

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HOANG XUAN LE, AKA Wayne,
AKA Wangsta,

Defendant - Appellant.

No. 23-1814

D.C. No.
8:20-cr-00002-
DOC-1

OPINION

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted June 24, 2026
Pasadena, California

Filed October 15, 2026

Before: Michelle T. Friedland, Danielle J. Forrest, and
Roopali H. Desai, Circuit Judges.

Opinion by Judge Friedland

SUMMARY*

Criminal Law

The panel vacated Hoang Xuan “Wayne” Le’s convictions for first-degree murder, conspiracy to commit murder, and possession of a firearm in furtherance of murder, and remanded for further proceedings.

Le, co-Defendant Sheila Marie Ritze, and James Dao set out from Dana Point Harbor in Southern California on what Dao believed would be a lobster-fishing trip. When the boat returned, Dao was not with Le and Ritze. The Oceanside Police Department Harbor Unit recovered Dao’s body floating in the ocean. Dao had drowned and had sustained two gunshot wounds and blunt force trauma. An analysis of cell phone location data revealed that the trip likely went no further than three nautical miles from the shore.

Le argued that the federal government lacked jurisdiction to prosecute him because Dao’s death occurred within three nautical miles off the coast of California, an area that he contended is within the state’s exclusive jurisdiction. The panel disagreed and held that, under section 901(a) of the Antiterrorism and Effective Death Penalty Act of 1996, the special maritime and territorial jurisdiction of the United States includes the first three nautical miles from the shoreline.

Le further argued that a new trial is warranted because the district court violated the Sixth Amendment when it

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

replaced a juror during deliberations for reasons stemming from the juror's views on the merits of the case. The district court concluded that the juror's mental health concerns constituted distinct, independent grounds for dismissal.

The panel assumed without deciding that the plain error standard applies because, even under that demanding standard, Le's challenge succeeds. Under the plain error standard, Le must show (1) an error, (2) that is clear or obvious, (3) that affected his substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings.

The panel first addressed whether Le had demonstrated error. Under *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999), dismissal of a juror is appropriate only if the available evidence is "sufficient to leave one firmly convinced that the impetus for a juror's dismissal is unrelated to [his or her] position on the merits." The panel was left far from "firmly convinced," given that the juror in this case directly confirmed, in response to the district court's questioning, that her mental health crisis was based on pressure from other jurors to reach a specific verdict, and the rest of the record bolsters the conclusion that the juror's removal stemmed from her view of the merits. Faced with a juror whose distress both stemmed from her view of the prosecution's case and was severe enough to preclude her from continuing to deliberate, caselaw instructs that the only constitutionally permissible path forward was to declare a mistrial; replacement of the juror was not among the permissible options.

Having determined that the removal of the juror without declaring a mistrial constituted error, the panel held that the remaining prongs of plain error review were also satisfied.

Rejecting the government's contention that Le waived his ability to raise the juror-removal issue on appeal, the panel concluded that a defendant cannot waive a challenge to a juror's removal when the removal violates *Symington* and runs afoul of the Sixth Amendment's unanimity guarantee. In light of the panel's holding that the record reflects a reasonable possibility that the juror's removal stemmed from her views on the merits and thus violated *Symington*, the panel held that Le's consent to the juror's removal did not foreclose the panel's review of the Sixth Amendment error.

COUNSEL

Davina T. Chen (argued), Law Office of Davina T. Chen, Los Angeles, California; Craig Wilke, Law Office of Craig Wilke, Fullerton, California; for Defendant-Appellant.

Rajesh R. Srinivasan (argued) and Daniel G. Boyle, Assistant United States Attorneys; Christina T. Shay, Assistant United States Attorney, Chief, Criminal Division; Bilal A. Essayli, Acting United States Attorney; Office of the United States Attorney, Los Angeles, California; Gregory S. Scally, Assistant United States Attorney, Deputy Chief, Orange County Office; Office of the United States Attorney, Santa Ana, California; for Plaintiff-Appellee.

OPINION

FRIEDLAND, Circuit Judge:

After local fishermen alerted law enforcement that they had encountered a corpse floating in the Pacific Ocean, the Oceanside Police Department recovered the body of Tri Minh “James” Dao. Dao had drowned after suffering two gunshot wounds and blunt force trauma to the head. A jury convicted Defendant Hoang Xuan “Wayne” Le of first-degree murder, conspiracy to commit murder, and possession of a firearm in furtherance of murder, for his role in Dao’s death, under 18 U.S.C. § 1111, § 1117, and § 924(c) respectively. Le now appeals his convictions. He first argues that the federal government lacked jurisdiction to prosecute him because Dao’s death occurred within three nautical miles off the coast of California, an area that he contends is within the state’s exclusive jurisdiction. He further argues that, even if the federal government did have jurisdiction to prosecute him, a new trial is warranted because the district court violated the Sixth Amendment when it replaced a juror during deliberations for reasons stemming from the juror’s views on the merits of the case.

We hold that, under section 901(a) of the Antiterrorism and Effective Death Penalty Act of 1996, the special maritime and territorial jurisdiction of the United States includes the first three nautical miles from the shoreline. Nonetheless, we vacate Le’s convictions because the replacement of the juror occurred for reasons stemming from the juror’s views on the merits and therefore violated unwaivable Sixth Amendment protections.

I.

A.

Late one night in October 2019, Wayne Le, co-Defendant Sheila Marie Ritze, and James Dao set out from Dana Point Harbor in Southern California on what Dao believed would be a lobster-fishing trip. When the boat returned, Dao was not with Le and Ritze. The Oceanside Police Department Harbor Unit soon recovered Dao's body floating in the ocean. Dao had drowned and had sustained two gunshot wounds and blunt force trauma. Neither Le nor Ritze reported Dao's death to law enforcement.

An analysis of cell phone location data revealed that the trip likely went no further than three nautical miles from the shore.

B.

After an investigation, the federal government charged Le with murder, 18 U.S.C. § 1111; conspiracy to commit murder, 18 U.S.C. § 1117; and possession, use, and discharge of a firearm in relation to a crime of violence, 18 U.S.C. § 924(c).¹ The operative indictment alleged that the crime occurred “in the Pacific Ocean off the coast of Orange County, California, a place within the special maritime and territorial jurisdiction of the United States, that is, the high seas and the territorial sea of the United States.”

