# APPENDIX

**APPENDIX A**

**PUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 19-4137**

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UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

ALLEN H. LOUGHRY, II,

Defendant – Appellant.

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Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, Jr., Senior District Judge. (2:18-cr-00134-1)

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Argued: May 3, 2021 Decided: May 20, 2021

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Before GREGORY, Chief Judge, WILKINSON, NIEMEYER, MOTZ, AGEE, KEENAN, WYNN, DIAZ, FLOYD, HARRIS, RICHARDSON, and QUATTLEBAUM, Circuit Judges.*

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Affirmed by published per curiam opinion.

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**ARGUED:** Elbert Lin, HUNTON ANDREWS KURTH LLP, Richmond, Virginia, for Appellant. Richard Gregory McVey, OFFICE OF THE UNITED STATES ATTORNEY, Huntington, West Virginia, for Appellee. **ON BRIEF:** Nicholas D. Stellakis, Boston, Massachusetts, Katy Boatman, HUNTON ANDREWS KURTH LLP, Houston, Texas, for Appellant. Michael B. Stuart, United States Attorney, Philip H. Wright, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

PER CURIAM:

The judgment of the district court is affirmed by an equally divided court.

*AFFIRMED*

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* Judge King, Judge Thacker, and Judge Rushing took no part in the consideration or decision of this case.

## APPENDIX B

FILED: February 25, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 19-4137
(2:18-cr-00134-1)

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UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

ALLEN H. LOUGHRY, II

Defendant – Appellant

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O R D E R

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A majority of judges in regular active service and not disqualified having voted in a requested poll of the court to grant the petition for rehearing en banc,

IT IS ORDERED that rehearing en banc is granted.

The parties shall file 15 additional paper copies of their briefs and appendices previously filed in this case within 10 days.

This case is tentatively scheduled for remote oral argument on Monday, May 3, 2021.

For the Court

/s/ Patricia S. Connor, Clerk

**APPENDIX C**

**PUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 19-4137

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALLEN H. LOUGHRY II,

Defendant - Appellant.

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Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, Jr., Senior District Judge. (2:18-cr-00134-1)

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Argued: October 29, 2020 Decided: December 21, 2020

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Before NIEMEYER, DIAZ, and QUATTLEBAUM, Circuit Judges.

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Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Quattlebaum joined.

Judge Diaz wrote a separate opinion joining in Parts III and IV and dissenting from Part II.

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**ARGUED:** Elbert Lin, HUNTON ANDREWS KURTH LLP, Richmond, Virginia, for Appellant. Richard Gregory McVey, OFFICE OF THE UNITED STATES ATTORNEY, Huntington, West Virginia, for Appellee. **ON BRIEF:** Nicholas D. Stellakis, Boston, Massachusetts, Katy Boatman, HUNTON ANDREWS KURTH LLP, Houston, Texas, for Appellant. Michael B. Stuart, United States Attorney, Philip H. Wright, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

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NIEMEYER, Circuit Judge:

After the former Chief Justice of the Supreme Court of Appeals of West Virginia, Allen H. Loughry II, was convicted of mail fraud and wire fraud for the misuse of public assets, he filed a motion challenging the fairness of his trial on the grounds that a juror — referred to by the district court and the parties as Juror A — allegedly engaged in misconduct and was biased. He requested a new trial or at least a hearing on his motion. The district court denied Loughry's motion, concluding that the evidence Loughry presented was insufficient to sustain his claims or even to justify a hearing.

The court thereafter sentenced Loughry to 24 months' imprisonment, imposed a $10,000 fine, and ordered restitution.

From the district court's judgment dated February 25, 2019, Loughry filed this appeal, alleging

only that the district court abused its discretion in denying his request for an evidentiary hearing to investigate Juror A's potential misconduct and bias.

For the reasons that follow, we affirm.

## I

In October 2017, the news media in Charleston, West Virginia, began investigating and reporting about lavish spending of public funds by justices of the West Virginia Supreme Court of Appeals for renovation and refurbishing of their offices, and shortly thereafter a federal investigation ensued. The investigation led to evidence that Loughry removed a historical desk from the court to his home; that he improperly used state vehicles and gas credit cards for personal use; and that he obstructed justice during the course of the USCA4 Appeal: 19-4137 Doc: 71 Filed: 12/21/2020 Pg: 2 of 31 3 investigation. The historical desk, which became prominent in the news coverage, was one that was selected for use in the courthouse in the 1920s by Cass Gilbert, a prominent architect who designed the West Virginia State Capitol, the United States Supreme Court building, the Woolworth building in New York, and other well-known buildings. The desk was thus referred to as the "Cass Gilbert desk."

In June 2018, a grand jury returned a 25-count indictment charging Loughry with mail fraud, wire fraud, and related crimes. During the same period, the West Virginia Judicial Investigations Commission filed a complaint against Loughry, alleging numerous violations of the state Judicial Code of Conduct, and the Judiciary Committee of the West Virginia House of Delegates began impeachment proceedings against Loughry, as well as

three other sitting justices of the West Virginia Supreme Court.

The criminal trial against Loughry began on October 2, 2018, with voir dire of the venire — the pool from which the jurors are selected. As is customary, the district court summarized for the venire the charges made against Loughry in the indictment and inquired whether any prospective juror knew Loughry; whether any knew the prospective witnesses; whether any were related to law enforcement officers; and whether any had ever served on a jury or as a witness in a criminal case.

With respect to the pending charges, the court inquired whether any of the prospective jurors had any knowledge or exposure to "this case" or the "facts of this case," and whether they had discussed the case with anyone. The court asked similar questions about the impeachment proceedings against Loughry and the other justices that were taking place in the state legislature. In response to affirmative responses from prospective jurors, the court inquired about whether those prospective jurors could set aside their knowledge or experience and "listen to the evidence and base a verdict solely upon the evidence received here in the courtroom." Finally, the court followed up with general questions about bias or preheld opinions about the guilt or innocence of the defendant. After these and similarly general voir dire questions, the court allowed counsel for the parties to conduct voir dire of individual prospective jurors who responded affirmatively to any of the questions.

During this process, Juror A answered "no" to questions of whether she had knowledge "of this case" or "facts of this case"; answered "yes" to questions of whether she had knowledge of the impeachment

proceedings; and answered "yes" to whether she could set aside her knowledge and render a verdict based solely on the evidence presented at trial. Loughry did not elect to conduct any further individual voir dire of Juror A, and she was impaneled as a juror, as was another juror who had answered these questions similarly to Juror A.

Following six days of trial and two days of deliberation, the jury returned a verdict finding Loughry guilty of eleven counts — one count of mail fraud, seven counts of wire fraud, one count of witness tampering, and two counts of making false statements to a federal agent — and acquitting him of one count of mail fraud and nine counts of wire fraud. The jury was unable to reach a verdict on one count of wire fraud. After the jury returned its verdict, the district court entered a judgment of acquittal as to the witnesstampering count for a lack of sufficient evidence. (The government had dismissed the three other counts of the indictment before trial.) Of significance here, the jury acquitted Loughry on the count charging him with mail fraud in connection with his removal of the historical Cass Gilbert desk from the Supreme Court building to his home, which had been the subject of extensive media coverage.

Shortly after trial, an individual on the street outside the Kanawha County Courthouse approached counsel for Loughry and informed him that he should look at the Twitter account of Juror A. Counsel did so and saw that Juror A had "liked" or "retweeted" four tweets over the summer of 2018 related to the West Virginia Supreme Court scandal.

Twitter is a social networking platform that allows a person to post and read short messages called "tweets." Tweets can be up to 280 characters long and

can include links to websites and other resources. A Twitter user can also "follow" other Twitter users, electing for those users' tweets to appear on his or her "home timeline" or "feed." The Twitter user can reply to a tweet with a comment, indicate that the user "liked" a tweet by tapping a heart icon, and republish a tweet to the user's own followers by "retweeting" it or quoting it. Twitter can thus be, and often is, used to receive news, to follow leaders and celebrities, or simply to stay in touch with family and friends.

Loughry's counsel found that Juror A had "liked" or retweeted some 11 tweets during the four months before Loughry's trial, and 4 of them related to comments about the conduct being reported about the justices of the West Virginia Supreme Court, as follows:

> *June 7, 2018*: Juror A "liked" and retweeted a tweet by a state legislator, Delegate Mike Pushkin, stating: "When the soundness of the judiciary is questioned, coupled with the corrupt activities of other branches of government, how is the public ever to have any faith in State government?" The tweet contained a link to a West Virginia Gazette Mail article about the civil complaint filed by the Judicial Investigations Commission charging ethics violations.
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> *June 26, 2018*: Juror A "liked" a tweet by another state legislator, Delegate Rodney Miller, stating: "Legis Special Session begins at noon today looking at Supreme Court impeachments; more state employees quitting/fired; DHHR $1 million overspending for nothing; RISE program dysfunctional until

> Gen. Hoyer gets involved. My goodness we've got issues to take care of!"
>
> *June 26, 2018*: Juror A "liked" another tweet by Delegate Mike Pushkin, stating: "Justice Loughry should resign. The people of WV already paid for his couch, he should spare them the cost of his impeachment." The tweet contained a link to a West Virginia Gazette Mail opinion piece entitled, "Ken Hall: WV Justices who take advantage of public funds should resign."
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> *August 7, 2018*: Juror A "liked" a tweet by private citizen James Parker, stating: "Yes, it's a sad day in WV to think these individuals who are supposed to be the pillars of what is right, just and truthful would be overcome with such an attitude of self importance that they thought the lavish spending was appropriate!"

Counsel also discovered that Juror A had accessed Twitter on at least two days during trial. On October 3 (the day the government began presenting its case), Juror A "liked" a tweet, and on October 6 (a Saturday on which the court was not in session), Juror A retweeted one tweet and tweeted one of her own. That activity on both dates, however, was related to football. Counsel also learned that Juror A was "following" two local journalists who had reported on the trial but did not provide any evidence that Juror A "liked" or retweeted those journalists' tweets during trial.

Based on this Twitter activity, Loughry filed a motion for a new trial or, alternatively, for an evidentiary hearing, contending that Juror A engaged in misconduct and was biased. He argued that Juror A was biased against him based on her Twitter

activity during the four months before trial and because she had failed to indicate that she had personal knowledge of the case or the facts of the case during voir dire. Loughry also contended that Juror A engaged in misconduct during trial by accessing her Twitter account on October 3 and October 6.

The district court denied Loughry's motion, ruling that the evidence presented was insufficient to show misconduct or bias. First, it concluded that "there is no reason to believe that Juror A was anything but truthful in answering" the questions relating to "this case" because Juror A's Twitter activity shows only that she had knowledge of the *impeachment proceedings and ethics investigation* — not "this case." The court did acknowledge that the facts relating to the impeachment proceedings and ethics investigation overlapped with the "facts of this case" — something that also had to be obvious to counsel at the time. But it concluded that an affirmative answer by Juror A relating to the "facts of this case" would not have provided a valid basis for challenging Juror A for cause in view of her other responses relating to her ability to consider only the evidence presented at trial. Moreover, the court pointed out that the only facts discussed in the tweets' linked articles that overlapped with the "facts of this case" related to the Cass Gilbert desk and the vehicle usage, but the jury acquitted Loughry of the desk-related count and seven vehicle-related wire-fraud counts. The court explained further that Juror A's failure to affirmatively respond to the open-ended questions asking potential jurors if they could "think of anything that might prevent them from rendering a fair and impartial verdict" or if they had "anything further to add" was a "simple innocent failure to

disclose information that could have been elicited by questions counsel chose not to ask."

The district court also rejected Loughry's separate claim that Juror A engaged in misconduct by using Twitter during trial. The court explained that it had never admonished the jurors to make no use of social media during trial. "Rather, the jury was informed repeatedly that the jurors were not to use social media to learn or discuss anything about '*this case*,'" and Juror A's Twitter activity does not show that she read tweets about "this case." (Emphasis added).

The court concluded that "[w]ithout even a threshold showing of juror misconduct," it would not "expend its resources to allow the defendant to pry into a juror's pretrial conduct and fish for evidence of bias."

After the district court sentenced Loughry and entered judgment, Loughry filed this appeal, challenging only the court's denial of an evidentiary hearing with respect to Juror A's alleged misconduct and bias.

## II

Loughry contends first that Juror A's use of social media during the trial constituted misconduct, in violation of *Remmer v. United States*, 347 U.S. 227 (1954), entitling him to an evidentiary hearing. In *Remmer*, the Supreme Court held that any outside contact "with a juror during a trial about the matter pending before the jury is . . . presumptively prejudicial," entitling the defendant to a hearing to determine if such contact was in fact prejudicial. *Id.* at 229. Loughry relies on evidence that Juror A used Twitter on two days during the span of trial — once

on October 3 and twice on October 6 — and that she "followed" two local reporters, one of whom tweeted on October 9 (during trial) that "[t]here seems to be quite a bit of evidence against the Justice." Loughry presented no evidence, however, that Juror A accessed Twitter on October 9 and was thereby exposed to that tweet. Nonetheless, Loughry urges that because of the nature of social media, any *potential* juror contact with social media during trial about a matter before the jury triggers the *Remmer* presumption of prejudice, citing *United States v. Harris*, 881 F.3d 945 (6th Cir. 2018). In *Harris*, the court held that a *Remmer* hearing was justified by evidence that a juror's live-in girlfriend had researched the defendant online and likely found information about the defendant that had been excluded at trial. *Id.* at 952. The court reasoned that knowledge of this information was imputable to the juror because the girlfriend did not know the defendant and had no reason to research the defendant except for the juror's participation in the case. *Id.* at 953–54.

Rejecting Loughry's argument, the district court concluded:

> There is no evidence or allegation that Juror A posted anything related to the case during [trial]. Although Juror A follows a number of West Virginia elected officials and members of the media — including Kennie Bass of WCHS-TV and Brad McElhinny of West Virginia MetroNews, who reported on the evidence admitted at trial — there is no evidence that Juror A was exposed to any content related to the case. [Moreover] . . . the court had instructed the jurors to refrain from using social media or the internet to obtain

> information on the case or communicate with anyone about the case, and Juror A has not been shown to violate that admonition.

The court added that Loughry failed to show that the reporter's October 9 tweet "was of such a character as to reasonably draw into question the integrity of the verdict." (Quoting *Barnes v. Joyner*, 751 F.3d 229, 244 (4th Cir. 2014)).

It is foundational to due process that a defendant in a criminal case be given the right to a trial "by an impartial jury." U.S. Const. amend. VI; *see also United States v. Small*, 944 F.3d 490, 504 (4th Cir. 2019). And the Supreme Court has held that this impartiality is presumptively compromised by "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury." *Remmer*, 347 U.S. at 229. A defendant seeking a hearing on this issue must present "a credible allegation that an unauthorized contact was made, and that the contact was of such a character as to reasonably draw into question the integrity of the trial proceedings, constituting more than an innocuous intervention." *United States v. Johnson*, 954 F.3d 174, 179 (4th Cir. 2020) (cleaned up). This requires "something more than mere speculation." *United States v. Forde*, 407 F. App'x 740, 747 (4th Cir. 2011) (per curiam) (quoting *United States v. Barshov*, 733 F.2d 842, 851 (11th Cir. 1984)); *see also United States v. Gravely*, 840 F.2d 1156, 1159 (4th Cir. 1988) ("[T]he sixth amendment . . . [does not] require[ ] an inquiry into possible external influence when a threshold showing of external influence has not been made"); *United States v. Wintermute*, 443 F.3d 993, 1003 (8th Cir. 2006) (rejecting a *Remmer* claim where the defendant had argued that a juror's comment suggested that she had "*probably* accessed

the Internet" during trial on the ground that such "hypothesis" was nothing but "[s]peculation"); *United States v. Robertson*, 473 F.3d 1289, 1294–95 (10th Cir. 2007) (rejecting a *Remmer* claim that was based only on "innuendo").

In this case, the record shows that on October 3 and October 6, Juror A accessed Twitter, "liking" a tweet on the first of those days and retweeting a tweet and tweeting one of her own on the second. All of this activity related to football, and none referred to any facts about the case or, more broadly, the scandal at large. The record also shows that Juror A followed reporters who were reporting on the Loughry trial, and one had tweeted on October 9, "There seems to be quite a bit of evidence against the Justice." But there is no evidence that Juror A read that tweet. Indeed, there is no evidence that she accessed her Twitter account on October 9. Loughry's request for a *Remmer* hearing rests on the argument that Juror A *could have seen* the reporter's tweet on October 9 or other tweets by the reporters because she had a Twitter account and used it. Such a standard is defined so broadly as to reach not only Juror A's activity but also the activity of *any* other juror who had a social media account. In any event, the jurors were repeatedly instructed to avoid social media "about this case," and we presume that the jury followed these instructions. *See Stamathis v. Flying J, Inc.*, 389 F.3d 429, 442 (4th Cir. 2004). The stubborn fact yet remains in this case that Loughry did not make "a credible allegation that an unauthorized contact was made." *Johnson*, 954 F.3d at 179 (cleaned up).

