." *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2, 8 (1991). Consistent with this principle, our court has never required district court judges develop—by interrogation of witnesses—the record on which they render judgments; instead, we require district court judges to make specific findings based on the evidence that the parties place in the record.[1]

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[1] There is one exception to the principle I have stated: when the question before the court is whether a party has received adequate representation, there is reason to distrust the parties' ability (or

Thus, for example, Federal Rule of Criminal Procedure 23 states that a district court can excuse a seated juror in a criminal case, but only if the district court finds that "good cause" exists. And when the record does not support a district court's finding that good cause existed, we do not hesitate to tell it so. *See, e.g.*, *United States v. Symington*, 195 F.3d 1080, 1088 (9th Cir. 1999) (finding district court erred in dismissing juror when record showed reasonable possibility that juror's view of merits of case were basis of removal). But we have never held that a district court has any duty to interrogate jurors to develop that record, or that it would be reversible error for a district court to accept the parties' submission that the record was sufficient for it to rule.[2]

Nor should we. District court judges are "in the best position to evaluate the jury's ability to deliberate," and should be accorded the widest latitude in determining

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motive) to develop a full record. Thus, for example, a court cannot accept a guilty plea unless it has "determine[d] that the defendant understands" the rights he gives up by pleading guilty, thereby ensuring that a defendant who waives his right to trial is doing so in knowing and voluntary fashion. Fed. R. Crim. P. 11(b). Here, by contrast, the majority does not argue (and there is no reason to think) that the parties are incapable or unwilling to develop the necessary record by interrogation of the witnesses.

[2] Of course, much as an appellate court judge may choose to research a legal point not fully presented in the parties' briefs, a trial court may choose to participate in development of the record, by (for example) asking questions itself of jurors accused of improper conduct. Indeed, district court judges often question jurors accused of improper conduct to determine whether the juror may continue to serve, in part because a party's lawyer may not be keen to ask hard questions of a juror about to decide his client's case. Salutary though this practice may be, no court has ever made it *mandatory* in the manner of today's majority opinion.

how to make that evaluation. *United States v. Vartanian*, 476 F.3d 1095, 1098 (9th Cir. 2007) (quoting *United States v. Beard*, 161 F.3d 1190, 1194 (9th Cir. 1998)). Indeed, this court has, for more than three decades, considered trial courts "uniquely qualified" to evaluate the possibility that a juror has been biased. *United States v. Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981). Despite this presumption, the majority creates a new, unnecessary requirement that will hinder the ability of district court judges to manage the jury as they see fit.

In sum, the majority's rule is inconsistent with both basic principles of adversarial procedure and well-founded principles of appellate deference to trial court judgments. Because I would not mandate any *sua sponte* inquiry by the district court into a matter that the parties are well-equipped to investigate themselves, I concur only in the judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

No. CV-11-00036-BU-RFC-RWA

Rocky Dietz, Plaintiff

v.

Hillary Bouldin, Defendant

April 18, 2013

JUDGMENT IN A CIVIL CASE

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict finding FOR the PLAINTIFF and AGAINST the DEFENDANT in the amount of $15,000.00.

DATED: April 18, 2013.

Tyler P. Gilman
Clerk of Court

By: /s/ Erica Larson
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

No. CV-11-00036-BU-RFC-RWA

Rocky Dietz, Plaintiff

v.

Hillary Bouldin, Defendant

April 17, 2013

VERDICT FORM

We, the jury, duly impaneled, find for the Plaintiff Rocky Dietz in the above-entitled action and unanimously assess his damages at the sum of $ -0- (zero)

DATED this 17 day of April, 2013.

/s/
Jury Foreperson

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

No. CV-11-00036-BU-RFC-RWA

Rocky Dietz, Plaintiff

v.

Hillary Bouldin, Defendant

April 17, 2013

TRANSCRIPT OF PROCEEDINGS

Before: Richard W. Anderson, US District Court Judge.

APPEARANCES

FOR THE PLAINTIFF	GEOFFREY C. ANGEL ANGEL LAW FIRM 803 West Babcock Bozeman, Montana 59715

FOR THE DEFENDANT — JESSE BEAUDETTE
BOHYER, ERICKSON, BEAUDETTE & TRANEL, PC
283 West Front St., Suite 201
Missoula, Montana 29807

* * * * *

[251] (Whereupon, the court recessed pending return of the jury. Thereafter, the following proceedings were held with all counsel and the parties present outside the presence and hearing of the jury:)

THE COURT: We have a verdict, I understand, counsel.