The parties asked the district court to rule on whether California's territorial waters—that is, the first three nautical miles off the shoreline—fall within the special maritime and

¹ Ritze was convicted of second-degree murder for her role in Dao's death. We resolve Ritze's appeal in a concurrently filed memorandum disposition.

territorial jurisdiction of the United States. Given the cellphone location data from the boating trip, the Government conceded that “it cannot prove beyond a reasonable doubt that the alleged murder was committed more than three nautical miles from the California shore.” For that reason, the parties stipulated that, if the first three nautical miles from the shoreline are outside the special maritime and territorial jurisdiction of the United States, the murder, conspiracy to commit murder, and firearm charges “should be dismissed for lack of jurisdiction.”

The district court concluded that the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 901(a), 110 Stat. 1214, 1317, brought the entire first twelve miles from the coastline within the special maritime and territorial jurisdiction of the United States for purposes of Title 18 crimes, so the court declined to dismiss.

C.

Le proceeded to trial on the three counts against him. The central factual dispute at trial was whether Le acted with premeditation, or whether he shot Dao in self-defense. The Government advanced a theory that Le had lured Dao onto the boat to kill Dao with a motive of recovering the proceeds of Dao’s life insurance policy from his widow to cover debts he owed Le. But Le testified that, while on the boat, Dao asked to borrow money and, when Le refused, Dao became agitated and the two engaged in a struggle during which Dao was shot twice by his own gun. On Le’s telling, Dao fell overboard during the struggle, and Le and Ritze departed from the scene, declining to alert the authorities because they were afraid. At the end of a 12-day trial, the district court instructed the jury on first- and second-degree murder, voluntary and involuntary manslaughter, and self-defense.

The district court further instructed the jury that, to convict Le, it had to find beyond a reasonable doubt that the crime occurred “within the special maritime and territorial jurisdiction of the United States of America.” The district court stated that such jurisdiction “includes the territorial sea of the United States, from the mean low tide point on the shore extending seaward to twelve miles offshore.”

After more than three full days of deliberations, the foreperson notified the court that one juror, BJR, was unable to continue. The foreperson sent the court a jury note that stated: “One of the jurors is unable to continue. She cannot make a decision. To quote ‘I can’t do this.’ She would like to be excused, but the rest of the jury would like to continue to deliberate with an alternate if necessary.” BJR then submitted a personal note stating that the deliberations had put her mental health in a dangerous position. Her note stated:

I am asking to be excused from further deliberation. My experience in the jury deliberations has put my mental health into a position that has become dangerous to me. At this point, I am unable to continue to subject myself to this and I need to protect my mental health.

After soliciting input from both the defense and the Government, the court decided to question BJR about her position. The parties and the court worked together to draft questions that could identify the source of BJR’s distress without revealing the status of jury deliberations. In response, BJR confirmed that the “worsening of [her] mental health” was “based on pressure from other jurors to reach a

specific verdict.” She was unable to answer whether she was physically or mentally incapable of reaching any decision without revealing privileged information about the jury’s internal deliberations or discussions.

The court initially declined to excuse BJR and re-instructed the jury on its duty to deliberate. Shortly after deliberations began again, the foreperson sent another note reporting that BJR had expressed thoughts of self-harm in order to be removed from the process. That note stated:

[BJR] is extremely stressed and has informed us she will not be capable of any further deliberation. She’s indicated that she has had thoughts of hurting herself in order to be removed from this process. She presents clearly as distressed and in crisis. The rest of the jurors would like to continue with the deliberation process, but are unable to due to her inability to go on with the processes. There’s a concern that her vote does not represent the result of a complete and comprehensive deliberation, but rather a way to remove herself from a process that is causing her extreme stress and potentially causing harm to her mental health.

After further discussion with the parties, the court had the following exchange with BJR:

THE COURT: We received a note informing us that you will not be capable of any further deliberation; is that true? Yes or no?

[BJR]: Yes.

THE COURT: All right. We've received a note informing us that you've had thoughts of hurting yourself to be removed from this process; is that true?

[BJR]: Yes.

The parties jointly agreed to excuse her. The court dismissed BJR, offering access to confidential counseling services. The court then seated an alternate juror. After less than a full day of deliberations, the newly constituted jury returned a verdict of guilty on all three counts. The district court sentenced Le to life in prison. Le timely appealed, challenging both the federal government's jurisdiction and BJR's removal.

II.

We review statutory interpretation questions, including those affecting jurisdiction, *de novo*. *United States v. Corey*, 232 F.3d 1166, 1170 (9th Cir. 2000); *Gonzalez v. Herrera*, 151 F.4th 1076, 1080 (9th Cir. 2025). We review forfeited claims for plain error. *United States v. Depue*, 912 F.3d 1227, 1232-33 (9th Cir. 2019) (en banc). If a defendant waives a claim, that precludes our review of the claim altogether. *Id.*

III.

A.

We begin our analysis with some background on the development of the federal government's jurisdiction over crimes at sea. In 1793, President George Washington first claimed a three-nautical-mile territorial sea—that is, the sea over which the United States claims sovereignty. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488

U.S. 428, 441 n.8 (1989); Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea, 12 Op. O.L.C. 238, 239 n.2, 241 (1988).

States have traditionally exercised criminal jurisdiction over that three-nautical-mile territorial sea. *See, e.g., Manchester v. Massachusetts*, 139 U.S. 240, 263–65 (1891) (holding that the State of Massachusetts could exercise criminal jurisdiction over a fishing offense that occurred within three nautical miles of its shoreline). Accordingly, it has long been understood that the State of California may prosecute crimes committed on the oceanwaters that lie within three nautical miles of its shoreline. *See, e.g., People v. Weeren*, 26 Cal. 3d 654, 660–66 (1980) (explaining that California’s criminal jurisdiction includes the three nautical miles from its shoreline, and uses English nautical miles not standard nautical miles); *People v. Stralla*, 14 Cal. 2d 617, 631–32 (1939) (recognizing that California has “policing jurisdiction over its territorial waters”); Cal. Gov’t Code § 170.