To be sure, social media can facilitate improper contacts to a greater degree than before the technology existed. Sites containing news and prohibited information can be displayed instantly

with but a touch of a finger. As a consequence of this new reality, courts must become more circumspect in undertaking to guard jurors from inappropriate contacts and communications during trial. Indeed, a committee of the Judicial Conference — the Committee on Court Administration and Case Management — recently circulated proposed model instructions designed to do just that. See Judicial Conference Committee on Court Administration and Case Management, Proposed Model Jury Instructions, The Use of Electronic Technology to Learn or Communicate about a Case, updated June 2020. For example, the model instructions that are proposed for the beginning of trial read as follows:

> [D]uring the trial, you must not conduct any independent research about this case, or the matters, legal issues, individuals, or other entities involved in this case. Just as you must not search or review any traditional sources of information about this case . . . , you also must not search the internet or any other electronic resources for information about this case or the witnesses or parties involved in it.
>
> Second, this means that you must not communicate about the case with anyone . . . . Most of us use smartphones, tablets, or computers in our daily lives to access the internet, for information, and to participate in social media platforms. To remain impartial jurors, however, you must not communicate with anyone about this case, whether in person, in writing, or through email, text messaging, blogs, or social media websites and apps (like Twitter, Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and Snapchat).

* * *

> Finally . . . [m]any of the tools you use to access email, social media, and the internet display third-party notifications, pop-ups, or ads while you are using them. These communications may be intended to persuade you or your community on an issue, and could influence you in your service as a juror in this case. For example, while accessing your email, social media, or the internet, through no fault of your own, you might see popups containing information about this case or the matters, legal principles, individuals or other entities involved in this case. Please be aware of this possibility, ignore any pop-ups or ads that might be relevant to what we are doing here, and certainly do not click through to learn more if these notifications or ads appear. If this happens, you must let me know.

*Id.* While these model instructions, and the other ones proposed, focus on problems raised by social media, they do not recommend that jurors be told to avoid social media altogether — only with respect to matters related to "the case" before the jurors.

We commend such expanded instructions and highlight also that they recognize that accommodation should be made to allow jurors the use of electronic media for non-caserelated matters and to protect juror privacy. Of course, in seeking such a balance, an eye must always be kept on ensuring that defendants in criminal cases have an impartial jury, the touchstone of which is a jury "capable and willing to decide the case *solely on the evidence before it*." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (emphasis

added) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)).

Loughry contends that the increased risk of improper juror contact posed by social media was realized in this case based on the *possibility* that Juror A saw the reporters' tweets about the trial. Relying on the Sixth Circuit's recent decision in *Harris*, he argues that *Remmer* should be read to justify a hearing on improper contacts "merely [on] potential juror contact with social media during trial." But *Harris* does not, as we read it, reach so broadly.

In *Harris*, it was discovered that a juror's live-in girlfriend had accessed the defendant's LinkedIn page during trial. 881 F.3d at 952. The circumstantial evidence of improper contact arose because, other than her communication with the juror, the girlfriend had no reason to research the defendant. *Id.* As the court explained, the girlfriend did not know the defendant, and the trial "received little publicity." *Id.* The only reasonable explanation was that the juror "must have discussed the trial with his girlfriend." *Id.* Worse, the court concluded that the girlfriend likely found the defendant's LinkedIn page by searching the defendant's name on Google, a search method that would have also exposed her to "prejudicial information that the government was precluded from introducing at trial." *Id.* at 953. The Sixth Circuit concluded that this constituted "credible evidence" that the juror discussed the case with his girlfriend, that the girlfriend then searched the internet for the defendant, and that the girlfriend "potentially communicate[d] her findings" to the juror. *Id.* at 953–54. The court therefore ordered a Remmer hearing. *Id.* at 954.

The facts in *Harris*, however, are readily distinguishable from those before us, and the *Harris* court did not relax the *Remmer* requirements for a hearing. Rather, it applied them, finding that the defendant "presented a colorable claim of extraneous influence on a juror." *Harris*, 881 F.3d at 948. This holding is entirely consistent with what we have stated repeatedly — the standard for justifying a hearing under *Remmer* requires a defendant to present "a credible allegation that an unauthorized contact was made," *Johnson*, 954 F.3d at 179 (cleaned up); *see also Barnes*, 751 F.3d at 244, and the allegation must be based on "more than mere speculation," *Forde*, 407 F. App'x at 747.

Loughry also contends that whether or not Juror A actually viewed information about the case on Twitter during trial, she nonetheless committed misconduct by violating the district court's instructions that jurors avoid *all* social media during trial. Specifically, according to Loughry, the court instructed the jury to "avoid all social media" (on Day 2 of the trial) and "social networking exposure of any kind" (on Day 7 of the trial). Thus, he argues, Juror A's Twitter use on October 3 and 6 shows that she violated these instructions, justifying a *Remmer* hearing to investigate the scope of this misconduct.

We conclude, however, that the statements on which Loughry relies were taken out of context and that any reasonable juror receiving the district court's instructions during trial would have concluded that social media was prohibited *only in connection with the case*. A review of the instructions demonstrates this. Day 1 (October 2, at the outset of trial after the jury had been impaneled):

> I want to mention to you one thing that is so very important at the outset, and that is, of course, as jurors, you must decide this case solely upon the evidence that you hear from the witness stand and the exhibits as they're offered and introduced into evidence in the case.
>
> This means that during the trial, you must not conduct any independent research about this case, the matters in this case, or the individuals involved in this case.
>
> *You must not consult dictionaries or reference materials; you must not search the Internet, websites, blogs, or use any other tools, electronics or otherwise, to obtain information about this case or to help you decide the case.*
>
> Do not try to find out information from any source outside the confines of this courtroom.
>
> Until you retire and deliberate, you may not discuss this case with anyone, not even your fellow jurors.
>
> *You may not communicate with anyone about the case, on your cell phone, your iPhone, through e-mail, text messaging, Twitter, through any blog or website, including Facebook, Google, Myspace, LinkedIn, YouTube, anything imaginable.* It's all out. You must not use it in any sense.

*Day 2* (October 3, at the end of the day before the jury was dismissed for the day):

> You're going to hear me say this more than once, but, continue to be guarded, that is, do not expose yourself to any media coverage of any kind; avoid all social media, as well, and

> avoid discussing this or letting anyone draw you into discussion *about the case*.

*Day 3* (October 4, at the end of the day before the jury was dismissed):

> Once again, I'll remind you, it's better for you to have someone else review the newspapers, and they can filter what you see. As you know, of course, when the newscasts come on television, because that's pretty well fixed, you need to avoid that, of course. And radio is a little different, it gives the news at any moment, so you have to be very cautious about that. And if you happen to have it on and something is coming on *about this case* — and I'm not sure that that will happen, but it could very well happen — then click it off.
>
> And continue to observe the Court's direction that you not let anyone speak to you about this case nor [are] you to engage with anyone else, and avoid all social networking with respect to it as well.

*Day 4* (October 5 (Friday), at the end of the day before the jury was dismissed for the weekend):

> Avoid all social networking *having to do with the case.*

*Day 5* (October 8, at the end of the day before the jury was dismissed):

> It continues to be especially important that you observe the Court's directive that you avoid all media coverage *about this case*, and that, of course, has to do with radio, television and newspapers, and all social networking, as well.

> So continue to observe those same directions and avoid all contact. Don't let anyone contact you *about it*, whether it is through social networking or otherwise, and you, of course, would not be contacting those as well.

*Day 6* (October 6, at the end of the day before the jury was dismissed):

> Avoid all news media and social networking having to do with this case.

*Day 7* (October 10, at the end of the day before the jury was dismissed):

> And I will just say briefly that, as you can understand, under no circumstances are you to discuss *the case* with anyone or let anyone discuss it with you. Continue to avoid all news media and social networking exposure of any kind until you're back in here in the morning in the jury room.

*Day 8* (October 11, at the end of the day after deliberations began and before the jury was dismissed):

> And I am not going to go over all this with you again, but I want to impress upon you, continuing the necessity of your seeing to it that no one is in touch with you *about this case*, not even among yourselves, until all 12 of you are back in the jury room tomorrow morning.

*Day 9* (October 12, no instructions given as deliberations concluded and the verdict was returned).

(Emphasis added throughout).

The instructions thus given throughout the trial unambiguously prohibited socialmedia usage

*about the case* — well anticipating the model instructions recently proposed by the Judicial Conference Committee. The only instruction that did not use language equivalent to "about this case" was a short-form, single-sentence instruction given on Day 7, after deliberations had begun. If, for some reason, Juror A understood the Day 7 shortform instruction to prohibit all social media usage, it would nonetheless have been of no moment, since that day was well after Juror A's Twitter usage on Day 2 and on the Saturday after Day 4.

At bottom, we conclude that the district court did not abuse its discretion in denying Loughry's motion for an evidentiary hearing under Remmer because Loughry failed to make a credible allegation that an improper contact occurred.

## III

Next, Loughry contends that, in view of the four tweets Juror A "liked" or retweeted during the summer months before trial relating to the impeachment proceedings and ethics investigation of the West Virginia Supreme Court justices, Juror A dishonestly answered eight of the district court's questions during voir dire about her knowledge of the case, thereby indicating bias. *See McDonough*, 464 U.S. at 556 (holding that "to obtain a new trial . . . a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause"); *see also Conaway v. Polk*, 453 F.3d 567, 585 (4th Cir. 2006). More particularly, he argues that Juror A dishonestly answered five questions when denying knowledge of or discussion about "this case" or the "facts of this case" and three others when answering

general questions of prior knowledge and bias. The three general questions asked were: (1) whether prospective jurors had an opinion about or had expressed an opinion about the "guilt or innocence of the defendant or the charges" in the indictment; (2) whether there was anything that might "prevent [the prospective jurors] from rendering a fair and impartial verdict based solely upon the evidence" at trial; and (3) whether any prospective juror "wish[ed] to change or supplement" an answer. Loughry's argument that Juror A dishonestly answered the three general questions, however, depends on his demonstrating that she dishonestly answered the five questions about "this case" or the "facts of this case."

The district court rejected Loughry's claim that Juror A answered dishonestly during voir dire and reasoned further that any arguably wrong answers would not have warranted her dismissal for cause. We conclude that the evidence is insufficient to show that Juror A answered any voir dire questions dishonestly.

The district court began the relevant portion of voir dire by asking whether jurors had knowledge of "this case" or the "facts of this case." And the transcript makes clear that these questions related specifically, as the court explained, to the "case *as set forth in the indictment*." (Emphasis added). Juror A did not respond to these questions. One of the prospective jurors who did, however, also indicated that he was "probably" getting the criminal case "confused with the impeachment trials." After concluding this exchange with that juror, the court turned to the entire venire and asked, "Apart from what you've told me about *this case*, let me ask who among you have heard anything about *the impeachment proceedings* that are taking place in the state legislature?" (Emphasis added). Juror A was

among the prospective jurors who said "yes" to this question. The court then asked a series of follow-up questions, all geared towards uncovering whether the prospective jurors who answered "yes" would be able to ignore what they had learned about the impeachment proceedings and base a verdict solely upon the evidence adduced in court. Juror A and the other prospective jurors said that they could do so. Then, the court posed some open-ended questions, asking "while we're on the subject, is there anything further that any of you would want to relate to the Court about your knowledge of this case that goes beyond what we've already covered" and later, whether the prospective jurors wanted "to change or supplement" any answers. Juror A did not answer these questions. The court also asked the prospective jurors if "any of you now have an opinion or have you at any time expressed an opinion as to the guilt or innocence of the defendant of the charge or charges contained in this indictment in this case." Juror A, like the other prospective jurors, did not respond.

Given the series of questions the prospective jurors were actually asked, the four pretrial tweets that Juror A "liked" or retweeted do not suggest that Juror A was dishonest in answering, or failing to answer, any voir dire questions. The June 7 tweet linked to an article discussing the civil complaint filed by the Judicial Investigations Commission for ethics violations. One of the June 26 tweets mentioned impeachment, and the other argued that Loughry should resign from the bench. And the August 7 tweet merely expressed how "sad" it was that the justices "would be overcome with such an attitude of self importance that they thought the lavish spending was appropriate!" So while Juror A's Twitter activity clearly shows that she was aware of the *impeachment*

*proceedings and the ethics investigation*, it reveals nothing about her awareness of the *criminal case* — which the court carefully distinguished from the impeachment proceedings during voir dire. There is thus no reason to conclude that Juror A was dishonest when she did not answer the court's questions about knowledge of "this case" or the "facts of this case."

Crucially, when the court asked the venire about the impeachment proceedings, Juror A was one of the 13 prospective jurors who admitted hearing about them. Juror A was thus entirely forthcoming that she was aware of the impeachment proceedings. And when asked by the court — repeatedly — whether she would be able to put aside her knowledge of the impeachment and base a verdict solely upon the evidence presented in court, she affirmed that she could do so.

As for the open-ended question asking if the prospective jurors had anything to *add*, Juror A was not required to mention again her knowledge of the impeachment because she *had already told the court* that she had knowledge of the impeachment proceedings. And finally, with respect to the question asking whether any of the prospective jurors had "an opinion as to the guilt or innocence of the defendant of the charge or charges contained in this indictment in this case," Juror A's pretrial Twitter activity suggests only that she had an opinion on the *impeachment and the ethics investigation*, not Loughry's "guilt . . . of the charge or charges contained in this indictment in this case." Moreover, Juror A had by this point in voir dire already affirmed to the court that she could put aside her knowledge of the impeachment proceedings and decide the case based solely on the evidence introduced at trial. Her pretrial Twitter activity therefore does not suggest that she

dishonestly hid her views regarding Loughry's guilt or innocence.

Furthermore, even if we were to recognize that Juror A should have *volunteered* more information about her views on the impeachment proceedings — a requirement we do not impose — "a juror's failure to elaborate on a response that is factually correct but less than comprehensive" does not establish juror dishonestly "where no follow-up question is asked." *Porter v. Zook*, 803 F.3d 694, 697 (4th Cir. 2015). Here, Loughry's counsel was invited to inquire further into the jurors' knowledge of the case or the impeachment proceedings, and, in fact, he questioned other potential jurors who stated that they had knowledge about those topics. He did not, however, question Juror A or two other jurors who likewise stated that they had knowledge of the impeachment proceedings but not the criminal case. Loughry cannot now use his failure to follow up with Juror A as grounds for an evidentiary hearing. *See Billings v. Polk*, 441 F.3d 238, 246 (4th Cir. 2006) ("Otherwise, defendants would be able to sandbag the courts by accepting jurors onto the panel without exploring on *voir dire* their possible sources of bias and then, if their gambit failed and they were convicted, challenging their convictions by means of post-trial evidentiary hearings based on newly discovered evidence of possible juror bias").

Loughry's theory of dishonesty rests on parsing the transcript to isolate five standalone questions that asked about "this case" or about the "facts of this case." He then contends that Juror A dishonestly answered those questions because the "facts of this case" overlapped with the facts prompting the impeachment proceedings and that construing "this case" to not include "the impeachment" is possible

only by "hypertechnically parsing" the court's questions. But a fair reading of the voir dire transcript shows that when the court referred to "this case" and the "facts of this case," it was referring to *the criminal case* — not the impeachment proceedings. As the court stated, "You've heard what I told you about — what little I've told you about *this case as set forth in the indictment*. Do any of you have personal knowledge of the *facts of this case*?" (Emphasis added). And when asked about the impeachment proceedings — which Juror A's pretrial Twitter activity did reveal knowledge of — Juror A freely admitted to the court that she had knowledge of those proceedings. Moreover, with Loughry's counsel's own understanding that facts relating to impeachment overlapped with facts relating to the case, counsel knew from Juror A's answers that she had some knowledge of facts pertaining to the case — *i.e.*, the overlapping facts. Yet, he never inquired further and was satisfied to let her sit on the jury.

In sum, we conclude that because Loughry has not made a colorable showing that Juror A dishonestly answered material questions during voir dire, the district court did not abuse its discretion in failing to hold an evidentiary hearing to investigate *McDonough* bias.

## IV

Finally, Loughry contends that the district court abused its discretion in failing to hold an evidentiary hearing to investigate whether Juror A was *actually* biased against him. Specifically, Loughry contends that Juror A's failure "to answer numerous voir dire questions honestly . . . is evidence of bias against the defendant, particularly if Juror A acted deliberately for the purpose of getting onto the

jury." *See Jones v. Cooper*, 311 F.3d 306, 310 (4th Cir. 2002).

To demonstrate actual bias, a defendant "must prove that a juror, because of his or her partiality or bias, was not 'capable and willing to decide the case solely on the evidence before it.'" *Porter v. Zook*, 898 F.3d 408, 423 (4th Cir. 2018) (quoting *Phillips*, 455 U.S. at 217). Absent such proof, "[j]urors are 'presumed to be impartial.'" *United States v. Powell*, 850 F.3d 145, 149 (4th Cir. 2017) (quoting *Wells v. Murray*, 831 F.2d 468, 472 (4th Cir. 1987)).

Here, too, we conclude that the district court did not abuse its discretion in failing to hold an evidentiary hearing to investigate Loughry's allegations of actual bias. Juror A's pretrial Twitter activity reveals that she read tweets of Loughry's impeachment proceedings and ethics investigation and that she had seemingly approved of — "liked" — what she read. But when asked directly by the district court whether she could put aside what she had learned before trial about the impeachment proceedings and decide the case "based solely on the evidence as we receive it here in the courtroom through the witnesses and the exhibits that are admitted into evidence," she said "yes." It is difficult to see how the same pretrial Twitter activity that likely led Juror A to tell the court that she had heard about the impeachment proceedings now undermines that answer.