So, will you bring the jury in.

(Whereupon, the jury entered the courtroom, and the following proceedings were held with all counsel and the parties present within the presence and hearing of the jury:)

THE COURT: We are in the courtroom now with this court.

The jury has filled the box. You have sent us a note that you have reached a verdict. Is that correct; jurors?

THE FOREPERSON: That's correct, Your Honor.

THE COURT: Is it your unanimous verdict?

THE FOREPERSON: That's correct, Your Honor.

[252] THE COURT: Very well. I wonder if the clerk would go take the verdict form. And read the jury's verdict into the record omitting the title, court and cause.

THE CLERK: "We, the jury, duly empaneled, find for the Plaintiff, Rocky Dietz, in the above-entitled action and unanimously assess his damages at the sum of zero.

Dated this 17th day of April, 2013, signed by the jury foreperson.

THE COURT: Counsel wish the jury polled?

MR. ANGEL: No, Your Honor.

MR. BEAUDETTE: No, Your Honor.

THE COURT: Very well. That concludes the matter then, jurors. You have the Court's thanks for this performance of your civic duty, spent away from your jobs and your homes for very little thanks and for little compensation. It's an important thing you've done, however; and the Court appreciates your time. You're free to go. The jury's discharged.

(Whereupon, the jury left the courtroom, and the following proceedings were held with all counsel and the parties present outside the presence and hearing of the jury:)

THE COURT: Court is in recess.

MR. BEAUDETTE: Thank you.

MR. ANGEL: Your Honor, I have a post-trial motion I'd like to make.

THE COURT: You'll have plenty of time for post-trial motions. You don't have to make them right now.

[253] MR. ANGEL: Okay. Thank you, Your Honor.

THE COURT: I would not be surprised.

MR. ANGEL: Thank you, Your Honor. I appreciate it.

(Whereupon, a recess was held. Thereafter, the following proceedings were held with all counsel present outside the presence and hearing of the jury:)

THE COURT: Okay, the record will show that counsel and the Court are in chambers, having just stopped the jury from leaving the building when I had told them they were dismissed. The reason for this was, in a fairly quick second thought and reviewing the verdict at zero dollars not being legally possible in view of stipulated damages exceeding $10,000, I wanted to talk to counsel about the best way, in their opinion, that we should proceed. I suggested the alternatives of extensive post-trial motions, being motions for new trial, which very likely would be granted. Or sending the jury back for continuing deliberations at this time in the hopes we could avoid doing this twice, telling them that their verdict is not legally permissible, and to resume their deliberations. In which case, it's now 25 minutes to five. We would call them back tomorrow morning at 9:00 for that purpose.

I'll begin by listening to Plaintiff's counsel as to his suggestions.

MR. ANGEL: Thank you, Your Honor. It's Plaintiff's position that the -- obviously, the verdict is contrary to the undisputed evidence and the law. The jury did not follow the law. I [254] mean, I would object to this jury ruling on the case in light of that fact, for obvious reasons.

THE COURT: You want another chance.

MR. ANGEL: I think that this jury, having been dismissed, I saw them talking with Erika. They obviously have some inabilities to follow the Court's instructions. And I don't feel like we'd get a fair and impartial verdict at this point given what they've done to this point.

THE COURT: Mr. Beaudette.

MR. BEAUDETTE: Your Honor, I would ask that the Court keep the jury, tell the jury that their verdict is

impermissible under the law and the evidence, that we had stipulated and agreed to, you know, all the medical expenses being related, and that a verdict of zero is not within the law and cannot be accepted by the Court. And have this jury reach a new verdict based upon following the law.

THE COURT: You said, Mr. Angel, you saw jurors talking to Erika. That would be the clerk of the court.

MR. ANGEL: That's what I thought I saw, yes.

THE COURT: Are you suggesting somehow or another there was discussion about the case?

MR. ANGEL: No, not at all. But it's my understanding, once they've been released, I'm not sure the Court -- I'm not sure it's appropriate to recall them back. And it seems to me that the verdict was the product of some prejudice. And I don't know how we would get rid of that. I think they would just come back with the [255] next lowest number they could think of where the Court would allow it to stand. And I don't think it's appropriate under the circumstances.

THE COURT: Well, this is a jury you picked. What if the Defendant would stipulate that the verdict could be increased to the $10,000 number? I don't know if they're prepared to do that; but if they did, what would be your reaction to that?