The federal government’s authority to prosecute crimes committed at sea has been defined by statute since the founding. *See United States v. Flores*, 289 U.S. 137, 151–52 (1933) (explaining that “[f]rom the very organization of the government, and without intermission, Congress has also asserted the power, analogous to that exercised by English courts of admiralty, to punish crimes committed on vessels of the United States while on the high seas or on navigable waters not within the territorial jurisdiction of a state”). In 1948, Congress passed the modern Special Maritime and Territorial Jurisdiction of the United States (“SMTJUS”) statute, 18 U.S.C. § 7. Act of June 25, 1948, Pub. L. No. 80-772 § 7, ch. 645, 62 Stat. 683, 685. The areas described by 18 U.S.C. § 7 “are often referred to as ‘federal enclaves.’”

United States v. Smith, 925 F.3d 410, 415 (9th Cir. 2019) (quoting *United States v. Markiewicz*, 978 F.2d 786, 797 (2d Cir. 1992)).

In relevant part, 18 U.S.C. § 7 defines the “special maritime and territorial jurisdiction of the United States” to include “[t]he high seas” and “any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.” 18 U.S.C. § 7(1). Several crimes enumerated in Title 18 of the U.S. Code reference the “special maritime and territorial jurisdiction of the United States.” *See, e.g.*, 18 U.S.C. § 1111(b) (murder) (“Within the special maritime and territorial jurisdiction of the United States, Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life”); 18 U.S.C. § 113 (assault) (“Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished”); 18 U.S.C. § 1201 (kidnapping); 18 U.S.C. § 2111 (theft).

In 1988, President Ronald Reagan expanded the territorial sea of the United States beyond three nautical miles from the shoreline. He signed a proclamation that stated: “The territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law.” Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) (“Proclamation 5928”); *Argentine Republic*, 488 U.S. at 441 n.8. Proclamation 5928 also provided that “[n]othing in this Proclamation . . . extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom.” Proclamation No. 5928, 54 Fed. Reg. at 777.

Less than a decade later, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1317 (“AEDPA”). Section 901 of AEDPA is titled “Expansion of Territorial Sea” and subsection (a) states:

TERRITORIAL SEA EXTENDING TO
TWELVE MILES INCLUDED IN
SPECIAL MARITIME AND
TERRITORIAL JURISDICTION.—The
Congress declares that *all the territorial sea
of the United States*, as defined by
Presidential Proclamation 5928 of December
27, 1988, for purposes of Federal criminal
jurisdiction is part of the United States,
subject to its sovereignty, and is within the
special maritime and territorial jurisdiction of
the United States for the purposes of title 18,
United States Code.

AEDPA § 901(a) (emphasis added).

B.

The parties disagree about whether section 901(a) of AEDPA made the first three nautical miles from the shore part of the “special maritime and territorial jurisdiction of the United States” for purposes of the federal murder statute at issue here.²

² When interpreting a criminal statute that refers to the “special maritime and territorial jurisdiction of the United States,” courts often describe that language as establishing a “jurisdictional element” of a crime. *See, e.g., United States v. Read*, 918 F.3d 712, 718 (9th Cir. 2019) (referring to that phrase in 18 U.S.C. § 113(a) as the “jurisdictional element”). We

The Government argues that, for purposes of Title 18, section 901(a) includes, within the special maritime and territorial jurisdiction of the United States, the full territorial sea, which, under Proclamation 5928, stretches twelve nautical miles from the shoreline.³ Le argues, on the other hand, that section 901(a) extended the special maritime and territorial jurisdiction to include only the area between the

recognize that “[j]urisdiction” is “a word of many, too many, meanings” and that this type of label has been used to refer both to substantive elements of crimes and to the court’s power to hear a case. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998) (citation modified). We need not determine which category the concept of “the special maritime and territorial jurisdiction of the United States” falls into to answer the question here: whether the first three nautical miles from shore are “within the special maritime and territorial jurisdiction of the United States” for purposes of the murder statute under which Le was convicted. See *United States v. Gabrion*, 517 F.3d 839, 870–72 (6th Cir. 2008) (Moore, J., concurring in the judgment) (recognizing that “the question of jurisdiction [may be] intermeshed with the merits of the case” when “the location of the murder is an element of the offense under 18 U.S.C. § 1111(b)” and explaining that it was not necessary to determine whether the location of the murder was a substantive element of the crime or an issue determining the court’s subject matter jurisdiction because, either way, “we would need to affirm”). Moreover, for ease of discussion, we focus our analysis on the murder statute, 18 U.S.C. § 1111, because it contains the phrase “within the special maritime and territorial jurisdiction of the United States,” rather than incorporating that phrase by reference (through reference to a crime that contains the phrase), as the conspiracy statute, *id.* § 1117, and the firearm statute, *id.* § 924(c), do. The parties have not suggested that there is any difference between the three statutes that would affect the federal government’s authority to prosecute Le.

³ The Government also asserted, in the alternative, that the “high seas” clause of 18 U.S.C. § 7(1) provides federal criminal jurisdiction here. Because we hold that section 901(a) of AEDPA provides the authority the Government needed to prosecute Le, we do not reach the “high seas” question.

three-nautical-mile mark and the twelve-nautical-mile mark, but it left the first three nautical miles from the shoreline exclusively within state criminal jurisdiction. Le’s theory is that section 901(a) was intended solely to provide statutory criminal jurisdiction over the portion of the sea newly designated as federal territory by Proclamation 5928, that is, the waters between three and twelve nautical miles offshore.

We agree with the Government. “When interpreting the meaning of a statute, we look first to its plain language.” *Salas v. United States*, 116 F.4th 830, 839 (9th Cir. 2024) (citation modified). Section 901(a) proclaims that, “for purposes of Federal criminal jurisdiction,” “*all* the territorial sea of the United States” is “within the special maritime and territorial jurisdiction of the United States for the purposes of title 18, United States Code.” AEDPA § 901(a) (emphasis added). By using the word “all,” the plain text of the statute brings the entire territorial sea designated by Proclamation 5928 within the special maritime and territorial jurisdiction, at least for purposes of Title 18 crimes.⁴

Le acknowledges that, when AEDPA is read in isolation, it supports the Government’s reading. But he asks us to reach a different conclusion based on the interaction between Proclamation 5928 and 18 U.S.C. § 7(1). Specifically, he points to the Proclamation’s instruction that “[n]othing in this Proclamation . . . extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom.” Proclamation No. 5928, 54 Fed. Reg. at 777. Le argues that the

⁴ We do not decide whether section 901(a) of AEDPA also confers federal criminal jurisdiction to prosecute Title 18 crimes that do not reference—either directly or indirectly—the “special maritime and territorial jurisdiction of the United States.”

combination of the “nothing . . . alters” language and 18 U.S.C. § 7(1)’s definition that includes the “high seas” or other waters “out of the jurisdiction of any particular State” resulted in a jurisdictional gap such that no sovereign could prosecute crimes committed between three and twelve nautical miles from the shoreline. Only this gap, he argues, was brought within the special maritime and territorial jurisdiction under AEDPA § 901(a).