Insofar as Juror A's Twitter activity reveals that she had some preexisting knowledge of the case, "it is a long-settled proposition that mere knowledge of a case is insufficient to support a finding of actual prejudice." *United States v. Higgs*, 353 F.3d 281, 309 (4th Cir. 2003). Moreover, even if that activity

suggests that she likely viewed Loughry less than favorably, she nonetheless affirmed to the district court that she did not have "an opinion" and has not "expressed an opinion as to the guilt or innocence of the defendant of the charge or charges *contained in this indictment in this case*" and that she could render a verdict based solely on the evidence at trial. (Emphasis added).

We conclude that the district court did not abuse its discretion in refusing to hold an evidentiary hearing on actual bias.

* * *

The long and short of this case is that evidence indicates that Juror A had some pretrial exposure to news of the investigations of the West Virginia Supreme Court justices and participated modestly in the public dialogue via a few "likes" and retweets on Twitter. But evidence further indicates that she engaged in no prohibited contacts or communications during trial. As we have noted, social media does heighten the risk that jurors will be exposed to external information about the case, but here Loughry has failed to make a threshold showing that that risk was realized. In this case, all the evidence points to a fair trial. The jury, including Juror A, assured the court that it was "capable and willing to decide the case on the evidence before it." *McDonough*, 464 U.S. at 554 (quoting *Phillips*, 455 U.S. at 217). And its verdict reflects just that, as the jury acquitted Loughry on several charges.

At bottom, we conclude that the district court, which carefully scrutinized the evidence advanced by Loughry in support of his motion, did not abuse its discretion in denying Loughry's request for an evidentiary hearing. The court's judgment is

**AFFIRMED.**

DIAZ, Circuit Judge, dissenting in part:

My colleagues conclude that the district court acted within its discretion in denying Loughry's request for an evidentiary hearing to explore allegations of juror misconduct. For the reasons explained by the majority, I agree that denying Loughry a *McDonough*[1] hearing wasn't reversible error. On the present record, I also agree that Loughry failed to make out a claim of actual bias. But because I would hold that Loughry is entitled to a Remmer[2] hearing to ascertain the full extent of Juror A's Twitter activity during the trial, I respectfully dissent.

Under *Remmer*, a defendant is entitled to a presumption of prejudice and a hearing when he "presents a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury" that could "reasonably draw into question the integrity of the verdict." *Barnes v. Joyner*, 751 F.3d 242, 244 (4th Cir. 2014). This is a "minimal standard." *Id.* at 245 (quoting *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996)).

As we explained in *Barnes*:

> Extrajudicial communications or contact with a juror has been deemed to trigger *Remmer* in a variety of circumstances, including: a juror being offered a bribe during trial and subsequently being investigated by an FBI

[1] *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984).

[2] *Remmer v. United States*, 347 U.S. 277 (1954).

> agent; a juror applying for a job at the prosecuting attorney's office during the trial; a local restaurant owner suggesting to jurors in a capital case that "they ought to fry the son of a bitch,"; and allegations, if proven to be true during an evidentiary hearing, that a juror's husband pressured her throughout the trial to vote for the death penalty.

*Id.* (cleaned up). More recent examples include a juror asking her father, *see Hurst v. Joyner*, 757 F.3d 389, 398 (4th Cir. 2014), and a pastor, *see Barnes*, 751 F.3d at 246, what the Bible says about the death penalty; and a juror researching the definition of an element of a crime on Wikipedia, *United States v. Lawson*, 677 F.3d 629, 639–40 (4th Cir. 2012).

Here, Loughry's request for a hearing was predicated on the claim that Juror A was likely exposed to tweets published by two reporters during Loughry's trial. Specifically, Loughry alleged that after the trial, an individual approached Loughry's counsel and told him he should look into Juror A's Twitter account. A review of the juror's public account revealed that, in the months leading up to trial, Juror A had "liked" and "retweeted" comments criticizing Loughry and a news article detailing the judicial complaint filed against Loughry by West Virginia's Judicial Investigation Commission. The review also revealed Twitter activity by Juror A on two dates during the trial: October 3 and October 6, 2018.[3] Loughry argued that because Juror A "followed" two reporters who covered the trial, she would have seen their "near constant 'tweets' concerning the trial"

[3] Loughry also alleged that Juror A used her Instagram account on October 7, 2018 and her Facebook account on October 8, 2018.

because "such posts appear on a user's home timeline." J.A. 834; *cf. Oracle Am., Inc. v. Google Inc.*, 172 F. Supp. 3d 1100, 1106 (N.D. Cal. 2016) ("When one Twitter user 'follows' another Twitter user, the latter's posts appear in the former's default real-time feed of tweets.").

As Loughry details on appeal, the two reporters "tweeted" or "retweeted" about his case a combined total of 73 times during the trial. Indeed, one of the reporters did so twelve 3 times on October 3 alone. And on October 9—the day before jury deliberations began— the other reporter tweeted: "There seems to be quite a bit of evidence against the justice." Appellants' Br. at 4–5.[4]

While we haven't previously addressed this precise issue, other courts have found that social media use can trigger the *Remmer* presumption. *See Ewing v. Horton*, 914 F.3d 1027, 1029, 1032 (6th Cir. 2019) (juror looked up defendant's Facebook profile); *United States v. Harris*, 881 F.3d 945, 952–54 (6th Cir. 2018) (juror's live-in girlfriend viewed defendant's LinkedIn page); *State v. Smith*, 418 S.W.3d 38, 48–49 (Tenn. 2013) (juror exchanged Facebook messages with a government witness). And in a different context, the Supreme Court has recognized "the extraordinarily high" risk of jurors being tainted by "read[ing] reactions to a verdict on Twitter." *See Dietz v. Bouldin*, 136 S. Ct. 1885, 1890, 1895 (2016).

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[4] The government says that we should disregard these tweets because Loughry didn't attach them as exhibits in the district court. Loughry invites us to take judicial notice of the tweets instead, as they remain publicly available to this day. Neither is necessary here, as the fact that the reporters tweeted throughout the trial wasn't in dispute below, and the district court assumed as much in denying Loughry a hearing.

In *Dietz*, the Court considered the extent of a district court's authority to "rescind a jury discharge order and recall a jury for further deliberations after identifying an error in the jury's verdict." *Id.* at 1890. The Court held that a district court had such authority, but cautioned that "[b]ecause the potential of tainting jurors and the jury process after discharge is extraordinarily high, . . . this power is limited in duration and scope, and must be exercised carefully to avoid any potential prejudice." *Id.* The Court emphasized that, in weighing its decision, a district court must consider the extent to which the dismissed jurors may have accessed their smartphones or the internet after being dismissed. *Id.* at 1895. As the Court explained,

> It is a now-ingrained instinct to check our phones whenever possible. Immediately after discharge, a juror could text something about the case to a spouse, research an aspect of the evidence on Google, or read reactions to a verdict on Twitter. *Prejudice can come through a whisper or a byte.*

*Id.* (emphasis added).

So too here. Loughry has made a credible allegation that Juror A was likely exposed to tweets from reporters commenting about the trial. Indeed, it's undisputed that (1) a substantial percentage of Juror A's Twitter activity in the months leading up to trial related to the investigation of Loughry and the related impeachment proceedings; (2) Juror A "followed" two reporters who covered the trial and tweeted regularly throughout it; and (3) Juror A used Twitter on at least two days during the trial. And, in my view, Juror A's activity on other social media sites during additional trial days indicates that she likely

scrolled through her Twitter feed passively on at least some of the days when she didn't affirmatively interact with other accounts.

Loughry's evidence is admittedly circumstantial. Nonetheless, it's the most he could possibly offer without the opportunity to conduct discovery or question Juror A. As Loughry explains, Twitter "can be accessed by phone virtually anywhere and for any length of time, and includes no visible record of whether a tweet has been seen or not." Reply Br. at 9. Thus, it's impossible to obtain direct evidence of which tweets Juror A saw without a hearing. *Cf. Smith*, 418 S.W.3d at 47 ("[T]echnology has made it easier for jurors to communicate with third parties and has made these communications more difficult to detect"); *United States v. Fumo*, 655 F.3d 288, 332 (3d Cir. 2011) (Nygaard, J., concurring in part and dissenting in part) ("The Internet and social networking sites . . . have simply made it quicker and easier to engage more privately in juror misconduct"). And the evidence Loughry did offer is stronger than the evidence presented in *Harris*, where the Sixth Circuit remanded for a *Remmer* hearing after determining that the defendant presented "a colorable claim of extraneous influence." *Harris*, 881 F.3d at 954.

There, Harris offered evidence that a juror's live-in girlfriend viewed Harris's LinkedIn5 profile either during or shortly after the trial (the record was inconclusive regarding the exact date). *Id.* at 952. The Sixth Circuit agreed with Harris that the juror's girlfriend likely found the LinkedIn profile by searching for Harris on Google, where she may have also seen prejudicial information that the government was precluded from introducing at trial. *Id.* at 953. And though the district court had admonished the

jury not to discuss the case with others, the Sixth Circuit reasoned it was "quite possible" that the juror told his girlfriend about the trial, leading her to google Harris and potentially communicate her findings to the juror. *Id.* at 953–54. The court determined that this mere possibility of inappropriate communication with a juror was enough to warrant a *Remmer* hearing and held that the district court abused its discretion in denying one. *Id.* at 954. 5 "LinkedIn is a web-based social networking site that presents itself as an online community offering professionals ways to network." *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1016 (N.D. Cal. 2012).

There is much less need for speculation here. As the district court explained, when a Twitter user publishes a tweet, that tweet appears on the homepage of all accountholders who "follow" that user. Thus, when Juror A used Twitter during the trial, the reporters' tweets were on her homepage, where she would have either read them or scrolled past them to read other tweets. And since she was on the jury and interacted with other tweets about Loughry in the months leading up to trial, it's reasonable to assume that tweets about the trial would have caught her eye.

The district court—and my friends in the majority—fault Loughry for failing to prove with certainty that Juror A saw the reporters' tweets. But again, there's simply no way Loughry could do so without being allowed, at minimum, to question Juror A about her Twitter use during the trial. *See, e.g., Harris*, 881 F.3d at 954 (stating that although Harris "did not establish that [a juror] was exposed to unauthorized communication, Harris did present a colorable claim of extraneous influence, which necessitated investigation."); *see also* Fed. R. Evid.

606(b)(2)(A) ("A juror may testify about whether[ ] extraneous prejudicial information was improperly brought to the jury's attention.").

My colleagues also express concern that granting Loughry's request for a Remmer hearing would open the floodgates to a hearing any time a defendant presents evidence that a juror used social media during a trial. Not so. The mere fact that Juror A used Twitter during the trial isn't what warrants a hearing here. Rather, Loughry is entitled to hearing because of Juror A's past Twitter activity, coupled with who she follows (reporters) and the fact that those reporters used Twitter repeatedly to report and comment on Loughry's trial.

* * *

On this record, I would remand for a *Remmer* hearing, where the government could attempt to rebut the presumption of prejudice by showing either that Juror A didn't see the reporters' tweets during the trial or that her exposure to them didn't harm Loughry. Because my colleagues disagree, I respectfully dissent.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA,

v. Case No. 2:18-cr-00134

ALLEN H. LOUGHRY, II,

MEMORANDUM OPINION AND ORDER

Pending is the defendant Allen H. Loughry, II's motion for a new trial, filed under seal October 26, 2018, seeking a new trial pursuant to Rule 33 for the alleged violation of the defendant's Sixth Amendment right to trial by an impartial jury. The focus of the motion is on Juror A, whose anonymity the court strives to preserve. The defendant supplemented his motion on November 13, 2018, to all of which the government has responded, followed by the defendant's reply and the government's surreply.

## I. Factual and Procedural Background

Beginning in October 2017, the Justices of the Supreme Court of Appeals of West Virginia came under media scrutiny for alleged corruption. The defendant, then-Chief Justice Allen H. Loughry, II, was one of those at the core of this scrutiny, with the allegations against him relating to lavish renovations, the taking of a so-called "Cass Gilbert desk" and Supreme Court couch to his home, and the improper use of state vehicles and of state credit cards for the purchase of fuel. Amidst the media

investigation, the defendant himself alerted the Office of the United States Attorney to alleged improper spending, attributing the blame to a Supreme Court employee. A federal investigation into the Supreme Court ensued, and eventually turned its attention to the defendant and Justice Menis E. Ketchum II individually. Concurrent with the federal and media investigation, the West Virginia Judicial Investigation Commission and the West Virginia House Judiciary Committee were also conducting investigations.

On June 6, 2018, the West Virginia Judicial Investigation Commission filed a 32-count judicial complaint against Loughry, alleging that he violated several parts of the state's Code of Judicial Conduct. Subsequently, on June 19, 2018, a federal criminal indictment of Loughry was returned by the grand jury. That was followed by the resignation of Ketchum as of July 27, 2018, and the filing in this court on July 31, 2018, of an Information charging Ketchum with a wire fraud offense for improper use of a state credit card for the purchase of fuel, to which a guilty plea would be filed. Thereafter, on August 7, 2018, the West Virginia House Judiciary Committee Case 2:18-cr-00134 Document 134 Filed 02/08/19 Page 2 of 38 PageID #: 3170 3 approved articles of impeachment against four sitting justices on the Supreme Court (then-Justices Loughry, Workman, Davis and Walker; with Ketchum having already resigned as of July 27th).[1] Each of these events was highly publicized in the media throughout West Virginia.

On October 2, 2018, the court conducted jury selection for the defendant's federal criminal trial.

[1] The defendant ultimately resigned from the Supreme Court on November 12, 2018.

Due to the pretrial publicity, a larger than normal venire was drawn, consisting of approximately seventy potential jurors, split into a morning group and an afternoon group. In an effort to remove the taint of any negative pretrial publicity from the trial, a thorough voir dire was conducted. The court questioned the venire, inter alia, of their knowledge of this case or the impeachment proceedings, and whether those jurors having such knowledge were able to set that aside and render a verdict based solely on the evidence presented in the courtroom. The parties were permitted to conduct individual voir dire, at the bench out of the hearing of the jury panel, of prospective jurors selected by each of them. Particularly, the defendant followed up with several individuals who indicated their awareness of the case and the impeachment proceedings.

Specifically, in the morning session, three prospective jurors stated that they had heard about the case in the news media (prospective jurors J.W., C.C. and R.F.), all three of whom were questioned individually at the bench. Following questioning, prospective juror J.W. was excused by agreement of the parties because he was the primary caretaker for his wife who had a disability; prospective juror C.C. was the subject of a defense challenge for cause that was denied; and prospective juror R.F. was not the subject of a challenge.

The court denied the defendant's for-cause challenge to prospective juror C.C. because, although he indicated during his individual voir dire that he had been following the case "pretty closely" in the media, had discussed it with "friends or family," and had "opinions . . . about the facts and circumstances as [he] underst[ood] them from the news[,]" he was "completely confident" that he could set aside any

pretrial knowledge and base a verdict solely upon what would be presented in the courtroom. Transcript of Voir Dire at 76-81. The court "with respect to [C.C. was] satisfied that he [could] serve as a fair and impartial juror in the trial of the case." Id. at 236.

In the afternoon session, eleven jurors stated that they had read or heard about this case in the news media, of which ten stated that they had also heard something about the impeachment proceedings. Three additional jurors stated that they had heard about the impeachment proceedings, bringing the total number of those aware of either proceeding to fourteen. Of those ten who stated awareness of both proceedings, two were struck by agreement of the parties without further questioning (P.K. and J.P.), six were brought to the bench for individual voir dire and two were not, with one of the two, juror J.A., being empaneled on the jury. None of the three who said they had heard only of the impeachment proceedings were called to the bench for individual voir dire, one of whom, Juror A, was empaneled on the jury.

Of those six brought to the bench, the parties agreed to excuse one, prospective juror M.J., after he responded that he could "[p]robably" make a judgment about the guilt or innocence of the defendant based solely on what he sees in the courtroom, but could not affirm with certainty because he held negative feelings towards the United States judicial system as a whole. Id. at 214-20. The defendant made a for-cause challenge of prospective juror D.S. that was granted, and the remaining four (B.D., B.H., J.F. and J.W.) were not the subject of for-cause challenges.

The court granted the for-cause challenge of prospective juror D.S. because the court found his responses to the questions posed at the bench "indicative that he is one who comes in with an opinion that in this case [the court] believe[s] is deleterious to the defendant[,]" after he stated that he had "possibly" formed an opinion as to the guilt or innocence of the defendant, but that he "would try to go in with an open mind." Id. at 208-10, 236.

A jury of twelve with three alternates was empaneled. In summary, of those fifteen, two had stated awareness either of this case or the impeachment proceedings: juror J.A. of the afternoon session stated that the juror had read or heard about this case in the news media and had heard about the impeachment proceedings, id. at 151 and 156; and Juror A of the afternoon session stated that the juror had heard about the impeachment proceedings, id. at 155.