MR. ANGEL: I would still not want this jury sitting in trial of that, given --

THE COURT: Well, it would not. That would end it. I'm talking about that stipulation.

MR. ANGEL: Oh. We actually had a few discussions afterwards; because we could all see there's a lot of work

coming. But I don't think there's any change in position between the Plaintiff and Defendant.

THE COURT: Well, I did dismiss the jury on the record. But none of them had left the building. Had they even left the floor?

THE CLERK: There was one that left the building to go get his hotel receipt --

THE COURT: Okay.

THE CLERK: -- and to come bring it back.

THE COURT: All right. I hate to just throw away the money and time that's been expended in this trial, not only by the Court but by the parties, when we all know that a new trial will be [256] mandatory if I do that, if I dismiss the jury. Clearly, the verdict somehow is the result of misapprehension on the part of the jury as to their duties in setting damages. We have stipulated medical bills of approximately $10,000 that are agreed, by all, are payable and should be in the verdict. Then we have undisputed general damages in some amount, the amount not quantified because the Defendant has agreed that some physical harm resulted, though there is strong disagreement as to the extent of that harm. The jury must award something for that over and above the agreed medical bills. They must. Would you agree, defense counsel?

MR. BEAUDETTE: I would agree, Your Honor.

THE COURT: And the Court could accept no verdict which does anything less. I'm going to send the jury back into deliberations. I'm going to tell them exactly that. That the verdict has a floor and must be the amount of the medical bills plus a reasonable amount under the Court's instructions for general damages, which is an

amount that is totally within their discretion but it must be something over and above $10,136. And then I'll tell them they can come back tomorrow morning to reach that decision. I'll have them come in at 9:00. And I suppose whatever they do, we'll still have motions and arguments post-trial. But at least I will not have just arbitrarily, without much consideration, thrown out the result of all the work we've gone through getting to this point. So, that's what we're going to do.

MR. ANGEL: And my objection is noted for the record, I [257] take it. I don't have to say any --

THE COURT: I think your position is noted for the record, yeah.

MR. ANGEL: Okay, thank you, Your Honor.

THE COURT: And we will presume that you object.

MR. ANGEL: Yes, Your Honor.

THE COURT: And stand on your request for a second bite at the apple. And we'll see what they do tomorrow.

MR. ANGEL: Understood, Your Honor.

THE COURT: All right.

MR. BEAUDETTE: Thank you, Your Honor.

(Whereupon, the Court, counsel and the parties returned to the courtroom, and the jury then entered the courtroom, and the following proceedings were held with all counsel and the parties present within the presence and hearing of the jury:)

THE COURT: The record will show, even though the jury was discharged, we're back in open court with the jury in the box, all seven of you, the Court having

called them back moments after having dismissed them. And I did so. I want to tell you what's going on here. I did so because, upon rather quick reflection upon your verdict, I came to the conclusion that it was not possible to reach that verdict under the law and the facts of this case.

I'll tell you why. There was never any dispute, it was admitted from the beginning in this case, that the medical bills of $10,136.75 were caused by this collision and were due and payable. [258] It doesn't matter by whom or to whom. That was the admission in the case. So, the verdict as a starting point had to be at least $10,136.75. The verdict could not fly in the face of that undisputed evidence.

Secondly, it was admitted by the Defendant that some injury occurred in this accident. It was contested hotly that the injury was anywhere near as severe as contended by the Plaintiff. But nonetheless, it was admitted that some injury happened. That being the case, some compensation for that undisputed injury had to be awarded. Had to be, under the law. That being the case, your verdict had to be $10,136.75 plus some other and additional reasonable amount as compensation for the injury which you find was inflicted. And remember, there is a stipulation in this case that something happened, some injury was done, some damage occurred. It was never quantified, and that's where a fair jury comes in.

As a result of all this, unless something has happened in that brief interlude between your discharge a bit ago and now that would have reflected upon your deliberations outside the jury room, I'm going to call you back into session tomorrow morning and have you reconvene for the purpose of reaching another verdict. I cannot accept the verdict you've reached.

Now, before doing that, I'm going to ask any of you, did anything occur during the . . . the few minutes after you were discharged where you talked to anybody about the case outside your immediate numbers?

[259] JURY PANEL VOICES: No, sir. No.

THE COURT: Did we get everybody stopped in time for that not to occur?

JURY PANEL VOICES: (Heads nod) Uh-huh, yes.

JUROR: I didn't. You did. Most of us were just outside the door here. And there was only two that went down the --

THE COURT: That's what I tried to do. I understand one juror had gone to the first floor and it was maybe to get a hotel receipt.