Based on his assumption that the “high seas” begin beyond the territorial sea,⁵ Le contends that the three-to-twelve nautical mile area that was previously considered the “high seas” is now within the territorial waters of the United States. He argues that, before section 901(a) of AEDPA was enacted, the three-to-twelve nautical mile stretch did not fall within the special maritime and territorial jurisdiction nor the high seas, which created a jurisdictional gap. In Le’s view, Proclamation 5928 did not transform those waters into “any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any

⁵ Le points to several sources in arguing that the “high seas” begin where the United States’s territorial sea ends. *See, e.g., The Scotland*, 105 U.S. 24, 29 (1881); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355–56 (1909); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1923); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 121 (2013); U.N. Convention on the High Seas, art. 1, *opened for signature* Apr. 29, 1958, 450 U.N.T.S. 82 (entered into force Sep. 30, 1962); U.N. Convention on the Territorial Sea and the Contiguous Zone, art. 1, *opened for signature* Apr. 29, 1958, 516 U.N.T.S. 205 (entered into force Sep. 10, 1964); The Government counters that the “high seas” begin at the shoreline, citing other authority. *See, e.g.,* 33 C.F.R. § 2.32(a), *United States v. Wiltberger*, 18 U.S. 76, 94 (1820), *Ross v. McIntyre*, 140 U.S. 453, 471 (1891), *United States v. Rodgers*, 150 U.S. 249, 253 (1893). We do not need to resolve which understanding of “high seas” is correct because, even assuming Le is correct, his jurisdictional argument still fails.

particular State,” described by 18 U.S.C. § 7(1), because Proclamation 5928 expressly stated that it did not alter federal law or any jurisdiction derived therefrom. Le contends that section 901(a) of AEDPA filled that gap by extending the special maritime and territorial jurisdiction to include the area between three and twelve nautical miles from shore. But in his view, because the first three nautical miles from the shoreline are not “out of the jurisdiction of any particular State,” 18 U.S.C. § 7(1), there can be no federal criminal jurisdiction in that area and thus no federal jurisdiction over his crime. According to Le, AEDPA does not provide a standalone category of special maritime and territorial jurisdiction; rather, such jurisdiction is defined only by 18 U.S.C. § 7(1), and AEDPA merely amended that provision. He argues that the Government’s broader understanding of AEDPA’s impact must be wrong because it gives no effect to the “out of the jurisdiction of any particular State” language in 18 U.S.C. § 7(1).

We are unpersuaded. Le’s argument requires us to ignore the plain language of section 901(a) of AEDPA. We “must presume that a legislature says in a statute what it means and means in a statute what it says there.” *In re Roman Cath. Archbishop of Portland in Or.*, 661 F.3d 417, 432 (9th Cir. 2011) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). Proclamation 5928 defined the territorial sea: “[t]he territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law.” Proclamation No. 5928, 54 Fed. Reg. at 777. That definition encompasses the first three nautical miles from the shoreline because international law establishes that the “baseline for measuring the breadth of the territorial sea is the low-water line along the coast”—that

is, the shoreline. U.N. Convention on the Law of the Sea, art. 5, sec. 2, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994). The territorial sea of the United States is therefore defined as the first twelve nautical miles off the shoreline. That definition was, in turn, incorporated by the language of section 901(a) of AEDPA: “The Congress declares that all the territorial sea of the United States, *as defined by Presidential Proclamation 5928 of December 27, 1988*, for purposes of Federal criminal jurisdiction is part of the United States, subject to its sovereignty, and is within the special maritime and territorial jurisdiction of the United States for the purposes of title 18, United States Code.” AEDPA § 901(a) (emphasis added).

Putting those pieces together, the special maritime and territorial jurisdiction of the United States necessarily encompasses the first three nautical miles from the shoreline, at least for purposes of the Title 18 crimes. That is, section 901(a) of AEDPA is properly understood as providing an additional category of special maritime and territorial jurisdiction rather than as merely amending 18 U.S.C. § 7(1).

Contrary to Le’s assertions, our interpretation does not fail to give effect to the words “out of the jurisdiction of any particular State” in 18 U.S.C. § 7(1). Those words mean that 18 U.S.C. § 7(1) does not grant authority to the federal government to prosecute crimes within the first three nautical miles from shore—because that area is within the states’ jurisdictions. But AEDPA provides federal authority over some crimes committed in that area—at least those enumerated in Title 18 that require that the crime have occurred within the special maritime and territorial jurisdiction of the United States. AEDPA § 901(a) (“all the

territorial sea of the United States . . . is within the special maritime and territorial jurisdiction of the United States *for the purposes of title 18, United States Code*.” (emphasis added)). By its express language, AEDPA applies only to crimes defined in Title 18, but there are also crimes defined elsewhere in the U.S. Code that are not affected by AEDPA given their placement outside Title 18. *See, e.g.*, 15 U.S.C. § 1243 (criminalizing the manufacture, sale, or possession of switchblade knives within the SMTJUS “as defined in section 7 of title 18”); 16 U.S.C. § 3372 (criminalizing possession of certain fish, wildlife, and plants within the SMTJUS “as defined in section 7 of Title 18”); 15 U.S.C. § 1175 (criminalizing gambling devices within the SMTJUS “as defined in section 7 of title 18”). Those crimes incorporate the definition of special maritime and territorial jurisdiction of the United States from 18 U.S.C. § 7(1). And the words “out of the jurisdiction of any particular State” in 18 U.S.C. § 7(1) mean that those crimes can be prosecuted by the federal government only beyond the three nautical mile line. That is enough effect to avoid superfluity.⁶

Le further resists the text, arguing that reading section 901(a) of AEDPA to extend federal special maritime and territorial jurisdiction for Title 18 crimes to include the three-nautical-mile area that begins at the shoreline would

⁶ For these same reasons, section 901(a) of AEDPA does not constitute an implied repeal of 18 U.S.C. § 7(1). 18 U.S.C. § 7(1)’s exclusion of areas over which states have jurisdiction from the areas included in federal criminal jurisdiction continues to apply to those non-Title 18 crimes. *See Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (“We will not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all.” (citation modified)).

require an express amendment to 18 U.S.C. § 7. That argument does not carry weight.