On October 12, 2018, after a six-day trial and two days of deliberation, the jury rendered a verdict finding the defendant, Allen H. Loughry, II, guilty of eleven counts of the second superseding indictment, consisting of one count of mail fraud (Count 3), seven counts of wire fraud (Counts 5, 6, 10, 11, 12, 15, and 18), one count of witness tampering (Count 20), and two counts of making false statements (Counts 23 and 25). He was found not guilty of ten counts, consisting of nine counts of wire fraud (Counts 1, 4, 7, 9, 13, 14, 16, 17, and 21) and one count of mail fraud (Count 2); the jury was unable to reach a verdict on one count of wire fraud (Count 8). Notably, the defendant was not federally indicted on any claims relating to office expenditures, and the jury returned a verdict of not guilty on the wire fraud claim related to the Cass Gilbert desk (Count 21), two of the more highly

publicized allegations against the defendant. By order entered January 11, 2019, the court granted a judgment of acquittal as to Count 20 (witness tampering) for insufficient evidence.

a. Juror A

As indicated in the defendant's motion, on October 23, 2018, the defendant's counsel, John Carr, was approached by an individual on the street who instructed him to look at the Twitter account of Juror A. Defense counsel did so and found what was thought by the defendant to be potentially troublesome activity from Juror A's Twitter account.

Twitter is a social media platform whereby people may publish information to be shared with other members on the platform. A person with a Twitter account may "follow" other Twitter accountholders, and conversely, be "followed." On the Twitter homepage, a Twitter accountholder sees the "tweets" of each of the accounts that the accountholder follows. A "tweet" is essentially a short statement, occasionally accompanied by photographs or links to news articles, that is shared with a Twitter accountholder's followers, such that it appears on the followers' homepages. The followers who see this tweet on their homepage may then "retweet" it, whereby it will be posted to the retweeter's twitter profile and be shared with the retweeter's followers on their homepages. Followers may also "like" a tweet, an action which does not necessarily share the tweet with others but nonetheless makes the tweet visible to the liker's followers.

The defendant brings to the court's attention the following activities from Juror A's Twitter account.[2]

First, on June 7, 2018, Juror A liked and retweeted a tweet from West Virginia House Delegate Mike Pushkin that read:

> 'When the soundness of the judiciary is questioned, coupled with the corrupt activities of the other branches of government, how is the public ever to have any faith in State government?'

Defendant's motion, ECF # 89, Ex. 1 at 15. Pushkin's statement is a quote, without attribution, from the book authored by the defendant entitled "Don't Buy Another Vote, I Won't Pay for a Landslide: The Sordid and Continuing History of Political Corruption in West Virginia." See Government's Trial Exhibit 16. In addition to the quote, the Pushkin tweet and Juror A's retweet thereof contained a photo of the defendant and a link to a Charleston Gazette-Mail news article, written June 6, 2018, entitled "WV Supreme Court Justice Loughry named in 32-count judicial

[2] The defendant also points to a Facebook post on August 15, 2018, wherein Juror A shared the Facebook page for Judge Will Thompson's Supreme Court campaign and noted that he was a personal friend of Juror A's. Judge Thompson is a judge on the Twenty-Fifth Judicial Circuit of West Virginia, sitting in Boone County, Juror A's home county. He was running for the seat vacated by Justice Robin Davis, who had resigned the day after the West Virginia House of Delegates had voted to impeach her as well as Loughry, Workman and Walker; at that time, Justice Loughry had not yet resigned. Accordingly, this post appears wholly unrelated to the defendant and the facts of this case. The court therefore disregards it, and only addresses the Twitter posts. It is noted that Juror A also retweeted two other unrelated matters involving Boone County Schools.

complaint." ECF # 89, Ex. 1 at 17. The article details the Judicial Investigation Commission's allegations against then-Justice Loughry, including the cost of his office renovations, his personal possession of the Cass Gilbert desk and other Supreme Court property, and his alleged improper personal use of state-owned vehicles. Id.

Second, on June 26, 2018, Juror A liked a tweet by West Virginia House Delegate Rodney Miller, which read:

> Legis Special Session begins at noon today looking at Supreme Court impeachments: more state employees quitting/fired: DHHR $1 million overspending for nothing: RISE program dysfunctional until Gen. Hoyer gets involved. My goodness we've got issues to take care of!

ECF # 89, Ex. 2 at 7.

Third, that same day, Juror A liked another tweet by Mike Pushkin, which read:

> Justice Loughry should resign. The people of WV already paid for his couch, he should spare them the cost of his impeachment.

Id. at 5. The tweet contained a link to an opinion article by Ken Hall published June 25, 2018 in the Charleston Gazette-Mail entitled "WV justices who take advantage of public funds should resign." Id. at 10. The article mentioned the defendant's suspension from the Supreme Court and the complaint from the Judicial Investigations Commission; it did not mention the federal indictment nor contain any details on the facts surrounding the federal criminal case.

Fourth, on August 7, 2018, the day the Judiciary Committee adopted the articles of impeachment against Loughry and the other Justices, Juror A liked a tweet by James Parker, which read:

> Yes, it is a sad day in WV to think these individuals who are supposed to be the pillars of what is right, just and truthful would become overcome with such an attitude of self importance that they thought the lavish spending was appropriate!

Id. at 5.

Fifth, following the defendant's trial, Juror A tweeted on October 13, 2018:

> Grateful to have had a chance to serve as a juror for a Criminal trial this week. It was emotionally draining & I'm glad it's Over. #Juror #ThisisAmerica #Justiceserved #Loughry[3]

ECF #89, Ex. 1 at 11. On October 14, 2018, Delegate Miller replied to this tweet, stating: "Thank you for your service. It can be draining at times, but so important." ECF #89, Ex. 2 at 20.

Finally[4], the defendant accuses Juror A of accessing social media throughout the trial.

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[3] The "#" symbol in a tweet, called a "hashtag," works as a type of tag, categorizing the tweet by the term following the "#" and making it searchable by that term. Here, for instance, if one were to search for "Loughry" on Twitter, Juror A's tweet could appear in the search results.

[4] In his supplemental motion, the defendant also states that "[u]pon information and belief," Juror A contacted the media hours after rendering a verdict to give a telephone interview to "WCHS." The defendant does not state the content of this interview or the source of his information and belief. 5 Instagram

Specifically, he claims that Juror A accessed Twitter on October 3 and October 6, Instagram[5] on October 7, and Facebook on October 8. Aside from a single Twitter like by Juror A on October 3, wholly unrelated to this case, the defendant does not state the source of his knowledge of Juror A's contact with social media during trial, nor does he set forth the extent or nature of any such contact. Indeed, there is no evidence or allegation that Juror A posted anything related to the case during that time. Although Juror A follows a number of West Virginia elected officials and members of the media -- including Kennie Bass of WCHS-TV and Brad McElhinny of West Virginia MetroNews, who reported on the evidence admitted at trial -- there is no evidence that Juror A was exposed to any content related to the case. As will be further fully developed, the court had instructed the jurors to refrain from using social media or the internet to obtain information on the case or communicate with anyone about the case, and Juror A has not been shown to have violated that admonition.

The defendant notes that during the four months prior to trial, Juror A liked eleven tweets, four of which related to the defendant or the Supreme Court. These four consist, as outlined above, of Mike Pushkin's tweet on June 7, Rodney Miller's tweet on June 26, Mike Pushkin's tweet that same day, and James Parker's tweet on August 7; the remaining seven likes during that four-month period prior to trial were wholly unrelated to the case.

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is another social media platform, intended primarily for sharing photographs.

[5] Instagram is another social media platform, intended primarily for sharing photographs.

During voir dire, Juror A expressed having heard about the impeachment proceedings in the state legislature, but affirmed having the ability to set that aside and listen to the evidence and base a verdict solely upon the evidence received in the courtroom. Transcript of Voir Dire at 155, 157.

Potentially relevant to this motion, Juror A answered the following questions in the negative:

> Question 1: Do any of you have any personal knowledge of the facts of this case? Id. at 144.
>
> Question 2: Have you heard this case discussed at any time by anyone in your presence? Id.
>
> Question 3: Have any of you read or heard anything about this case in the news media or television or radio? Id. at 146.
>
> Question 4: Is there anything further that any of you would want to relate to the Court about your knowledge of this case that goes beyond what we've already covered? Id. at 157.
>
> Question 5: Do any of you now have an opinion or have you at any time expressed an opinion as to the guilt or innocence of the defendant of the charge or charges contained in this indictment in this case? Id. at 158.
>
> Question 6: Have you heard anything at all from any source about the facts of this case from social networking websites, such as Twitter, Facebook, Instagram, any of you? Id. at 163.
>
> Question 7: Are you sensible to any bias or prejudice in this matter or can you think of

> anything that may prevent you from rendering a fair and impartial verdict based solely upon the evidence and my instructions to you as to the law applicable to that evidence? Id. at 184-85.
>
> Question 8: Whether reflecting on all the questions that I've asked you so far, are there any of them to which you would wish to change or supplement your answer that you've already given me? Have you thought of anything later that you believe you should have told me? Do any of you have anything further to add? Id.

Defendant contends that Juror A lied during voir dire by answering these questions in the negative. Juror A was not questioned individually on voir dire and was placed on the jury.

The defendant now moves for a new trial under Federal Rule of Criminal Procedure 33 for deprivation of his sixth amendment right to trial by an impartial jury.

## II. Discussion

Under Rule 33, a court may "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. The Sixth Amendment of the United States Constitution commands juror impartiality in criminal prosecutions. As stated by the Fourth Circuit:

> The Sixth Amendment . . . affords an accused the right to trial by an impartial jury. As the Supreme Court has observed, a "touchstone of a fair trial is an impartial trier of fact -- 'a jury capable and willing to decide the case solely on the evidence before it.'"

Conaway v. Polk, 453 F.3d 567, 582–83 (4th Cir.2006) (citations omitted). The defendant raises several theories of juror bias, each discussed in turn.

### A. McDonough Claim

The defendant's primary claim for a new trial is that Juror A was dishonest during voir dire. In McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984), the Supreme Court set forth a particularized test for determining whether a new trial is warranted in such scenarios. The Court held:

> to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

McDonough, 464 U.S. at 556. The Court noted, "it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on voir dire examination." McDonough, 464 U.S. at 555. Accordingly, "[u]nder th[e McDonough] test, the bar for juror misconduct is set high." Porter v. Zook, 803 F.3d 694, 697 (4th Cir. 2015).

Under the first prong, the Fourth Circuit has noted that "the [McDonough] test applies equally to deliberate concealment and to innocent non-disclosure[.]" Jones v. Cooper, 311 F.3d 306, 310 (4th Cir. 2002), see also Porter v. Zook, 898 F.3d 408, 431 (4th Cir. 2018) ("we have viewed the 'honesty' aspect

of the first McDonough prong as encompassing not just straight lies, but also failures to disclose."). Additionally, answers to voir dire questions that are technically true but "misleading, disingenuously technical, or otherwise indicative of an unwillingness to be forthcoming" may suffice. Billings v. Polk, 441 F.3d 238, 245 (4th Cir. 2006). However, failing to disclose a fact will not give rise to a McDonough claim if counsel had the opportunity to elicit the information but failed to do so: "McDonough provides for relief only where a juror gives a dishonest response to a question actually posed, not where a juror innocently fails to disclose information that might have been elicited by questions counsel did not ask." Billings, 441 F.3d at 245, see also Porter, 803 F.3d at 697 ("a juror's failure to elaborate on a response that is factually correct but less than comprehensive may not meet this standard where no follow-up question is asked.").

As for the second prong, "'[t]he category of challenges for cause is limited,' and traditionally, a challenge for cause is granted only in the case of actual bias or implied bias (although a third category, inferred bias, might also be available)." Jones, 311 F.3d at 312 (citing United States v. Torres, 128 F. 3d 38, 43 (2d Cir. 1997)).

Additionally, "a litigant must show that the fairness of his trial was affected either by the juror's 'motives for concealing [the] information' or the 'reasons that affect [the] juror's impartiality.'" Conaway, 453 F.3d at 585 (quoting McDonough, 464 U.S. at 556).

For the first prong, the defendant contends that Juror A's social media activity prior to trial indicates that Juror A had knowledge of the case and

thus should have answered in the affirmative several questions answered in the negative. A close review of that activity and the questions asked, however, demonstrates otherwise.

First, there is no reason to believe that Juror A was anything but truthful in answering questions 2, 3, 4, and 5. Each of these questions asked the jurors about their knowledge of "this case," the facts of which were briefly described to the venire before voir dire. The social media activity of Juror A demonstrates that Juror A had knowledge of the impeachment proceedings and the investigation by the West Virginia Judicial Investigation Commission. Indeed, Juror A admitted as much during voir dire. None of the four tweets or their corresponding articles mention this case nor the federal indictment at all, and they each occurred two to four months before the trial began. The first tweet at issue, and the corresponding article that contains the most detail into the various allegations against Loughry, was retweeted by Juror A before any indictment had been filed. The article noted that "a federal investigation regarding the Supreme Court has been underway at least since December 2017[,]" but it does not state the details of that investigation, or even that Loughry, individually, was a focus of that investigation. Juror A may have had a preconceived notion that Loughry should resign from his seat on the Supreme Court of West Virginia, as indicated by the juror's "like" of the June 26, 2018 tweet from Mike Pushkin, but that does not indicate any preconceived notion towards his guilt or innocence in this case. Nor do Juror A's answers to these questions suggest an unwillingness to be forthcoming. See Billings, 441 F. 3d at 253. Those answers were not inherently misleading or disingenuously technical; rather, Juror A indicated a

willingness to be forthcoming by alerting the court and the parties of Juror A's knowledge of the impeachment proceedings. Accordingly, the defendant fails to meet the first McDonough prong for questions 2, 3, 4, and 5.

Second, as for questions 7 and 8, the court finds no dishonesty. These generic questions were not asked to elicit specific information but were rather meant to allow the prospective jurors the opportunity to volunteer any additional information. At most, Juror A could be said to have failed to volunteer information regarding the extent of Juror A's knowledge of the impeachment proceedings in response to these questions. But a juror's "fail[ure] to volunteer certain information when questioned about her ability to be impartial . . . does not amount to a dishonest response to the questions posed." Billings, 441 F.3d at 244. Juror A's failure to elaborate on the extent of Juror A's knowledge of the impeachment proceedings when asked if one had any additional information to disclose is not a dishonest response, but a simple innocent failure to disclose information that could have been elicited by questions counsel chose not to ask.

Third, questions 1 and 6 differ from the others because they do not simply ask about "this case," but rather ask about "the facts of this case." The court notes the importance of this distinction because the facts of the federal indictment overlap slightly with the facts contained in the judicial complaint and the articles of impeachment. Specifically, here, the article retweeted by Juror A on June 7, 2018, contains information about Loughry's possession of a Cass Gilbert desk and his use of state-owned vehicles for personal trips to Tucker County and the Greenbrier. Assuming Juror A read and remembered the detailed

contents of this article, Juror A may have failed to answer fully when responding that Juror A had no personal knowledge of "the facts of this case" and had not heard anything on any social media platform about "the facts of this case."

The court has little difficulty, however, finding that the McDonough claim for those two questions fail on the second prong.

It is doubtful, first, that positive answers to those questions would have warranted a dismissal for cause. "[I]t is a long-settled proposition that mere knowledge of a case is insufficient to support a finding of actual prejudice." United States v. Higgs, 353 F.3d 281, 309 (4th Cir. 2003). Many of the potential jurors with pre-existing knowledge of the case remained in the venire. Indeed, the court denied the defendant's for-cause challenge to prospective juror C.C. because, although he had somewhat extensive knowledge of the case from pretrial publicity, he confidently confirmed that he could remain impartial. Moreover, the court granted the defendant's for-cause challenge to prospective juror D.S. only after he failed to assure the court that he could set aside his knowledge and decide the case based solely on the evidence presented. Juror J.A., who stated pretrial knowledge of both the case and the impeachment proceedings, was seated on the jury.

Moreover, the defendant cannot show that the fairness of his trial was affected by Juror A's non-disclosure of such knowledge as Juror A may have had. The overlapping facts of this case and the facts contained in the pertinent news articles relate to the Cass Gilbert desk and the vehicle usage. The defendant was acquitted, however, of wire fraud in relation to the Cass Gilbert desk (Count 21) and was

acquitted of seven of the wire fraud counts pertaining to his use of state-owned vehicles (Counts 4, 7, 9, 13, 14, 16, and 17) for which he allegedly made personal use of a state credit card to buy fuel. As for those wire fraud counts pertaining to his use of the state credit card for fuel on which he was convicted, there was ample evidence from which a jury could have convicted him, and the court has affirmed those convictions accordingly. See Memorandum Opinion and Order, ECF # 119 at 6-15. Juror A thus apparently set aside any preconceived notions, as Juror A affirmed under oath would be done, and judged the defendant fairly and impartially.

Accordingly, the motion is denied as to the McDonough claim.

### B. Actual Bias

Apart from the McDonough claim, the defendant has failed to demonstrate that Juror A was actually biased against him. A claim of actual bias requires an analysis distinct from a McDonough claim. Jones, 311 F. 3d at 310 ("The McDonough test is not the exclusive test for determining whether a new trial is warranted: a showing that a juror was actually biased, regardless of whether the juror was truthful or deceitful, can also entitle a defendant to a new trial."). To succeed on an actual bias claim, the defendant "must prove that a juror, because of his or her partiality or bias, was not 'capable and willing to decide the case solely on the evidence before it.'" Porter, 898 F.3d at 423 (quoting Smith v. Phillips, 455 U.S. 209, 217 (1982)).