JUROR: I did that, but I didn't talk to anybody.

THE COURT: You didn't talk to anyone. So, in terms of you being contaminated by any outside information, that is not a factor.

JUROR: No.

JURY PANEL: No.

THE COURT: Well, I do apologize for the . . . the confusion. But understand this, if I don't do what I've done, I will have no choice but to grant a new trial to the Plaintiff, bring us all back together again on a different day, not you, in front of a new jury, and go through this all over again in front of a different panel. And so, I concluded that the only way I could salvage the work and the expense that's gone on to this point is to bring you back and ask you to start over with clarifying instructions as to what the minimums are that you may do.

JUROR: (Raises hand)

[260] THE COURT: Yes, sir.

JUROR: May I ask? Had you said that upon sending us into the room, you would have had a different answer.

THE COURT: I suspect that. I suspect that would be true.

JUROR: It was wide open, and we did not know how to determine that.

THE COURT: It's partly -- I accept the blame for part of this. It's also up to counsel to formulate their stipulations so that perhaps they're more clearly defined than they were in this case.

JUROR: Was our note not clear, Your Honor?

THE COURT: Your note was clear. It doesn't matter whether those bills were paid or by whom or remain unpaid. None of that matters. The fact that matters is that they were incurred. They're stipulated as reasonable and caused by this collision. That's all that matters.

JUROR: That's what we wanted to know, but we never got clarification on that.

THE COURT: Well, you asked who paid the bills or are they paid. That was the question. And I answered that question. It's not germane to your deliberations. Now, if you'd asked the other question, I would have answered the other question. But you didn't ask it. Just unfortunate confusion I think on everybody's part. And I accept the blame, to start with, for not making this [261] more clear before you went back into that room for the last time. But now I hope I have made it clear. And I'm going to ask you, though, are there any other questions

before we recess for the evening subject to coming back tomorrow morning?

JUROR: Would it be possible to meet yet this afternoon so we don't have to come back tomorrow?

THE COURT: We're not equipped for night session. The security goes home. And it would be possible as far as I'm concerned, but I can't commit everybody else, I'm sorry. And you have some distance to travel, I know. I'm sorry. No. It's not possible. Anything else?

JURY PANEL: (No response)

THE COURT: Okay. Well, 9:00 tomorrow morning, and we'll see you after you try again. Do you understand? Do you think you understand what the problem is? And what your duty is?

JURY PANEL: (Heads nod)

THE COURT: All right. Again, my apologies. Good night.

THE CLERK: All rise.

(Whereupon, court adjourned until the following day.)

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

No. CV-11-00036-BU-RFC-RWA

Rocky Dietz, Plaintiff

v.

Hillary Bouldin, Defendant

April 18, 2013

TRANSCRIPT OF PROCEEDINGS

Before: Richard W. Anderson, US District Court Judge. Butte, Montana.

APPEARANCES

FOR THE PLAINTIFF	GEOFFREY C. ANGEL ANGEL LAW FIRM 803 West Babcock Bozeman, Montana 59715

FOR THE DEFENDANT JESSE BEAUDETTE
BOHYER, ERICKSON,
BEAUDETTE & TRANEL,
PC
283 West Front St., Suite 201
Missoula, Montana 59807

* * * * *

[2] BE IT REMEMBERED THAT this matter came on regularly for jury trial at the time and place and with the appearances of counsel hereinbefore noted before Ann Y. Wayrynen, a Notary Public for the State of Montana.

The following proceedings were held in chambers:

THE COURT: I understand the plaintiff has a motion or motions. We are in chambers with both counsel present.

Mr. Angel you may proceed.

MR. ANGEL: The plaintiff at this time would make a motion for a mistrial, and there's three reasons for that.

I did a little research, and it seems to me that the discharge of the jury and the effect of the sequestration on that is an issue that I think can't be cured. That's one ground for a mistrial.

There's also the issue of submitting the same question to the jury that they've already deliberated on and come to a verdict. It's the plaintiff's position that it's improper to ask them to amend that answer because we don't have an inconsistent verdict hear [sic]. We just have an unlawful verdict.

And the third basis is that the jury did reach an unlawful verdict, which is certainly an indication and per-

haps even proof that they did not follow the evidence or the law, and so we are limited by some sort of prejudice. There were two violations of orders in limine. I think it's just evidence that there is not a fair and impartial jury there based on [3] that. So I just wanted to make a record so there is no issue of waiving those objections.