Congress need not have expressly amended 18 U.S.C. § 7 for section 901(a) of AEDPA to have extended the federal government’s criminal jurisdiction to California’s three-nautical-mile territorial sea. Le correctly points out that Congress has expanded the special maritime and territorial jurisdiction in the past by expressly amending 18 U.S.C. § 7. *See, e.g.,* National Aeronautics and Space Administration Authorization Act of 1982, Pub. L. No. 97-96, § 6, 95 Stat. 1207, 1210 (1981) (adding subsection 6 to 18 U.S.C. § 7, which expanded the SMTJUS to cover “[a]ny vehicle used or designed for flight or navigation in space . . . while that vehicle is in flight”). But nothing requires Congress to always use the same statutory approach. As we explained above, Congress chose to provide an additional category of the special maritime and territorial jurisdiction of the United States in section 901(a) of AEDPA. That choice was entirely permissible. *See Andreiu v. Ashcroft*, 253 F.3d 477, 487–88 (9th Cir. 2001) (Beezer, J., concurring) (en banc) (“It is not the court’s business to tell Congress how to structure a statute.”).⁷

⁷ Le makes three other arguments, all of which are unconvincing. He argues that the rule of lenity counsels against our interpretation. But the rule of lenity applies when interpreting ambiguous criminal prohibitions, and, here, there is no ambiguity. *See, e.g., Shular v. United States*, 589 U.S. 154, 165 (2020). Le also argues that the doctrine of constitutional avoidance favors his argument. But Le does not offer any argument that the Government’s interpretation of section 901(a) of AEDPA exceeds what the Constitution allows, and longstanding caselaw suggests it does not. *See United States v. Flores*, 289 U.S. 137, 151 (1933) (explaining that “[t]he criminal jurisdiction of the United States is wholly statutory, but it has never been doubted that the [Constitution’s] grant of admiralty

IV.

Having determined that the Government had jurisdiction to bring this prosecution, we turn to the juror removal issue.

The Government argues that Le either waived this issue in the district court, preventing him from asserting it as an error on appeal, or at least forfeited it, requiring us to apply plain error review. This is a rare instance in which the merits of the claim dictate whether the claim can be waived, so we address the merits first and then explain why our conclusion on the merits means that the issue could not have been waived. In considering the merits, we assume without deciding that the Government is right that plain error review applies because, even under that demanding standard, Le's challenge succeeds. *United States v. Kyle*, 734 F.3d 956,

and maritime jurisdiction to the federal government includes the legislative power to define and punish crimes committed upon vessels lying in navigable waters of the United States" (citation omitted)); *Miller v. United States*, 88 F.2d 102, 104 (9th Cir. 1937) (explaining that the "[Admiralty and Maritime Jurisdiction] [C]ause does give Congress power to provide for the punishment of offenses committed upon any navigable waters other than those of the high seas, although within the jurisdiction of a state"); *see also* U.S. Const. art. III, § 2, cl. 1 (extending the judicial power "to all Cases of admiralty and maritime Jurisdiction"). Le further argues that our interpretation would intrude on states' power to punish crimes. But that argument also fails because nothing in our interpretation of AEDPA precludes states from exercising criminal jurisdiction over their territorial waters. States and the federal government already share concurrent jurisdiction to prosecute the crimes enumerated in Title 18 of the United States Code on much of the land in the United States, *see, e.g., United States v. Crawford*, 657 F.2d 1041, 1046 n.6 (9th Cir. 1981) (recognizing that counterfeiting offenses enumerated in 18 U.S.C. § 472 are crimes over which "states have concurrent jurisdiction to prosecute"), so there is no reason that states and the federal government cannot concurrently exercise jurisdiction over crimes committed within three nautical miles of the shoreline.

962–63 (9th Cir. 2013) (“Because we find that [the defendant] can satisfy the plain-error standard of review, we assume without deciding that plain error is the proper standard in this case, and proceed accordingly.”).

Under the plain error standard, Le must show (1) an error, (2) that is clear or obvious, (3) that affected his substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Depue*, 912 F.3d 1227, 1232 (9th Cir. 2019) (en banc).

A.

We begin with whether Le has demonstrated error. “In all criminal prosecutions,” the Sixth Amendment guarantees the right to trial “by an impartial jury.” U.S. Const. amend. VI. The Supreme Court has interpreted that clause to endow a federal criminal defendant with the right to a unanimous verdict, *see Ramos v. Louisiana*, 590 U.S. 83, 93 (2020), and the Federal Rules of Criminal Procedure echo that constitutional requirement, Fed. R. Crim. P. 31(a) (“The verdict must be unanimous.”).

In *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999), we held that the right to a unanimous verdict was violated when a holdout juror—a juror who was unable to reach agreement with the remainder of the jury on what the verdict should have been—was removed during deliberations. *Id.* at 1085. In that case, on the sixth day of jury deliberations, the jury sent the district court a note reporting that a juror named Cotey appeared unable to meaningfully participate in the group’s discussions because she had “stated [her] final opinion prior to review of all counts.” *Id.* at 1083. When the district court individually questioned each juror, eleven jurors described Cotey as

confused, unfocused, and resistant to explaining her reasoning. *Id.* at 1083–84. Yet the jurors’ responses also revealed signals that some of the friction with Cotey traced back to substantive disagreement rather than her incapacity. *Id.* Several jurors indicated that Cotey had strong views on particular elements of the offenses and would not abandon them despite pressure to conform, and Cotey herself expressed that she was being pushed to align with a majority she was not yet prepared to join. *Id.* at 1084. The district court ultimately determined that there was good cause to dismiss Cotey,⁸ concluding that she was either unwilling or unable to deliberate. *Id.* After an alternate was seated, the jury returned convictions on several counts. *Id.*