For many of the same reasons that the McDonough claim fails, so too does this one. As previously noted, it is well settled that mere knowledge of a case is insufficient to support a finding

of actual prejudice. See Higgs, 353 F.3d at 309. Further, "the requirement of impartiality does not mean that jurors need to be 'totally ignorant of the facts and issues involved.' Thus, for example, in the context of pretrial publicity, 'the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is [not] sufficient to rebut the presumption of a prospective juror's impartiality.'" United States v. Powell, 850 F.3d 145, 149 (4th Cir.), cert. denied, 138 S. Ct. 142, 199 L. Ed. 2d 188 (2017) (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)).

Even assuming that Juror A was aware of some of the facts and issues involved in the case at the start of trial, and even assuming Juror A had a preconceived notion that the defendant was guilty of something, there is simply no evidence that Juror A was not capable and willing to set that aside and decide the case solely on the evidence presented. Rather, there is evidence that after a thorough deliberation, the jury found the evidence to be insufficient in several instances, and therefore ruled in the defendant's favor on those counts. The defendant points to Juror A's tweet following the trial as evidence of bias. A juror's willingness to sit on a jury, however, and relief when it is finished, is surely not indicative of any bias against the defendant.

Accordingly, the motion is denied as to the actual bias claim.

### C. Social Media Access During Trial

The defendant also claims that his right to trial by an impartial jury was violated because Juror A and allegedly five other jurors, unnamed in the defendant's motion, accessed their social media accounts on days when the trial was ongoing. He does not allege that any of the jurors posted anything

related to the case on those days, nor that anyone contacted the jurors on social media regarding the case. Rather, the defendant claims that because Juror A follows certain media reporters on social media, Juror A could have seen information related to the case.[6]

The Supreme Court has noted that "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." Phillips, 455 U.S. at 217. Under Remmer v. U.S., 347 U.S. 227 (1954), any outside contact with a juror during trial is presumed prejudicial and resolved at a hearing to determine if such contact was prejudicial. However, "[t]o be sure, 'due process does not require a new trial every time a juror has been placed in a potentially compromising situation[.]'" Barnes v. Joyner, 751 F.3d 229, 244 (4th Cir. 2014) (quoting Phillips, 455 U.S. at 217). Rather, "to be entitled to the Remmer presumption and a Remmer hearing, a 'defendant must first establish both that an unauthorized contact was made and that it was of such a character as to reasonably draw into question the integrity of the verdict.'" Barnes, 751 F.3d at 244 (quoting Stockton v. Com. of Va., 852 F.2d 740, 743 (4th Cir. 1988)).

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[6] The court notes the policy concerns with counsel prying into jurors' personal social media accounts. As stated recently by the United States District Court for the Southern District of New York: "There are also serious policy concerns regarding the appropriateness of counsel delving into jurors' social media accounts, after the conclusion of trial, to potentially uncover juror statements made out of court and unrelated to the App'x proceedings, and use any discovered statements as evidence of purported juror bias or inability to be fair. Such a practice may decrease willingness to serve on juries or dampen private citizens' ability to engage in civil discourse." Lewis v. Am. Sugar Ref., Inc., 325 F. Supp. 3d 321, 335, n. 3 (S.D.N.Y. 2018).

Other courts faced with the issue of a juror's social media use during trial have found it not necessarily prejudicial. See e.g., United States v. Feng Li, 630 F. (2d Cir. 2015) (district court did not abuse its discretion in denying request for new trial after a juror posted on social media regarding "the duration of the trial, courtroom temperature, future creative writing projects, and whether it would be appropriate to speak to certain trial participants about her career as a crime fiction writer when the trial concluded[,]" because the "social media postings did not violate the spirit of the court's social media instruction, which 'was concerned with comments concerning "the facts or circumstances of the case."'") (emphasis in original), and United States v. Fumo, 655 F.3d 288, 306 (3d Cir. 2011), as amended (Sept. 15, 2011) (district court did not abuse its discretion in denying request for new trial when juror posted on Facebook about the trial because the posts were "nothing more than harmless ramblings having no prejudicial effect[,] raised no specific facts dealing with the trial[, and did not] indicate[] any disposition toward anyone involved in the suit.")

The defendant asserts both in his motion and his briefing that the jurors were admonished by the court not to make any use of social media during the course of the trial. The defendant, who fails to support that assertion with any citation of the record, is incorrect.

Rather, the jury was informed repeatedly that the jurors were not to use social media to learn or discuss anything about "this case," a term which at times was referred to by use of the pronoun "it." Indeed, the jurors were not told that they could make no use of their cell phones, landline telephones,

iPhones, or the tools of social media. The following instructions were given, all in the context of this case.

At the close of the first day of trial, on October 2, 2018, once the jury of twelve members and three alternates were chosen, they were instructed as follows:

> I want to mention to you one thing that is so very important at the outset, and that is, of course, as jurors, you must decide this case solely upon the evidence that you hear from the witness stand and the exhibits as they're offered and introduced into evidence in the case.
>
> This means that during the trial, you must not conduct any independent research about this case, the matters in this case, or the individuals involved in this case.
>
> You must not consult dictionaries or reference materials; you must not search the Internet, websites, blogs, or use any other tools, electronic or otherwise, to obtain information about this case or to help you to decide the case.
>
> Do not try to find out information from any source outside the confines of this courtroom.
>
> Until you retire and deliberate, you may not discuss this case with anyone, not even your fellow jurors.
>
> You may not communicate with anyone about the case, on your cell phone, your iPhone, through e-mail, text messaging, Twitter, through any blog or website, including Facebook, Google, Myspace, LinkedIn, YouTube, anything imaginable. It's all out. You must not use it in any sense.

The next morning on October 3, 2018, just before opening statements, the jury was asked and it answered as follows:

> Well, all of you have safely returned. And my first question of you is, whether or not you had any difficulty observing the Court's instructions so far –
>
> THE JURY: No, Your Honor.
>
> THE COURT: -- that you not speak to anyone about this case, and avoid all media coverage about it, and you not let anyone speak to you about it.
>
> Have you been successful in that regard?
>
> THE JURY: Yes.

When the jury was excused that evening, the court stated:

> You're going to hear me say this more than once, but, continue to be guarded, that is, do not expose yourself to any media coverage of any kind; avoid all social media, as well, and avoid discussing this or letting anyone draw you into discussion about the case.

When, at the close of October 4, 2018, the jury was released for the evening, the jurors were given a similar instruction.

> THE COURT: Once again, I'll remind you, it's better for you to have someone else review the newspapers, and they can filter what you can see. And you know, of course, when the newscasts come on television, because that's pretty well fixed, you need to avoid that, of course. And radio is a little different, it gives the news at any moment, so you have to be very

> cautious about that. And if you happen to have it on and something is coming on about this case -- and I'm not sure that that will happen, but it could very well happen -- then click it off.
>
> And continue to observe the Court's direction that you not let anyone speak to you about this case nor [are] you to engage anyone else, and avoid all social networking with respect to it, as well.

On October 5, 2018, at the point at which the jury was being excused for the weekend, the jury was instructed in significant part as follows:

> Avoid all social networking having to do with the case.

The jury returned on Monday, October 8, 2018, at the close of which the jury was instructed:

> It continues to be especially important that you observe the Court's directive that you avoid all media coverage about this case, and that, of course, has to do with radio, television and newspapers, and all social networking, as well.
>
> So continue to observe those same directions and avoid all contact. Don't let anyone contact you about it, whether it is through social networking or otherwise, and you, of course, would not be contacting those as well.
>
> Let me ask you, once again, have any of you had any difficulty observing those directions so far?
>
> THE JURY: No.

The presentation of evidence in this case concluded on October 9, 2018, at which time the jury was excused until the next morning when closing

arguments and instructions to the jury would begin. The jury was instructed at that time as follows:

> Avoid all news media and social networking having to do with this case.

The jury in due course began its deliberations in late afternoon on October 10, 2019, by which time Juror A's October 3rd "like" on an unrelated matter and three other alleged but unspecified social media contacts during trial would have concluded. The jury was instructed as follows just before it was excused for that evening:

> And I will just say briefly that, as you can understand, under no circumstances are you to discuss the case with anyone or let anyone discuss it with you. Continue to avoid all news media and social networking exposure of any kind until you're back in here in the morning in the jury room, at 9:30, with deliberations starting only after all 12 of you are present.

The jury returned the next day, October 11, 2018, and, after a day of deliberation, was excused overnight with the following instruction:

> Well, I gather you've had a hard day's work and you're ready to go home and come back in the morning at 9:30. And I'm not going to go over all this with you again, but I just want to impress upon you, continuing the necessity of your seeing to it that no one is in touch with you about this case, not even among yourselves until all 12 of you are back in the jury room tomorrow morning at 9:30.

The jury reached a verdict the next afternoon on Friday, October 12, 2018.

Thus, aside from the fact that there was no request that the court ban the jury from all access to social media, nor any voir dire questions regarding whom the jurors followed on social media, the court's instructions, just as those in Feng Li, were limited to avoiding social media contacts concerning this case. The defendant has not shown that any such unauthorized contact was made. Furthermore, the defendant has not shown that accidental glimpses of a tweet regarding the defendant's trial, if any should ever be shown to exist, would reasonably call into question the integrity of the verdict. The jury was not expected to live in a vacuum during trial but was instructed to avoid all contacts pertaining to the trial so that their verdict would be based solely on the evidence presented and not by any outside influence or contact.

Accordingly, the motion is denied as to this claim.

### D. Post-Trial Evidentiary Hearing

The court pauses to address its decision not to conduct an evidentiary hearing. In his reply, the defendant states: "If the Court determines that the record is insufficient, the Defendant further respectfully requests that an evidentiary hearing be held to further develop the record concerning the issues raised by this motion." ECF # 108-1 at 4. Because the request was first raised in the reply, the court directed the government to file a sur-reply addressing the request. See ECF # 109 and 110, filed under seal. It is apparent to the court that the record is sufficient and that no hearing is warranted.

The Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove

actual bias." Phillips, 455 U.S. at 215. "A court is not, however, 'obliged to hold an evidentiary hearing any time that a defendant alleges juror bias.'" Porter v. Zook, 898 F.3d 408, 426 (4th Cir. 2018) (quoting Billings, 441 F.3d at 245). The Fourth Circuit has not set forth a specific test for determining when a post-trial evidentiary hearing is mandated for allegations of jury impartiality.

In Billings, the Fourth Circuit stated that it does not require courts "to hold a post-trial evidentiary hearing about matters that the defendant could have explored on voir dire but, whether by reason of neglect or strategy, did not." Billings, 441 F. 3d at 245.

Further, in Jones v. Cooper, 311 F. 3d 306, the Fourth Circuit affirmed the district court's denial of a juror bias claim without holding an evidentiary hearing. There, after a careful review of the questions asked in voir dire and juror questionnaires, the court found it sufficient that "even truthful answers to the questions on the questionnaire could not have formed the basis for a challenge for cause." Jones, 311 F.3d at 313. The court further noted that although the "[m]isstatements on [the] jury questionnaire" were troubling, they "d[id] not, standing alone, indicate juror bias." Id.

On the other hand, in Porter v. Zook, the Fourth Circuit found that a district court abused its discretion when it dismissed a defendant's actual bias claim without holding a hearing. 898 F. 3d 408. In that case, the defendant faced the death penalty for killing a law enforcement officer in order to interfere with the performance of his official duties. Id. During voir dire, the juror at issue answered positively the question of whether he has any family members in

law Case 2:18-cr-00134 Document 134 Filed 02/08/19 Page 33 of 38 PageID #: 3201 34 enforcement; he confirmed that his nephew was a police officer, but omitted the fact that his brother was also a police officer in the jurisdiction adjacent to that of the victim police officer. Id. In finding that an evidentiary hearing was necessary in that instance, the Fourth Circuit relied on Williams v. Taylor, U.S. 420 (2000). In Williams, a juror, when asked on voir dire if she was related to any of the witnesses, answered "no" because she did not consider herself "technically related" to her ex-husband, who was listed as a witness; she also failed to mention that the prosecutor in the case had represented her in her divorce. Id. at 440-442. The Court found that even if the juror was not technically related to her ex-husband, "her silence . . . could suggest to the finder of fact an unwillingness to be forthcoming; this in turn could bear on the veracity of her explanation for not disclosing that [the prosecutor] had been her attorney." Id. at 441. The Court stated: "these omissions as a whole disclose the need for an evidentiary hearing. It may be that petitioner could establish that [the juror] was not impartial . . . or that [the prosecutor's] silence so infected the trial as to deny due process." Id. at 442.

The Fourth Circuit found this language in Williams to mandate a hearing in Porter:

> To withhold information that one's brother was an officer in the adjacent jurisdiction certainly "suggest[s] ... an unwillingness to be forthcoming," and at the very least, "disclose[s] the need for an evidentiary hearing." Williams, 529 U.S. at 441–42, 120 S.Ct. 1479. The district court failed to recognize the applicability of Williams and therefore erred in dismissing

> Appellant's actual bias claim as a matter of law without a hearing.

Porter at 426. The court did not set forth a particularized standard for determining when, in other cases, a hearing is mandated.

Other circuits, however, have affirmed the broad discretion given to trial courts faced with juror bias claims. As stated by the Tenth Circuit:

> A court confronted with such a claim "has wide discretion in deciding how to proceed" and appropriately denies a hearing when a party presents "only thin allegations of jury misconduct." A hearing is not required when it would not be "useful or necessary" in determining whether a defendant's rights were violated.

United States v. Brooks, 569 F.3d 1284, 1288 (10th Cir. 2009) (internal citations omitted).

The Second Circuit further notes policy concerns with holding such post-trial hearings:

> We are always reluctant to "haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences." As we have said before, post-verdict inquiries may lead to evil consequences: subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts.

United States v. Ianniello, 866 F.2d 540, 543 (2d Cir. 1989) (internal citations omitted). The Second Circuit thus only requires a hearing "when a party comes forward with 'clear, strong, substantial and

incontrovertible evidence ... that a specific, non-speculative impropriety has occurred[.]'" Id.

The Eighth Circuit also provides trial courts with broad discretion, only requiring a hearing upon a sufficient showing of bias:

> The district court has broad discretion in handling allegations that jurors have not answered voir dire questions honestly, and we defer to its discretion in deciding whether a post-trial hearing is necessary. That discretion is not unlimited, however, and a movant who makes a sufficient showing of McDonoughtype irregularities is entitled to the court's help in getting to the bottom of the matter.

United States v. Tucker, 137 F.3d 1016, 1026 (8th Cir. 1998) (internal citation omitted).

In exercising its discretion not to hold a hearing here, the court has carefully considered the merits of the defendant's claims as well as the consequences of holding such a hearing, and finds that the latter far outweighs the former. The facts here simply do not rise to the level of Porter and Williams. Juror A's potential knowledge stemming from pretrial publicity relating to facts of the case, and alleged failure to disclose it, while of modest concern, does not indicate bias at the level of Porter, where the juror failed to disclose that his brother, like the victim, was a police officer, or Williams, where the juror failed to disclose that her ex-husband was a witness and that the prosecutor had previously represented her. Rather, here, there are mere thin allegations that Juror A came into the case with allegedly prejudicial pretrial knowledge. The defendant does not present '"clear, strong, substantial and incontrovertible evidence ... that a specific, non-speculative impropriety has

occurred,'" Ianniello, 866 F.2d at 543, but rather speculates that Juror A may have lied on voir dire because Juror A could have remembered facts from an article retweeted months prior, and that Juror A may have seen information related to the case when accessing Twitter during the trial. As discussed supra, those facts, without more, do not demonstrate that the defendant's Sixth Amendment right was violated. Without even a threshold showing of juror misconduct, the court declines to expend its resources to allow the defendant to pry into a juror's pretrial conduct and fish for evidence of bias.

It has always "remain[ed] within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias, or in exceptional circumstances, that the facts are such that bias is to be inferred." McDonough, 464 U.S. at 556–57, 104 S.Ct. 845 (Blackmun, J., concurring) (emphasis added). The court finds it wholly unnecessary to exercise such option here.

## III. Conclusion

Based on the foregoing discussion, it is ORDERED that the defendant's motion for a new trial on the basis of the alleged deprivation of his Sixth Amendment right to trial by an impartial jury be, and it hereby is, denied.

The Clerk is directed to transmit copies of this order to all counsel of record and any unrepresented parties.

ENTER: February 8, 2019

/s/ *John T. Copenhaver, Jr.*
John T. Copenhaver, Jr.
Senior United States District Judge

## APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH DISTRICT

No. 19-4137

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALLEN H. LOUGHRY, II,

Defendant-Appellant.

_____/

TRANSCRIPT OF REMOTE ORAL ARGUMENT
UNITED STATES v. LOUGHRY,
996.F.3d 729(4th Cir. 2021)

Richmond, Virginia

Monday, May 3, 2021

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APPEARANCES:
HON. GREGORY, Chief Judge
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HON. NIEMEYER
HON. MOTZ
HON. AGEE
HON. KEENAN
HON. WYNN
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C O N T E N T S

P R O C E E D I N G S

THE CLERK OF COURT: · The Honorable, the Judges of the United States Court of Appeals for the Fourth Circuit. · Oyez! · Oyez! · Oyez! · All persons having any manner or form of business before the Honorable, the United States Court of Appeals for the Fourth Circuit, are admonished to give their attention for the Court is now sitting. · God save the United States and this Honorable Court.