THE COURT: Mr. Beaudette.

MR. BEAUDETTE: Your Honor, I haven't done any research, and I didn't know what he was going to be moving for this morning.

With regard to the jury being discharged, the Court released the jurors. They went back to the jury room and made it out into the hallway. I think one of them made it down to the first floor. And, then, they were called back. We went back into court, back into session. The Court asked the jurors if any of them had talked to anybody, discussed anything with the case; and, they all indicated, no, they had not.

I don't think there is any issue with the jury or any evidence of anything coming in to the jury between the time period between when they were released and when they were called back by the Court.

With regard to submitting the same question to the jury, I don't think that is going to be an issue. In the discussion in court with the jury, I believe their indication was they didn't understand the instructions and that they had to award the past medicals. I think their question that they sent out and the discussion the Court had with them when they were recalled indicates that they were a little confused as to what they had to do.

[4] And, with regard to the unlawful verdict, I believe that that has been cured by the Court's additional instructions to the jury as to what they have to award in

this case based upon the admissions that have been made.

THE COURT: All right. Well, the issue is clear. Your contention has been preserved, Mr. Angel.

MR. ANGEL: Thank you.

THE COURT: I am going to deny the motion for a mistrial.

What we are going to do, counsel, on this very topic is we are going to give them another verdict form with another blank and it's going to be exactly the same as yesterday's, except on the title it's going to be called Verdict No. 2. We will keep Verdict No. 1 in the record for everybody's future reference, and Verdict No. 2 will supplement it. And if there is a judgment entered, it will be entered pursuant to Verdict No. 2.

Then, I imagine we'll all be looking forward to post-verdict litigation.

MR. ANGEL: Thank you.

MR. BEAUDETTE: Thanks, Your Honor.

(Whereupon, court stands in recess during jury deliberations)

The following proceedings were held in open court:

THE COURT: Please seated. Bring in the jury, if you would. [5] The record will show that we are in open court. Counsel, the jury has announced that they have reached a verdict, Verdict No. 2 in this case. And all seven of the jurors are here this morning for that purpose, and they are in the jury box.

Ladies and gentlemen, is that correct? Have you reached a verdict?

JURY FOREPERSON: Yes, Your Honor.

THE COURT: I wonder if you would give it to the clerk of court, please, who will now read the jury verdict into the record.

CLERK OF COURT: We, the jury duly empanelled, find for the plaintiff, Rocky Dietz, in the above-entitled action and unanimously assess his damages at the sum of $15,000. Dated this 18th day of April, 2013, and signed by the jury foreperson.

THE COURT: Is that your verdict, ladies and gentlemen?

(All jurors answer affirmatively.)

THE COURT: Is it a unanimous verdict?

(All jurors answer affirmatively.)

THE COURT: All right. Do either counsel wish the panel polled?

MR. ANGEL: No, Your Honor.

MR. BEAUDETTE: No, Your Honor.

[6] THE COURT: Well, that is a verdict which the Court can accept, ladies and gentlemen.

This has really been unusual for me, as well as for you. Sometimes we, as lawyers and judges, take the requirements of the law as to what a jury must and must not do for granted because we are so familiar. And we do forget, maybe this is a first experience for you folks, and we are not as careful as we ought to be in explaining what to us is obvious. For that I apologize.

The delay and your need to return this morning instead of going home for good last, I accept the blame for that.

I have good news. Because you have served in this case, you will not be called again. Your names will be removed from the jury pool. And at least until a new jury pool is created, you are off the hook, so to speak. And a new jury will be created later this year, a new pool. If for some unimaginable reason any of you are included in that jury pool and are called for further service, all you have to do is advise the clerk of court that you just served in April of 2013 and you will be automatically excused. So this will not happen again.

Beyond that, I hope you at least found the experience interesting, and you have a better idea of what we who work in the courts do or try to do when we go through day after day.

You've done your duty. You have done it well. You have listened carefully, and I'm satisfied we have had a fair and [7] impartial jury, as well as an intelligent jury. Thank you very much.

Court is in recess.

* * * * *

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

No. CV-11-00036-BU-RFC-RWA

Rocky Dietz, Plaintiff

v.

Hillary Bouldin, Defendant

April 18, 2013

VERDICT FORM NO. 2

We, the jury, duly impaneled, find for the Plaintiff Rocky Dietz in the above-entitled action and unanimously assess his damages at the sum of $ 15,000.00

DATED this 18 day of April, 2013.

/s/
Jury Foreperson