Our court reversed. *Id.* at 1088. We acknowledged that “[a] trial judge faces special challenges when attempting to determine whether a problem between or among deliberating jurors stems from disagreement on the merits of the case,” *id.* at 1086, given that “a court may not delve deeply into a juror’s motivations because [the court] may not intrude on the secrecy of the jury’s deliberations.” *Id.* (quoting *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987)). Specifically, the need to avoid “second-guess[ing]” or “influenc[ing] the work of the jury,” or “exposing [the]

⁸ For the good cause standard, the district court cited Federal Rule of Criminal Procedure Rule 23(b)(3), which today provides that “[a]fter the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.” The current wording reflects stylistic amendments that have been made since *Symington* was decided. See Fed. R. Crim. P. 23 advisory committee’s notes to 2002 amendments. Despite citing Rule 23(b)(3), which authorizes proceeding with 11 jurors, the district court in *Symington* seated an alternate juror. *United States v. Symington*, 195 F.3d 1080, 1084 (9th Cir. 1999).

deliberations to public scrutiny,” limited the district court’s “investigative power” into the problems a juror might be having. *Id.* (citation modified). We recognized that, as a result, the “trial judge may not be able to determine conclusively whether or not a juror’s alleged inability . . . to deliberate is simply a reflection of the juror’s opinion on the merits of the case, an opinion that may be at odds with those of her fellow jurors.” *Id.*

Nonetheless, we held that a district court may not remove a juror for reasons stemming from her views on the merits and that such a reason is therefore not good cause for removal. *Id.* at 1087; *see also United States v. Murphy*, 483 F.3d 639, 644 (9th Cir. 2007) (“We have held that ‘good cause’ for dismissal of a juror cannot be based on the juror’s views on the merits of the case.” (citing *Symington*, 195 F.3d at 1085–88)). We stated that, when there is not good cause to remove the juror, “the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial.” *Symington*, 195 F.3d at 1087. We explained that, on appeal, we must similarly evaluate whether “the record evidence discloses any *reasonable* possibility that the impetus for a juror’s dismissal stem[med] from [her] views on the merits of the case.” *Id.* If so, the dismissal violated the Sixth Amendment. *Id.* Applying that standard in *Symington*, we concluded that the Sixth Amendment had been violated because the statements made by Cotey and her fellow jurors “suggest[ed] that the other jurors’ frustrations with [Cotey] derived primarily from the fact that she held a position opposite to theirs on the merits of the case.” *Id.* at 1088.

We applied that standard again in *United States v. Litwin*, 972 F.3d 1155 (9th Cir. 2020), determining that the trial court record “clearly disclose[d] a ‘reasonable possibility

that the impetus for [a juror's] dismissal stem[med] from [her] views on the merits of the case.” *Id.* at 1174 (quoting *United States v. Christensen*, 828 F.3d 763, 807 (9th Cir. 2015)). There, hours into deliberations following a lengthy criminal trial, the jury sent a note saying that Juror 5 “says no matter what, she will not change her mind.” *Id.* at 1162. The district court questioned two other jurors and then Juror 5 herself. *Id.* at 1162–66. One juror stated that Juror 5 “doesn’t want to listen” and “doesn’t want to hear anybody else’s opinions or statements or review anything.” *Id.* at 1174. Another juror mentioned that Juror 5 seemed “confused” and was “getting stuck on one part of [a] sentence” in the jury instructions. *Id.* at 1172. The district court never followed up on whether an aspect of the instructions needed clarification and instead dismissed Juror 5 on two grounds: (1) she supposedly harbored “malice” toward the judicial process stemming from the court’s earlier refusal to excuse her from jury service for financial hardship, and (2) she had “refused to deliberate.” *Id.* at 1167.

On appeal, we rejected the district court’s malice rationale as unsupported by the record. *Id.* at 1172–73. We then concluded that what the district court described as “refusal to deliberate” was not good cause for removal, because it could instead be reasonably understood as Juror 5’s effort to articulate her concerns that the prosecution’s evidence was insufficient. *Id.* at 1174–77. With no actual basis for dismissal independent of Juror 5’s view of the merits, we vacated the convictions and remanded for a new trial. *Id.* at 1179.

Under *Symington* and *Litwin*, to determine if there was error in this case, our inquiry focuses on whether there is any “reasonable possibility” that BJR’s removal was related to her views of the case and thus a violation of Le’s Sixth

Amendment right to a unanimous jury. *Symington*, 195 F.3d at 1087. Dismissal of a juror is appropriate only if the available evidence is “sufficient to leave one firmly convinced that the impetus for a juror’s dismissal is unrelated to [his or her] position on the merits.” *Symington*, 195 F.3d at 1087 n.5. The trial record here leaves us far from “firmly convinced.” *Id.*

BJR directly confirmed, in response to the district court’s question, that her mental health crisis was “based on pressure from other jurors to reach a specific verdict.” That statement reflects a causal connection between the jury pressure and BJR’s mental health deterioration.

The rest of the record further bolsters the conclusion that BJR’s removal stemmed from her view of the merits. The jury had deliberated for more than three full days before the crisis with BJR emerged. *See Christensen*, 828 F.3d at 811 (explaining that a “longer period of time” before jury breakdown is “consistent with a juror attempting to engage in deliberations on the merits but unable to convince his or her cohort”). The foreperson expressed concern not merely about BJR’s mental health but specifically about her “vote,” stating that “[t]here is a concern that her vote does not represent the result of complete and comprehensive deliberation.” The foreperson also indicated that the other jurors wanted the court to replace BJR. Those statements evince a substantive disagreement with BJR that caused the conflict. Indeed, the district court recognized as much, stating that “the record may reflect a possibility that [BJR] was a holdout juror.”

The district court nevertheless concluded that BJR’s mental health concerns constituted “distinct, independent grounds for dismissal.” The Government stresses that

characterization on appeal, arguing that the dismissal was not based on BJR's views of the merits but on her independent inability to continue deliberating and the serious threat to her mental health. The district court and Government are correct that removing a juror for mental health reasons truly independent of his or her views on the merits would be proper. *See id.* at 806 (holding that where "independent grounds" existed to remove a juror, a defendant's Sixth Amendment rights were not violated). Such independent grounds provide "good cause" and could include juror illness, juror misconduct, or juror bias, among other reasons. *See Symington*, 195 F.3d at 1085; *Litwin*, 972 F.3d at 1169.