CHIEF JUDGE GREGORY: · Thank you. · Mike, am I supposed to see the lawyers?

MIKE: · Yes, sir. · Excuse me, sir, but

Mr. McVey is -- it still says joining. · His connection is a little slow. · He should be coming in right about now. · You should be able to see him now, sir.

CHIEF JUDGE GREGORY: · I don't see any lawyer.

MIKE: · Okay. · Do you have the gallery view selected up? · At the top right of the video window, pick the view and maybe pull up the speaker view and select gallery view.

CHIEF JUDGE GREGORY: · You're a genius. · I see them all.

MIKE: · All right, sir. · Thank you.

CHIEF JUDGE GREGORY: · Good morning, everybody.

Mr. Lin, you may proceed.

MR. LIN: · Thank you, Your Honor.

ORAL ARGUMENT OF ELBERT LIN
ON BEHALF OF THE APPELLANT

MR. LIN: · Good morning, and may it please the Court. · My name is Elbert Lin, and I am here on behalf of Justice Loughry.

The only question in this appeal is whether the District Court should have held and evidentiary

hearing in light of the Twitter activity of one juror at Justice Loughry's criminal trial.

We've offered several bases for that hearing, but I'd like to start today with the ground we've highlighted in our petition for rehearing, which is that a hearing was required under the Supreme Court's decision in Remmer, which this Court's decision really bonds.

Both the District Court and the Government set the bar too high for a Remmer hearing, requiring proof that Juror A actually qua highly prejudicial information on social media rather than merely asking whether Loughry had made a genuine and credible allegation that this had occurred.

If adopted that novel requirement would significantly undermine the ability of criminal defendants to, as this Court said in Barnes, "Uncover otherwise ignoble facts to prove a Sixth Amendment violation." This Court explained Barnes --

JUDGE AGEE: Counsel, this is -- Counsel.

MR. LIN: Yes, Your Honor.

JUDGE AGEE: Counsel, this is Judge Agee. There was quite a bit more direct evidence in Barnes than you have here. But my first question is: In the context of your argument, when the Court's examining whether or not there is an allegation -- a credible allegation of external evidence of an improper juror contact, is that limited to Twitter context, like we have in this case, because of the way that service provider operates? Or is it broader to cover all types of social media?

MR. LIN: Judge, I want to make sure I understand your question. As to the standard of a genuine and credible allegation, are you asking whether that applies only to Twitter or to all social media? Am I -- Is that correct?

JUDGE AGEE: Yeah, that's -- that's correct.

Somebody has to write an opinion on this case, and as I understand it, Twitter operates somewhat differently than other social media. · So what I'm asking you about is whether or not your argument covers social media in toto or whether it's limited to Twitter.

MR. LIN: · I understand. · Thank you, Your Honor.

Our argument is that that is the standard that this Court set forth in Barnes, so to answer your question correctly, I would say the genuine and credible allegation standard applies in all cases.

Now, the facts, of course, of any particular Remmer claim, Remmer case, are going to vary. · And we do think that the unique nature of Twitter, Judge Agee, as you referred to, the fact that it is not necessarily chronological, that Tweets are basically permanent unless you actively delete them, so they can sort of show up unannounced in your feed, those are all things to take into account in the highly fact-intensive analysis for a Remmer hearing.

We think they weigh in favor of a hearing. Here they may weigh in favor of hearing in many cases that involve Twitter, but we don't think, as a general matter, that the standard differs from case to case. · We think that's the standard this Court has long adhered, which was articulated, I think, very clearly in Barnes in what applies to all cases, whether it's Twitter, social media, or even traditional media, newspaper or television. It just may be, depending on the facts, more difficult to meet. · And we think the fact that this involves Twitter is one element that sort of facilitates some favor of a hearing.

JUDGE QUATTLEBAUM: · So, Mr. Lin, if --

JUDGE AGEE: · Well, social media brings a very different context to this whole area of a Remmer investigation. · So, you know, for instance, in Barnes

you had three jurors, including the suspect juror, who made statements, so you had really direct evidence in that case.

But in social media, I'm curious as to your view as to how counsel in a particular case, criminal or civil, is to find out about that. I mean, is it your view, for instance, that juror voir dire would include requests for the Court to require the prospective jurors to turn over their electronic devices for review by counsel?

MR. LIN: · Your Honor, the short answer to that is that's not what we're asking for as a prophylactic matter. · I think your point is the point that we have tried to make here, which that it is much more difficult in the social media context, and with respect to Twitter specifically, to get the kind of direct evidence that you might get in other cases. · Although, I will say it can also be very difficult to get direct evidence that states somebody has watched a television broadcast of, you know, a news report in their house at night.

But, of course, we, as a judicial system, need to balance the needs of the jurors, and we don't put them in, you know, a plastic box in every case. We don't sequester them in every case because we -- that's a balance that the judicial system has decided to make, and that's the reason why Remmer exists.

And I think if you have the evidence, in some cases, Your Honor, it's going to be direct, as you 20 · point out, but in many cases, it's going to be difficult for it to be direct. · And I think Twitter is certainly one of those mediums where it would be very difficult barring somebody actually seeing the person doing it and testifying to that, which I think is very difficult with the way that you can read stuff on your phones these days.

JUDGE WILKINSON: · Counsel, let me --

JUDGE QUATTLEBAUM: · Counsel, if I could --

JUDGE WILKINSON: · Let me ask you this: Evidentiary hearings can become a little bit of a fishing expedition, and I'm worried about -- I'm concerned. · Remmer servers a definite purpose and I understand that, but I'm concerned about pushing Remmer too far. · And when we -- we -- we start holding evidentiary hearings and probing this and probing that, I'm wondering whether we put really very heavy burdens upon jury service because you have to -- need to remember that these citizens who serve on juries are taking time from their personal lives and are disrupting their personal schedules all in the -- all in the service of a very noble civic obligation.

But if, in addition, to hearing the case, which sometimes can go on for quite a while, they're going to be subject to a bunch of post-verdict procedures and post-verdict probes and all the rest, are we putting unwarranted burden of  burden upon jury service? · The Federal Rules of Evidence warrant us against that, and I just think when we -- requiring an evidentiary hearing with little more than we have here, what is this – what is this going to do down the road to the willingness of citizens to give their time and jury service for the Criminal Justice System?

MR. LIN: · I understand your concern, Your Honor. · But I think, as you were pointing out, it is a balance, and we do need to protect the rights of the defendant, in particular in criminal cases. And so, we do, as a judicial system, make certain judgements about how much of a burden we're going to put on jurors, either sort of as a prophylactic matter by sequestering them or giving instructions or, you know, telling them not to be on social media or, you know --

JUDGE WILKINSON: · You're limit -- What you're limiting principle?

CHIEF JUDGE GREGORY: · Mr. Lin. · Mr. Lin. Mr. Lin.

JUDGE WILKINSON: · If we drift too far into the speculative and if we hold evidentiary hearings on the basis of speculation of what might be or whatever, what's your limiting principle? · How do we keep this from becoming an unwarranted – an unwarranted burden? · What would you do to limit this?

MR. LIN: · I understand, Your Honor. · And that would be my next point, which would be on this end of it Remmer exists, and we apply it, I think, in every case. · And you have to -- it's a fact-specific analysis.

And I think the answer to your question is: It's not speculative here. · There are a number of facts all taken together. · I think one of the most important ones that may not exist in every case is that there was documented interest by the juror in Justice Loughry leading up to the trial, not just interest but intense interest, and not just intense interest but on this very platform. · So it's not as though she had passing interest in Justice Loughry on newspaper. · She had -- Of the 11 times she chose to publicly interact with Tweets on Twitter in the four months leading to trial, four of those involved Justice Loughry. · And I think that is an important fact here that in future cases could be a limiting principle.

You have not just the fact that she had the means and opportunity, meaning that she had access to Twitter, she used Twitter, and she followed reporters who Tweeted 73 times between them about -- some of those Tweets were a classically prejudicial statement by --

CHIEF JUDGE GREGORY: · Mr. Lin.

MR. LIN: · Yes, Your Honor.

CHIEF JUDGE GREGORY: · Mr. Lin, let me ask you this: · Don't we do that by the fact that she was asked, "Of all the knowledge you have about this case impeachment, would it prevent you from giving a verdict based solely on the evidence?" · She said, "Yes, it would." · Don't we do that with all jurors?

MR. LIN: · We do ask that of all jurors, Your Honor, but --

CHIEF JUDGE GREGORY: · Well, why do you think that when a district court judge heard her and counsel didn't give -- do much of a voir dire when he had an opportunity to go further, why is it not sufficient when she says that as to prior, the four most prior, whatever that -- whatever that was, I'm going to decide this case based solely on the evidence? · That's what she said under oath, correct?

MR. LIN: · Yes, Your Honor.

CHIEF JUDGE GREGORY: · All right. · So, now, my question is this: · Let's get back to Remmer.

MR. LIN: · Of course.

CHIEF JUDGE GREGORY: · You said, "The balance." Well, the balance is you don't have to show prejudice to get the hearing.

But the other balance is this: · The Supreme Court said we're looking for protecting the sanctity of jurors to be free from the possibility of outside unauthorized intrusions purposely made, and, therefore, we're looking for improper contact about the case with the juror.

So you do have to show improper contact, not just contact. · What was the improper or the violation of the juror?

MR. LIN: · Your Honor, the improper contact here was the juror going out and reading information about that that could be prejudicial. And I think this is no different --

CHIEF JUDGE GREGORY: · Reading information? What information in the record says she read during the trial?

MR. LIN: · There are Tweets.

CHIEF JUDGE GREGORY: · During the trial. During the trial about the case.

MR. LIN: · There were Tweets by these two reporters, Mr. Bass and Mr. McElhinny --

CHIEF JUDGE GREGORY: · I said that she read -- that she read that information.

MR. LIN: · And that is the question here, Your Honor.

CHIEF JUDGE GREGORY: · Well, that's what I'm asking you.

MR. LIN: · I don't think what Remmer requires is proof that she read this. · I think it requires a credible allegation that she did.

CHIEF JUDGE GREGORY: · No. · It -- No. · It requires improper contact. · If someone – If someone wrote something and there's no evidence that someone read it, how is that improper contact?

Now, it may be -- Are you saying it's improper for a journalist to write about it? · I thought the question is whether or not she read it.

MR. LIN: · Your Honor, we think that what this Court has said and, I think, in Barnes and other cases is not that there's proof of improper contact, but that there is a credible allegation of improper contact.

CHIEF JUDGE GREGORY: · No. · Where those cases -- For example, in Remmer there was a proposed bribery; that is, you know, if you help out here, then maybe you can help yourself.

In Harris, improper was imputed to the juror because only -- they said only a juror would research because a juror can't research information, but that was imputed to the juror.

And the other cases dealt with jurors collectively making information. · Another case in the Fourth Circuit said a person went to their pastor and asked for the definition.

Where do you have the improper contact or conduct on the juror's part here or anybody that could be -- any act that can be imputed? · You see, you can't have speculation upon speculation because that would -- that's the balance, isn't it? Improper contact.

MR. LIN: · Well, Your Honor, Your Honor, two answers to that.

JUDGE DIAZ: · Mr. Lin, the Court --

CHIEF JUDGE GREGORY: · Can you answer the question first, Mr. Lin, and then Judge Diaz? · Go ahead.

MR. LIN: · Of course, Your Honor. · Two answers to that:

As to Harris, I don't think it was simply imputed. · There was -- Yeah, it was -- it was the juror's live-in girlfriend that viewed the information, but there was no evidence, direct evidence, there that the live-in girlfriend had seen or read anything about the trial. · The only evidence in Harris was that she had read the LinkedIn page of the defendant, and a LinkedIn page, Your Honor, as I'm sure you're aware, is simply an on-line resume. · And there was no evidence that she had seen anything about the trial.

It was assumed by the Sixth Circuit that she had gotten to that LinkedIn page by Googling the juror and that on the Google page, as the defense counsel said by doing it himself, there was prejudicial information about the trial on that Google page. · So it was assumed that the live-in girlfriend had seen this prejudicial information, and then, Your Honor, as you pointed out, it was then assumed that she had then conveyed that information, again, which there was no evidence that she had actually seen, to the jurors. · So

I think Harris is actually -- there's far less compelling evidence than there is here that the actual contact occurred.

CHIEF JUDGE GREGORY: · Judge Diaz has a question.

MR. LIN: · Thank you, Your Honor.

JUDGE DIAZ: · Well, it was gonna be more of a hint and you've taken it, Mr. Lin, that we look to Harris. · We can disagree with the result in Harris, I suppose, and suggest that it was wrongly decided. But as you had pointed out, there was no direct allegation of communication. · Just a possibility that it had occurred and that was, by itself, sufficient to warrant the hearing.

But I guess we need to get back to the nature of the technology here, right? · Because it's the very nature of the technology that prevents you from making that direct connection that Judge -- the chief judge -- and, you know, I don't blame my colleagues for wanting that, but I think we need to look at the nature of the technology here and understand it to know that it's just impossible to do more than what the Defendant did in this case.

And I want to get back to a point that Judge Wilkinson made about the importance of jury service. · As someone who presided over a number of trials as a state trial judge, I don't -- I don't minimize at all the burdens that we place on jurors. · But it's also important to recognize that jurors take an oath to comply with their obligations to decide a case fairly and impartially; and if we have a credible allegation that a juror failed in that oath, I think we would be doing a disservice by not persuing that simply because the nature of the technology doesn't lend itself to the kind of direct proof that has historically and conventionally been part of the analysis.

So I think we need to focus on the nature of the technology here, and I think the limiting principle, as you have pointed out, is just not the notation that a juror is on Twitter. · That can't be enough because, God knows, we'd never be able to impanel a juror if that was the test. · It's a confluence of facts in this case that, in my view, warrant, at least, further probing and questioning.

Now, my question. · Here's the question: · If a majority of the Court agrees with that, how – what would an evidentiary hearing look like in this case? · Is it going to be simply putting the juror up on the witness stand and asking her directly? Because, I imagine, I think you know what the answer is going to be. · But what more do you anticipate the Court could or would allow in such a process?

MR. LIN: · Yes, Your Honor. · I think you could ask -- Obviously, the direct question would be: Did you see these Tweets? · Did you see things and identify particular Tweets?

But I think you could also ask her about her other Twitter activity to assess the credibility of her answer. · Do you -- If she says I don't remember reading this or I didn't read this, do you remember reading other Tweets during that time? · You know, ·what do you remember of your Twitter activities? And then there's a judgement call to be made as to, you know, what her answers were as to whether she was exposed and what her credibility is as to her memory of what she saw.

But, Judge Diaz, I think your point is exactly right, and I think one of the things that I wanted to stress is: · I do think that the standard is a credible allegation of actual contact and I think that makes sense, but this --

JUDGE RICHARDSON: · Can I ask a question?

MR. LIN: · Yes. · Yes, Your Honor.

JUDGE RICHARDSON: · I think Judge Niemeyer is also trying to speak, but he's on mute so I'm gonna take that opportunity and go ahead and ask mine.

So I want to return to the Chief's earlier point, right. · He quotes Remmer as requiring a purposeful activity, and if we read 606(b)(2), right, it requires that the outside influence be brought to the jury, right? · It requires some affirmative action. · And if we look at all of the cases that the chief discussed, they're not passive receipt of publicly available information. · They're attempts to bribe or they're contact with a pastor; that's directed, right? · It's purposeful activity.

We don't have anything purposeful here, and so help me understand. · What do I do with that? · Why is that not make your case different from all of these other Remmer cases?

MR. LIN: · Your Honor, I don't think the purposeful element means simply that it's purposely brought from the outside. · United States v. Lawson from this Court, 2012, involves the reading of a Wikipedia entry by a defendant and not something that was brought to -- I'm sorry -- by a juror, not something that was brought affirmatively to the juror, but that the juror, him or herself, went out and read the Wikipedia entry.

I don't think that's really any different than what we have here, which is that we've got a juror who, again, we think given the confluence of facts and, in particular, the interest in Justice Loughry on this very medium ahead of time is what creates the credible allegation that she went out and read these Tweets, saw them, read them and then the question here -- (Indiscernible.)

JUDGE QUATTLEBAUM: · So, Mr. Lin. · Mr. Lin, to follow up on that and may -- and this kind of involves, I guess, several of my colleagues questions,

but if someone had been reading the, you know, Charleston Gazette about this and that was known and they took the oath that said despite that they could be fair and swore that they would do that and the judge instructed the jurors not to, you know, read news accounts or watch TV about the case and someone says I saw Juror A reading the newspaper, no indi -- and the actual only information was that they were reading the newspaper about, you know, an unrelated event, is it your -- under your theory, would that warrant a Remmer hearing?

MR. LIN: · No, Your Honor. · And I think it really is, again, a question of what facts you have. · If you -- If you know, for example, that the juror was reading a particular section of the newspaper on a particular day and you know that there was an article in that section, I think that that might be enough. · And it's just that -- or if you know that she had a proclivity to read in the newspaper about Justice Loughry, then, again, I think that would be an additional fact, the same medium, the same interest. · That would be helpful.