But where, like here, the record reveals that a juror's mental health crisis stems from her disagreement with other jurors about the merits of the case, those mental health concerns cannot be treated as an independent basis for removing the juror. If a juror whose mental health deteriorated as a direct consequence of being pressured to change her vote could be dismissed on that basis, that would create a dangerous mechanism for circumventing the unanimity guarantee. Jurors could then pressure a holdout until her resulting distress provided the apparent "independent" ground for her removal. *See Litwin*, 972 F.3d at 1169 ("[R]emoving a juror merely because she disagrees with her fellow jurors on the proper outcome of the case would provide an obvious endrun around the unanimous jury verdict guarantee. If a juror could be removed on this basis, then the right to a unanimous verdict would be illusory." (citation modified)).

The Fourth Circuit has recognized that risk as well. In *United States v. Laffitte*, 121 F.4th 472 (4th Cir. 2024), a juror had sent a note requesting replacement because she was

“experiencing anxiety and unable to clearly make [her] decision.” *Id.* at 479. The juror then explained to the district court that she had “started to feel very anxious due to some of the reactions to [her] decision” and that she did not want to “be trialed for [her] decision.” *Id.* at 480. The district court dismissed her based on her emotional state and anxiety. *Id.*; see also *id.* at 481 (detailing how the district court described the removed juror as “emotionally very fragile,” explaining that she “could hardly speak,” and “was on anxiety medication”). The Fourth Circuit reversed, holding that “[t]he removal of a juror whose emotions render her incapacitated may be an adequate exercise of the district court’s discretion” but that “such emotional distress only justifies removal if it bears no causal link to the juror’s holdout status.” *Id.* at 490 (citation modified). On the record there, the Fourth Circuit held that the “grounds for [the juror’s] removal—i.e., her emotional state and anxiety—appear to have been caused by her views of the case,” and that the dismissal therefore violated the Sixth Amendment. *Id.*

On the other hand, *United States v. Wilkerson*, 966 F.3d 828 (D.C. Cir. 2020), is informative as an example of proper dismissal. There, a juror sent a note expressly stating she “strongly disagree[d] with the laws and instructions” and “cannot follow them.” *Id.* at 833. She also noted that she was “experiencing emotional and mental distress.” *Id.* When questioned, she confirmed her disagreement with the law seven times without once referencing the evidence or her views of the defendant’s guilt. *Id.* at 836–37. The district court “found as a matter of fact that [the juror] sought to be dismissed because she disagreed with the applicable law rather than because of any concerns about the evidence.” *Id.* at 834. The D.C. Circuit affirmed dismissal of the juror

because the record contained no sufficient possibility that her request stemmed from evidentiary concerns—her request for dismissal stemmed from her disagreement with the law itself, an independently valid ground that bore no causal link to her holdout status on the merits. *Id.* at 835–38. The court recognized that “[t]o be sure, in her note, [the juror] conveyed that ‘[i]n addition’ to her disagreement with the law, she was ‘experiencing emotional and mental distress.’” *Id.* at 837. But there was no indication that the juror’s “distress derived from an evidentiary concern.” *Id.*

We recognize that the district court faced a genuinely difficult situation in supervising a juror in evident distress. It is undisputed that BJR could not have continued serving on the jury. And it is clear the district court was trying to be as fair as possible. But faced with a juror whose distress both stemmed from her view of the prosecution’s case and was severe enough to preclude her from continuing to deliberate, our caselaw instructs that the only constitutionally permissible path forward was to declare a mistrial. *Litwin*, 972 F.3d at 1169 (“[W]hen faced with a juror who refuses to agree with other jurors about the strength of the government’s case, the court has two options: ‘declare a mistrial or send the juror back to deliberations with instructions that the jury continue to attempt to reach agreement.’” (quoting *Symington*, 195 F.3d at 1086)). Replacement of the juror was not among the permissible options.

In *Litwin*, we articulated the importance of the mistrial remedy, even while recognizing its costs. We described how “a single juror’s ability to affect the outcome of a long-running prosecution is an inevitable possibility given the Sixth Amendment right to a unanimous jury verdict,” and that when this right collides with the government’s and the

court's interest in avoiding the burden of retrial, "our law requires that the former must prevail." *Id.* at 1159. The alternative—permitting dismissal when a majority's pressure eventually succeeds in incapacitating a dissenting juror—would give jurors perverse incentives and undermine the jury right enshrined in our Constitution.⁹

B.

Having determined that the removal of BJR without declaring a mistrial constituted error, we turn to the remaining prongs of plain error review: (2) whether the error was clear or obvious; (3) whether it affected Le's substantial rights; and (4) whether it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Depue*, 912 F.3d at 1232 (quoting *United States v. Hammons*, 558 F.3d 1100, 1103 (9th Cir. 2009)). We conclude that those three prongs are also satisfied.

An error is "plain" or "obvious" if it is clear as of the time of appellate consideration. *United States v. Dupas*, 419 F.3d 916, 924 (9th Cir. 2005); *Henderson v. United States*, 568 U.S. 266, 271 (2013). The rule that Le invokes has been the law of this circuit since *Symington* was decided in 1999, was reaffirmed more recently in *Litwin*, and has since been applied by our sister circuit on facts closely resembling this case. *Symington*, 195 F.3d at 1085–88; *Litwin*, 972 F.3d at 1169–70; *Laffitte*, 121 F.4th at 488–91. Here, BJR's own words indicated a causal link between her distress and the

⁹ After trial, Le obtained statements from BJR further detailing her experience during jury deliberations. The parties dispute whether we can consider these declarations under Federal Rule of Evidence 606(b). We need not reach this issue because even without the statements, we conclude that the record reveals a reasonable possibility that BJR's dismissal stems from her views on the merits.

jury's disagreement over the verdict. That causal link is what *Symington* and *Litwin* identified as the line dividing permissible and impermissible removal. The obviousness of the error is not diminished merely because the district court, understandably focused on BJR's immediate welfare, did not draw that link in the moment.

To determine whether the error affected Le's substantial rights, we ask whether there is "a reasonable probability that, but for the error, the result of the proceeding would have been different." *Greer v. United States*, 593 U.S. 503, 507–08 (2021) (citation omitted). That standard is satisfied here. The original jury, with BJR seated, deliberated for more than three full days without reaching a verdict. The district court itself recognized that the record might reflect a genuine holdout. Once BJR was replaced, the reconstituted jury required less than a full day to convict Le on all three counts. The disparity between those two timelines supports a reasonable probability that BJR's presence—and her vote—was the barrier between the original jury and a guilty verdict. And Le does not have to show that he would have been acquitted to establish an effect on his substantial rights; a hung jury and a resulting mistrial would have been materially different than the convictions Le received. *See Litwin*, 972 F.3d at 1178 (asking in the context of an impermissibly removed juror whether "absent the error . . . the jury would have returned a verdict of guilty" (citation modified)). On this record, there is a reasonable probability that the jury would not have been able to reach a unanimous verdict of guilty. Le's substantial rights were thus affected.

We now turn to the final prong of the plain error standard—whether letting the error stand would seriously undermine confidence in the judicial process. Few things

could more seriously affect the fairness, integrity, and public reputation of judicial proceedings than removing a juror because she does not agree with other jurors on whether the defendant should be found guilty. *See id.* at 1169. We cannot permit jurors to accomplish indirectly what the Sixth Amendment plainly forbids them from accomplishing directly.

C.

The Government contends that because Le was aware of his right to a unanimous jury and intentionally did not invoke it at the appropriate time, he waived his ability to raise this issue on appeal.¹⁰ After the first jury note was received and the court questioned BJR the first time, defense counsel opposed her dismissal arguing it would violate *Symington*. After subsequent discussion regarding BJR's thoughts of self-harm, when the district court asked whether BJR should be excused, defense counsel responded that there appeared to be "independent grounds to excuse her" and that the court

¹⁰ The Government does not argue that *United States v. Murphy*, 483 F.3d 639 (9th Cir. 2007), controls our waiver inquiry, and rightly so. *Murphy* upheld a conviction where the parties stipulated under Rule 23(b)(2)(A) to proceed with an eleven-member jury after a note described a juror as refusing to deliberate. *Id.* at 640–41, 645. Rule 23(b)(2)(A) states: "At any time before the verdict, the parties may, with the court's approval, stipulate in writing that . . . the jury may consist of fewer than 12 persons." Fed. R. Crim. P. 23(b)(2)(A). In *Murphy*, we recognized that Rule 23(b)(2)(A) does not have a "good cause" requirement, so *Symington* did not apply. *Id.* at 644–45. *Murphy* does not govern here because the district court expressly relied on good cause to dismiss BJR, and Le did not sign a written stipulation agreeing to proceed with fewer than twelve jurors.

would be “within its discretion” to seat an alternate. Le did not then move for a mistrial after BJR’s removal.¹¹

A “waiver is the intentional relinquishment or abandonment of a known right,” *Wood v. Milyard*, 566 U.S. 463, 474 (2012) (citation modified), and it forecloses appellate review of an issue entirely, *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc). But some rights cannot be waived, and some waivers cannot be enforced. *See Hunter v. United States*, 608 U.S. 713, 717 (2026) (holding that knowing and intelligent written appellate waivers in plea agreements cannot be enforced against criminal defendants when doing so would produce a miscarriage of justice); *see also id.* at 742 (Gorsuch, J., concurring) (identifying waivers that are invalid because they are “repugnant to the Constitution and laws of the United States” (quoting *Home Ins. Co. v. Morse*, 87 U.S. 445, 457 (1874))).

In *United States v. Lopez*, 581 F.2d 1338 (9th Cir. 1978), we held that the guarantee of a unanimous verdict under Federal Rule of Criminal Procedure 31 is a right that cannot be waived. *Id.* at 1340. There, a jury had said three times that it was deadlocked. *Id.* At defense counsel’s own urging, and with the express consent of the defendant, the district court permitted the jury to return a non-unanimous verdict. *Id.* The jury then returned a guilty verdict by a vote of ten to two. *Id.* We reversed, holding that a defendant may not waive the unanimity requirement, regardless of whether the waiver was voluntary. *Id.* Then-Judge Kennedy grounded the holding in the importance of unanimity to the deliberative process. Because “often only one or two

¹¹ Le did move, after the fact, for a new trial arguing the dismissal of BJR violated his Sixth Amendment rights.

members [of the jury] express doubt as to [a] view held by a majority at the outset of deliberations,” a rule insisting on unanimity forces the majority to engage with and test the minority’s doubts rather than simply outvoting them. *Id.* at 1341. That gives the eventual verdict a conclusiveness and reliability to which “[b]oth the defendant and society” are entitled. *Id.* Allowing waiver, our court suggested, would erode the structural safeguards baked into the deliberative process regardless of the individual defendant’s consent. We recognized that the protection secured by unanimity is not purely personal but is shared with society at large. *Id.* Although our court did not reach the constitutional guarantee of jury unanimity in *Lopez*, we later held in *United States v. Ullah*, 976 F.2d 509 (9th Cir. 1992), that, like the Rule 31 guarantee, the Sixth Amendment’s guarantee of a unanimous jury verdict is nonwaivable. *Id.* at 513 n.5 (agreeing with sister circuits that “a criminal defendant in federal court can waive *neither* the statutory *nor* the constitutional requirement of a unanimous jury verdict”).

And, in *Litwin*, we concluded that the foundational unanimity guarantee is violated when a district court removes a juror for reasons stemming from her view of the merits. *See* 972 F.3d at 1168–69. Simply put, removing a juror based on her view of the merits violates the same core protections as the unwaivable errors in *Lopez* and *Ullah*. We thus conclude that a defendant cannot waive a challenge to a juror’s removal when the removal violates *Symington* and runs afoul the Sixth Amendment’s unanimity guarantee.

In light of our holding that the record reflects a reasonable possibility that BJR’s removal stemmed from her views on the merits and thus violated *Symington*, Le’s consent to her removal does not foreclose our review of the Sixth Amendment error.

V.

For the foregoing reasons, we vacate Le's conviction and remand for further proceedings consistent with this opinion.¹²

¹² We need not reach Le's remaining arguments because our conclusion that dismissing BJR violated Le's Sixth Amendment rights requires vacating his conviction and remanding for a new trial.