But, you know, for example, the Government cites a case, Tunstall, from the Eighth Circuit where the allegation was that there was just a juror, not even a juror in the particular case, had been seen in the jury room reading a newspaper. · No allegation as to what the newspaper was. · That is not enough, and we completely agree with that. · But we think that the facts we have here are very different.

And I do want to stress this point, which is what is the consequence if these facts are not enough? · In what case --

JUDGE NIEMEYER: · Well, let me -- Let me ask you, Mr. Lin.

MR. LIN: · Yes, Your Honor.

JUDGE NIEMEYER: · If we focus on the trial, the contact during trial about a matter relating to the trial, the evidence in this case is that the juror had two Tweet engagements, both about football. There is no evidence that she had any other Tweet engagements or that it was about the trial.

Now, the question I have is: · If we just limit to that aspect, wouldn't every juror be subject to a Remmer hearing? · Because my suggestion is that every juror is -- or most jurors are participants in social media. · And during the course of the trial, you say there was reporting on the social media by the newspapers and the reporters, but that is the same for every juror.

So the question I'm really asking is: · How do we -- Where do we draw the line if we're not going to require a specific contact? · And your argument, as I hear it, is, okay, the summer Tweets. · Well, the summer Tweets were four Tweets over the period of four months, one a month. · She went on Tweets only 11 times the entire summer; that's, like, two, three times a month. · And the Tweets they had during the summer were just about the investigation and the -- what the Legislature was doing. · It was not about the case. · So you're arguing that her four times during the summer, average of once a month, is enough to impute to her during trial that she acted with misconduct.

And I'd just like to know where the line is. Because it seems to me this type of conduct during trial where we have two Tweets involving football and that's it, how we call her in for a hearing and why don't we call in all 12 jurors?

MR. LIN: · Chief, I see my time is expired. May I answer?

CHIEF JUDGE GREGORY: · Oh, yes. · Yes, you may.

MR. LIN: · Your Honor, if I could, just two responses. · The first is: · If you do take just the evidence during trial, I agree with you that that is not enough. · But I don't think you can just take the Tweets during trial. · I think you have to look at all of it because it speaks -- it is evidence that speaks to what she might have done.

As to the stuff beforehand, I think it's important to remember the nature of this technology. · The 11 times are the times that she publicly interacted with a Tweet. · That is not the number of times that she was on Twitter. · Many people are on Twitter all the time and don't do anything that leaves a public trail. · So our point is: · Of the 11 times that she saw an interest in something enough --

JUDGE NIEMEYER: · No. · You don't have – You don't have a lot of evidence, and we never do. · We don't know how many times a juror walks by a news stand and reads the headline. · We can't know that. The problem is that we're in a trial, and to establish some kind of prejudice, you have to come up with evidence. · You don't just speculate.

Now, this woman went on four times over the period of four months; that's what we have. · And the four times were quite innocuous. · There -- They've been recorded. · We recorded those in the -- in the earlier opinion, the panel opinion in this case. · And she indicated after she had seen those four, which were not about the case but about related matters, the ethics violation and the impeachment vio -- (Indiscernible) she saw four times during the summer, and she said that wouldn't influence her decision on the case. · She'd listen to the evidence. · Of course, as we know, she participated in an acquittal on several counts and did listen to the evidence.

But I get to the point where what troubles me is: · Why shouldn't we on the basis of your type of

allegations have to bring every juror in following a trial to make sure they didn't go and search out improper information during the course of the trial? · And we just don't have that.

And it seems to me the line -- I understand the fear you have. · There's increased risk; there's no question. · But the question is: · Where are we going to draw a line if we don't require evidence of at least one contact that's improper? · And we don't have that. · We're speculating.

MR. LIN: · One sentence, Your Honor. · The one-sentence response, Judge Niemeyer, is the proper context is it's four out of the 11 times that she chose to publicly interact with Tweeter. That's merely 40 percent. · It's actually 36 percent. · That shows an interest, a public interest, an undisputed interest in this particular defendant that you may not -- you may not have in every case.

JUDGE WILKINSON: · So, Counsel, what is the answer to this: · Are we driving courts in the direction of saying that -- I don't know what sequestration is going to look like in he future, but it might be like this: · If you're gonna sit on the jury in a case where there's a lot of publicity, the way there was with this one, you've got to check all your iPhones and check all your cell phones and check all the technology that you have on your person with the Court and put it into some kind of safe, and, in order to cut off the possibility of this sort of evidentiary hearing.

Because district judges will be very sensitive to what we say and say, oh, well, we've got to avoid this. · And is the way to avoid it in a heavily publicized trial just to say to check your iPhone, check your cell phone, everything if you're gonna sit on a jury? · Is that what we should do?

MR. LIN: · Well, Your Honor, I think that that is -- that's one way to avoid this kind of contact, which

I think is something to be concerned about because I think the prejudice that comes from an individual who reads Twitter passively is the same or perhaps worse than the prejudice of someone who actively interacts with a Tweet and -- I'm sorry, Your Honor. · Yes.

JUDGE KEENAN: · Mr. Lin, if I could add to that thought. · To what extent do we put into the mix the fact that the district judge found that she had potentially been either untruthful or inaccurate in answering Question No. 6 concerning her past exposure to social media? · And the fact apparently said she had not heard anything from Twitter when we know, in fact, she had been exposed to Twitter in the past about this trial. · I haven't heard you say anything about it, and I know it addresses in part your McDonough argument, but it seems to me that arguably that does factor into the mix here.

MR. LIN: · Yes, Your Honor. · I think you could take that fact into account. · I haven't mentioned it because I do think it speaks mainly to the McDonough claim and whether there should have been a hearing to inquire into it --

JUDGE KEENAN: · Right. · But why doesn't it make a difference in this case if we know that the juror was asked about whether she had seen anything on Twitter? · She didn't respond that she had, and now we know that that was inaccurate.

MR. LIN: · I agree, Your Honor. · I do think it is -- I'm sorry, Your Honor.

UNIDENTIFIED MALE JUDGE: · Yeah.

MR. LIN: · I do think it is a fact that that can be taken into account. · We don't think we need it. · I do really think -- and I know there's been some -- there's some judges think differently, but I do think the four out of 11 Tweets activity that is publicly documented ahead of time, that's a fact that, again,

you're not gonna see in a lot of cases. · And one of the --

I've gone well over my time, and so I can – I will save my further answers for rebuttal.

JUDGE MOTZ: · Chief, could I just ask --

JUDGE WYNN: · I have -- Please, Judge. · Go ahead, Judge.

JUDGE MOTZ: · I just have one question. · It's because I'm not very technically, as my colleagues can tell you, technically alert. · But my understanding is you can be on Twitter without ever making a -- having it show that you've looked at a message; is that correct?

MR. LIN: · That is absolutely correct, Your Honor.

JUDGE MOTZ: · And so, this person could have been on Twitter for everything and seen everything. We don't know definitively or not. · But she knows she followed those people, so it would automatically have come up.

MR. LIN: · That's right. · We know she followed those people. · It would have come up in her feed. It doesn't come up necessarily chronologically.

JUDGE MOTZ: · Oh.

MR. LIN: · And so she could have seen it on a different day as well.

JUDGE MOTZ: · Correct.

MR. LIN: · Yes, Your Honor.

JUDGE MOTZ: · Thank you. · I'm sorry.

JUDGE WYNN: · So my question goes, you know, whenever we wade into developing technology with traditional legal juris prudence, our understanding of how it works is critical to it. · We can't just do it as though we're looking at a newspaper or we're looking at items.

For instance, you know, to say someone looked at something for four times or that she Tweeted 11

times, that means she liked the Tweet or – And we've got to look into what is fed into this Twitter algorithm, and when you're looking at the technology here of what a Twitter represents – and that's important because we all know Twitter can be tremendously influential, and not every -- Here's your limiting principle: · Not ever jury -- juror is going to follow a reporter in terms of what they're Tweeting. · That's the limiting principle.

And if we start out with this notion that we're gonna put our heads down in the sand that says, well, you know, she only did it during trial during this time period here, the purpose of the hearing is to find that out, and it's a simple hearing. · It's not like you've got to reinvent the wheel on it. · And Lord knows, maybe our trial judges -- and we are overworked, but I don't see it, I mean, in terms of the number of cases we deal with. · Just conduct a simple hearing, and when you conduct the simple hearing, you will find the answers.

But to begin this process as though you understand the Twitter technology in relation to social media and not inquire as to, well, she's following these reporters, which you shouldn't be doing -- and not every juror is doing that. · And so, when you get into the whole question of the technology here, that's the -- that's the problem here with this case is we don't know.

And -- And the answer from maybe some of my colleagues would be, well, don't look because, you know, she hasn't said anything, and if you don't look, yeah, you won't see anything. · But it doesn't work that way in 2021. · We're not back 30, 40 years ago. · We're dealing with a whole different world in terms of technology. · And when you got people who are following people on-line who are to be making decisions in the case and these are people who are reporting on the case, why not simply just ask the

question? · And that's all you got to do, and then the judge can make a decision.

But to just blow it aside and don't do it, I don't get that. · I don't understand because I don't think it's -- I don't think it limits itself, and maybe correct me, to she just looked at it four times during the trial or she just looked at – Is that true? · I mean, how do we know that?

What we know are the likes, and if you know the difference between likes -- What is the difference between liking a Tweet and following the Tweet? · Does that mean you only just looked at the likes? · Certainly not.

CHIEF JUDGE GREGORY: · Judge Motz.

JUDGE WYNN: · And that's the inquiry here.

CHIEF JUDGE GREGORY: · Judge Motz.

JUDGE MOTZ: · No, no, no, no.

JUDGE WYNN: · Well, I would like a response to that, Judge.

CHIEF JUDGE GREGORY: · Oh, I didn't know there was a question. · Okay. · Go ahead.

MR. LIN: · Yes, Your Honor. · And that is -- that is the concern. · When you -- When you see a Tweet, there's no public trail. · When you like a Tweet, it means that you've affirmatively decided to indicate publicly that you not only saw it, but you liked it. · Now, what does "like" mean to a particular individual, that's not clear. · But that leaves the trail that you've actually seen it. · But just because you didn't like it, doesn't mean you didn't --

CHIEF JUDGE GREGORY: · Mr. Lin. · Mr. Lin.

MR. LIN: · Yes, Your Honor. · Yes, Your Honor.

CHIEF JUDGE GREGORY: · Judge Wynn and everybody spoke and raised good points about technology, but here's the question, my biggest -- Help me with this.

MR. LIN: · Of course.

CHIEF JUDGE GREGORY: · It seems like you're punishing her for being an avid reader or an avid follower, if you will, just like people who read the paper. · Used to -- You're right. · Forty years ago people read the newspaper. · That's why you say did you read anything in the newspaper and is that -- can that -- No, it didn't. · You move on. · Now it's that.

The question here, it seems like you're punishing her about pre-jury. · She's not a juror. She's a free citizen before she's on the jury.

In this case, you knew -- I've imputed to you your side knew that she knew something about the impeachment. · You knew there was an overlap in the fact of the impeachment and this case, in quotes, and you had an opportunity. · The judge did a great job in giving you a chance to go at it. · You asked her the questions. · You didn't ask what was the source of your information about impeachment. · You didn't ask anything about social media. · You didn't ask who it was. · You had that opportunity to do it. Now that it's over, you want to take her non-jury contact and following and say now you can put her through the gauntlet of questioning when you had the opportunity to do so yourself.

And you don't have any evidence that she con -- that she read any Tweet as a juror. · You're saying, well, because she did this before, it's likely she did it again. · Is that enough under Remmer when they were looking for improper contact? That's my question.

MR. LIN: · Thank you, Your Honor. · Couple of answers to that. · I think the first is the question of the voir dire and what happened in her unspeaker -- (Indiscernible) -- can be relevant, but I think it's important that the voir dire and the questions and her answer there not be used to immunize somebody from the potential Remmer hearing down the road.

Remmer is an independent protection against what might happen once somebody was -- is impaneled on the jury. · Now, you know, perhaps she shouldn't have been impaneled, and that's the point that we're making here. · But I think it's separate and apart from what happened there. · You've got other people in a different case where maybe there isn't the same question, but they get impaneled. · Remmer is a separate protection against what happens once the jury is impaneled and what those people might have interacted with.

But I think one of the points that I want to stress here is, is the reason why the activity ahead of time is so important is because it does show her motive and her interest and without that, it will be very, very difficult in a future case ever to have any inquiry into a juror's passive Twitter activity.

And passive, I think, is a really important point here. · Judge Niemeyer has pointed out, look, if someone had liked something during the trial, then you would know, of course, that she interacted with that and that would be a different case. · But what do we do about the cases where there's only passive activity and yet there's lots of evidence that shows that it's very likely that she came across this information? · Seventy-three Tweets --

JUDGE WYNN: · And so, going to that point -- And Chief Judge Gregory alluded to this in terms of the technology, but I don't think we can be dismissive of the technology here. · We can't just bring in a newspaper. · That has nothing to do with a Twitter account. · We can't bring in the traditional means of communication.

We're talking about a Twitter and we're talking about the type of indication that's an indication. · It's a red light. · You have been following these folks here. · They have been writing about the trial. · This is what

you liked over here. Doesn't mean you haven't been looking at the whole thing. · The likelihood -- What it indicates is there's a strong indication you've been doing this the whole while. · The only purpose of the hearing is: · All these questions that are being asked, just ask the question.

MR. LIN: · And, Judge Wynn --

JUDGE WYNN: · And that is it.

MR. LIN: · Judge Wynn, there is -- To answer, I think, Judge Wilkinson's question, there is a much less intrusive prophylactic approach here, which is to have district courts direct jurors to use filters on their Twitters or to unfollow the reports. · So you can actually put in a filter for certain words. · Could have filtered out "Loughry." Could have filtered out, you know, "Bass," "McElhinny."

JUDGE WYNN: · Well, all I'm saying is it's an uncomfortable place to be in 2021, but there are -- If we don't put a stop to this sort of thing now, then it is going to open the gate in the other direction. · The limiting principle is what is -- what is being advocated here. · We need to limit this right now. · If you don't, then you are opening it up to, well, why not? · Just do it. · And you don't know. · You just don't have to like it. · Just go ahead and just follow whatever you want to follow during the course of a trial, and it won't be in the hearing or inquiry because there's nothing that's pointing to it directly.

MR. LIN: · I will just add that to the importance of this -- And, again, I know I've gone over my time, but I'll just say it very quickly. This very same issue is before the Second Circuit right now in a case called, I think, Guzman -- Guzman-Lorea. · It's come out of, I think, it's the Eastern District of New York. · It's not fully briefed. · There's a reply brief that's due on May 11th.

Thank you, Chief, for the extra time.

CHIEF JUDGE GREGORY: · Thank you, Mr. Lin. Mr. McVey.

ORAL ARGUMENT OF R. GREGORY McVEY
ON BEHALF OF THE GOVERNMENT

MR. McVEY: · May it please the Court. · I'm Greg McVey. · I represent the United States.

Now, the Defendant's contention that there's a credible allegation of unauthorized contact with reporters' Tweets in this trial is nothing more than speculation. · The Defendant provided no evidence whatsoever that this juror had seen any Tweet by this reporter during trial or at any other time. · She -- There is no indication she's ever liked a Tweet by either of these reporters, no indication she's re-Tweeted a Tweet by these reporters, particularly during the course of the trial, and that's where the focus should be under -- under Remmer. · The Defendant never even provided the Tweets to the District Court that the reporters, McElhinny and Bass, had during the course of this trial.

The burden here or the standard of review, rather, is abuse of discretion. · The District Court looked at what was provided to the Court. · It made a decision based on the facts that were presented to the Court, and one cannot say that the Court abused its discretion when there was just simply no evidence presented at all, circumstantial, direct or any other way, that this juror had been in contact with through Twitter with the two reporters.

When one looks at even the Tweets that were made during the course of the trial -- I believe Defendant in footnote seven of his brief alluded to some of those Tweets -- there were nine about the trial, and if you look at what those Tweets concerned, nine about the trial from McElhinny, those were merely sort of headline types of Tweets. There was a 15-minute break or Justice Loughry is arriving at

court or leaving court. · It was barely announcing what had happened during the course of the day.

JUDGE DIAZ: · Mr. McVey, can I ask a question? This is Judge Diaz.

MR. McVEY: · Yes.

JUDGE DIAZ: · So what more in your mind would have been required in this case for the Defendant to have made out a proper claim for a Remmer hearing given the nature of the technology that we're dealing with?

MR. McVEY: · I think if there was some indication that the juror had liked a Tweet or even in comparing it to what happened in United States v. Harris, which the Defendant relies upon, if there was somebody in her household who was Tweeting that had come to the four somehow during the trial, but there's no evidence --

JUDGE DIAZ: · But, you know, but, of course, in Harris there was no indication that that information had been -- at least no direct evidence that that information had actually been passed on to the juror, but the Sixth Circuit in that case was willing to make the inference based on all the relevant facts. · That was enough to warrant a hearing.

And you mentioned earlier that you focused on the trial, but it's true, isn't it -- and we've talked at length with Mr. Lin about her Twitter activity before the trial. · You would like us, I think, to ignore that, but we can't.

MR. McVEY: · I believe, respectfully, Your Honor, it is irrelevant. · There were other jurors who had indicated knowledge about the trial itself, knowledge about the impeachment proceedings. · Those jurors were called to the bench for individual voir dire about that. · The Defendant, for whatever reason, chose not to call this particular juror up. Two of those people who had indicated they had prior

knowledge of the case ended up on the juror and -- on the jury, rather, and this juror was one of them. · If we are to --

JUDGE DIAZ: · No. · Well, Mr. McVey, certainly I understand that, you know, that that's -- the fact of prior knowledge by itself is never enough to warrant excusing a juror unless they can't set that information aside. · Having received those assurances, I don't fault the District Court for not excusing the jurors.

But my question is: · Why would you have us ignore the Twitter activity that had occurred before trial in deciding whether or not what happened during the trial, what the Defendant uncovered post-trial is enough to warrant a Remmer hearing? · You want to take those in isolation, but I don't think that that's appropriate.

MR. McVEY: · Well, I would respectfully disagree. · I believe that her pre-trial activity, which, again, I had occurred a month – months before, did not involve any contact with either of the reporters in question here. · They were Tweets about -- about the impeachment proceedings from a couple of legislators as well as a private citizen. Some of those Tweets concern other state activity. They had nothing whatsoever to do with – with Justice Loughry and the impeachment or the trial itself.

The jurors then took an oath to follow the law, to only listen to the facts presented at trial, and jurors are presumed to follow those instructions and we can presume that here. · Without further indication that there's some sort of activity by this juror --

JUDGE HARRIS: · Counsel.

MR. McVEY: · -- and what she saw those reporters --

JUDGE HARRIS: · Counsel.

MR. McVEY: · -- Tweet -- Yes.

JUDGE HARRIS: · Sorry, Counsel. · It's Judge Harris. · And I think I can probably anticipate your answer to this question, but I'm struck by the fact that not only was the juror sort of actively engaging on this issue on Twitter before the trial but I think it's, like, the second she gets out of jury service she's back on Twitter Tweeting about the trial. · And it just -- I'm not saying there's anything improper about that, but when you look at all of the facts in this case, she does seem to be, and not judging, but just a person who's actively engaged in Twitter about this issue. · And so if we're trying to figure out whether it's credible that someone like that, given that she is following these reporters, they're in her Tweet -- in her feed, would look at those Tweets during trial, why doesn't all of that factor in?

MR. McVEY: · Again, because there has to be some allegation that that actually occurred during trial.

JUDGE HARRIS: · Well, there is an allegation and the question is whether it's credible and it just -- I don't understand why in determining whether or not it's credible we wouldn't look at everything we know about Juror A and how she engages with Twitter about this issue.

MR. McVEY: · But, again, there's no activity during the trial from this juror that occurred about the trial. · Again, her activity on Twitter is about football. · On October 6th, that was a Saturday, there -- there was not even a trial happening that day. · There were no Tweets from Bass on that day. · There was a Tweet by McElhinny, I believe, on that date talking about him taking home pens and notebooks from work.

JUDGE QUATTLEBAUM: · Mister -- Mister --

MR. McVEY: · Again, and those --

JUDGE QUATTLEBAUM: · Counsel.

MR. McVEY: · Yes.

JUDGE QUATTLEBAUM: · Counsel, if I could – if I could interrupt. · Does your answer have to be that you ignore the pre-trial activity or the post-trial activity? · I mean, it seems to me it's a pretty, you know, pretty far stretch to say, you know, you can't look at anything that happened pre-trial. · Is it the answer that the standard of review is abuse of discretion and the District Court, who was closest to this, looked at all this information, looked at all the factors we're talking about here today and decided that, given the totality of information, one was not required? You're not asking us -- maybe you are. · If you are, please, tell us that we have to side with you, we have to draw some, you know, some wall between what happened pre or post-trial. · If you're saying that, please let us know because it seems to me you don't have to go that far.

MR. McVEY: · I don't -- No, I'm not saying that. · What I'm saying is that even if you look at that and you take her pre and post-trial activity into consideration, which I do believe, as you've stated, that the District Court did, that -- and I guess it's considering the weight of that evidence as opposed to whether or not it could be considered. · It just doesn't carry much weight.

And you are correct, the District Court considered all that. · The District Court, who, as you stated, had contact with her, had contact with the trial, and reviewed all of the evidence that was presented concerning whether or not that allegation of unauthorized contact was, indeed, credible and concluded that the Defendants just did not present that. · And one cannot say --

JUDGE RICHARDSON: · Counsel --

MR. McVEY: · -- that the Court abused --

JUDGE RICHARDSON: · Counsel.

MR. McVEY: · -- its discretion in looking at that.

JUDGE RICHARDSON: · Counsel.

MR. McVEY: · Yes.

JUDGE RICHARDSON: · Can you answer Judge Diaz's question to Mr. Lin and that -- and the particular one I'm thinking about is: · What does the hearing look like? · Assume you lose. · These are hypotheticals. · But assume you lose and it goes back. · Talk to us a little bit about – Your colleague, Mr. Lin, suggested a fairly wide-ranging set of inquiries, and I'm curious in light of 606(b) what your view of the sort of scope of that inquiry looks like.

MR. McVEY: · Well, I think this is one area in which we -- we substantially agree because, as what my colleague argued, was there would be questions about whether or not she had seen this. · And what that ends up being in the United States' mind is, in essence, a fishing expedition; is that they're using the hearing itself to develop a credible allegation of that unauthorized contact. · And that's what that hearing would be -- would be for, and that's just simply not what Remmer stands for; that that has to occur before a hearing is granted.

And, again, once that hearing is granted, then there is a -- there is a very -- a very strong burden on the part of the United States to rebut the presumption that that unauthorized contact was made and that it somehow influenced this juror's decision. · And that is a problem when we have jurors who are -- perhaps have Twitter contact during the course of the trial. · There's nothing there to show that they've had any contact with reporters, that sort of thing, and that becomes a problem because we cannot just call in jurors after the fact to determine whether or not they had any contact with reporters. · It would not be unusual for somebody on Twitter, I would say, to

follow the news of some sort. · This was a highly publicized case.

JUDGE NIEMEYER: · Can I ask a question about the record?

MR. McVEY: · Yes.

JUDGE NIEMEYER: · What did the District Court have before it with respect to post-trial contact and with respect to the reporters posting during trial?

MR. McVEY: · There were no Tweets provided to the District Court that were Tweeted by either reporter. · None of those were provided to the District Court.

There was information provided to the District Court about post-trial Tweets and, again, the District Court said because it was post-trial – I believe there was a mention of this juror Tweeting that, you know, she was glad the trial was over or words to that effect or was privileged to serve on that. · But the juror -- the District Court considered that. · It was post-trial, and there was nothing wrong with that. · That wasn't any sort of contact that this juror may have had with an outside source.

JUDGE DIAZ: · Mr. McVey, was there any dispute that these reporters were reporting daily, constantly about the trial and that, you know, they were doing so on Twitter? · There really wasn't any dispute about that, is there?

MR. McVEY: · There is no dispute about that, that's true.

JUDGE DIAZ: · Okay.

MR. McVEY: · That's true. · It's whether or not --

JUDGE DIAZ: · One of the concerns that I had --

MR. McVEY: · I'm sorry.

JUDGE DIAZ: · Go ahead. · I'm sorry. · Go ahead.

MR. McVEY: · No. · We would concede there was active reporting about the trial, but, again, one has to consider the nature of that reporting. · For example, Bass reported that he would update about the trial on the evening news. · That was the entirety of one of the Tweets.

But there was an active reporting about the trial. · Our dispute is whether or not this juror had seen any of that, followed any of that, and there's just no evidence of that.

JUDGE DIAZ: · So one of the concerns that I have about this case is sort of the notion of the implication of the District Court's opinion that in my view -- and, of course, my colleagues disagree -- essentially required some direct evidence of what it is that the juror was engaged in. · Did you dispute or do you disagree that a defendant might be able to make out a Remmer hearing without relying on direct evidence; simply relying entirely on circumstantial evidence?

MR. McVEY: · Yes, I would agree with that. · In fact, United States v. Harris, I think, stands for that, that there was circumstantial evidence because of the nature and sort of the nature of the facts of the situation that occurred there, that there was circumstantial evidence enough to make that credible allegation that the juror had had an outside contact. · So, certainly, yes, I would say this could be a situation that a credible allegation could be made through circumstantial evidence.

Here there's just no evidence and in our – at all that this juror had any contact with the reporters' Tweets during the course of the trial.

JUDGE DIAZ: · Well, I mean, that sort of begs the question. · You said here there's no evidence. There's no direct evidence, but Mr. Lin has argued that, in fact, given the nature of the technology, the

most he could allege is this circumstantial chain of events that began with the pre-trial Twitter activity and then continued with evidence that, at least on two occasions during the course of the trial, a trial in which reporters were constantly Tweeting information about the trial, that she engaged with Twitter.

And as my colleagues have indicated, Judge Wynn and others, the nature of this technology is such that there is -- there's never gonna be any direct evidence of someone who simply looks at his or her feed during the course of a trial. · So that's circumstantial evidence. · What's wrong with that?

MR. McVEY: · I would respectfully -- I would respectfully disagree with that. · There is just -- There is no evidence whatsoever that this juror had any contact with that, circumstantial or otherwise.

JUDGE DIAZ: · There's no direct evidence, I will grant you that, but, I mean, I just laid out a series of facts that, I think, suggests at least some circumstantial inference can be made that she, in fact, was engaged improperly with Twitter during the course of the trial. · And that's -- Essentially, that kind of credible allegation is effectively what the Remmer hearing is designed to root out.

MR. McVEY: · Well, with regard to the pre-trial activity, again, even if one considers that, that is of little weight. · It was an indication that, yes, she had knowledge about the case, but those Tweets or the re-Tweeting or the liking of those Tweets that are of concern had to do with people other than these two reporters. · It wasn't as if she was following and liking or re-Tweeting those reporters. · Perhaps if that had been the case, that might take it over the bar and that might be some circumstantial evidence that she was actively following these reporters.

There's no indication in those prior Twitter activities that she had involvement even then with those reporters. · There's no indication about her Twitter activity following trial that she was interacting with those reporters and seeing those. I think if that occurred --

JUDGE KEENAN: · Okay. · But, Mr. McVey --

MR. McVEY: · Yes.

JUDGE KEENAN: · Excuse me. · I didn't mean to interrupt you. · I thought you were winding down there.

JUDGE KEENAN: · Mr. McVey, you seem to have been saying, though, in your last statement there was evidence that she had been exposed to information about the trial, and we know that the trial judge found that she had been inaccurate or potentially untruthful about her exposure. · Why doesn't that become a big fact that weighs into the mix? · It's the same question I asked Mr. Lin. · We know we have a juror who had been exposed pre-trial and who didn't acknowledge that when she was asked that. · Why doesn't that become a big factor in whether the allegation of exposure during trial is credible? · I mean, it seems to me to be circumstantial evidence of untruthfulness.

MR. McVEY: · Well, I would -- I would respectfully disagree that that's what the record shows. · This juror was asked very specific questions about her knowledge of the impeachment proceedings. · She was forthright and told the --

JUDGE KEENAN: · Well, wait a sec, though, Mr. McVey. · Question No. 6 is:

"Have you heard anything at all from any source about the facts?"

She wasn't asked about the commission. · She wasn't asked about the indictment. · She was asked, "Have you heard anything at all from any source

about the facts?" · And the answer to that is clearly yes from what we know, and she didn't --

JUDGE NIEMEYER: · But --

JUDGE KEENAN: · -- she didn't say so.

JUDGE NIEMEYER: · Wasn't that question directed to the case, facts of the case? · And the Court was very specific in asking about the case and the impeachment proceedings.

MR. McVEY: · That's --

JUDGE NIEMEYER: · And there was no question -- There was no question that was asked about the facts of the case and that none of the Tweets talked about the case. · It wasn't even an indictment. · It wasn't even a grand jury proceeding talked about. · The screens were ethics violations and impeachment, and she answered that and said, yes, I did have knowledge.

And so to the extent that she said I have knowledge of the impeachment and the ethics, she is acknowledging all the facts that she had. · It's just not fair to say, then, when she's asked about facts of the case -- And the Court made a distinction between the impeachment and the facts of the case and his questions. · He actually explicitly noted that in his question, "I'm now talking about the case," and she didn't answer yes to that.

I agree with counsel that the record does not support that she was disingenuous in answering those questions, and counsel knew of this. · Counsel could have said, well, what did you learn about the impeachment? · What did you learn about the ethics violation?

MR. McVEY: · Yes. · I would agree with Judge Niemeyer's assessment. · There were specific questions asked about the facts of this case. There was a difference made between those. · She fully acknowledged --

JUDGE KEENAN: · Mr. McVey.

MR. McVEY: · Yes.

JUDGE KEENAN: · How were the facts different? How were the facts of this case different from the facts of the impeachment -- (Indiscernible) -- about the Cass Gilbert desk and the couch?

MR. McVEY: · Well, there's a couple responses to that. · At the time that the voir dire occurred, this juror would not necessarily have known what the facts of this case were, and so, in order to know those specific facts, she doesn't know. · She admitted and fully disclosed the fact that she was exposed to -- to information about the impeachment proceedings.

And, remember, the one aspect of this case that was most publicized was an issue of Justice Loughry and the Cass Gilbert desk, which he took to his home. · Judge Loughry was acquitted of that particular count. · The jury unanimously acquitted of the count. · That was -- That was one of the most publicized aspects of the overlap, if you want to put it that way, between the impeachment and the trial itself.

So this juror parsed out those differences between what was happening with the impeachment, what was happening with the ethics proceedings, and in terms of the facts of this case, as it related to the criminal case, had stated she knew nothing further.

JUDGE WILKINSON: · Counsel, let me --

JUDGE WYNN: · Is there anything in the record --

JUDGE WILKINSON: · -- ask you this: · I thought that the basic line that the Supreme Court has drawn in this area of law was between exposure on the one hand and the imposition or the intrusion of an outside influence on the other. · And in case after case after case, the Supreme Court makes clear that exposure is unavoidable unless you want a jury, which is composed of un -- of ill informed citizens,

which you don't want. · In today's media environment with a 24-hour news cycle, exposure is all the more unavoidable. · The Supreme Court has made the point that you can't reason back from the mere fact of exposure, even detailed exposure to bad faith, and, of course, voir dire is meant to address that.

Now, when you move from exposure -- and I think Judge Richardson made this point very well earlier: · Because when you move from exposure to the intrusion of an outside influence, then the case begins, it seems to me, to take on a wholly different dimension.

But in the absence of an outside influence that's being brought to bear on her, you have to, as Judge Quattlebaum has said, leave these kind of things up to the District Court because that's exactly what the District Court's assessment and its voir dire and its greater familiarity and the rest is supposed to have confidence in.

But as I understand it, this line between exposure and intrusion of outside influence has an important distinction in the Supreme Court's juris prudence for many years.

MR. McVEY: · That's correct. · It would be difficult to ever, ever see the jury in a case that was highly publicized such as this one. · And, yes, this juror had outside knowledge about facts that may have been overlapping with regard to the impeachment and the ethics proceedings but she took an --

JUDGE WILKINSON: · Right. · And when you're dealing with exposure, it becomes very difficult to draw lines, as I say, because everybody's exposed. It would have been highly unusual of a trial which was this well-publicized and this much of a public issue in West Virginia, it would be odd if people weren't exposed.

And, but that's a different thing altogether from somebody trying to exert an outside influence upon a particular juror, which seems to me a much more serious problem than the meer fact of exposure, and that I -- As I understand the record, I don't think that there was a kind of outside influence brought on this jury by anyone, and that, to me, when that line is crossed, that's a real red flag to me.

But when we're just talking about exposure, I know the Supreme Court said you don't want a completely unexposed juror. · They're probably lacking in a whole lot, including life experience and an interest in civic affairs.

MR. McVEY: · I would agree. · And in this case, there's no evidence whatsoever that at least during the trial that there was any exposure to any outside influence. · And that's the issue here for this Court to consider, is whether or not that credible allegation under Remmer was made during -- of that contact during trial, and there's just no evidence whatsoever for exposure to that.

And I apologize. · My screen is not showing a time, so I'm not sure how much I have left.

CHIEF JUDGE GREGORY: · Counsel, you have four minutes left.

MR. McVEY: · All right. · Thank you.

JUDGE QUATTLEBAUM: · Counsel, can I ask a question? · Is it relevant here that the District Court during the trial gave admonitions not to look, to stay away from reports, media reports, or whatever about this case as opposed to stay off social media altogether?

And I guess another, related to that, had the District Court given instructions to the jurors to stay off social media altogether and there was evidence that a juror was on it, would that produce a different result?

MR. McVEY: · I believe it would. · All the Court's instructions -- and they were fairly detailed in every day and every -- at every break was instructing them to stay away from news accounts. · And it was a general instruction about newspaper, television news, as well as social media. · There was instruction about that prior to the case actually starting and they were, again, reminded of that daily and, certainly, more than once daily to stay away from news accounts about the case and were instructed, too, if for some reason they accidently came upon those to immediately turn those off, ignore those or whatever. · And there is --

JUDGE MOTZ: · So can I ask you about the second part of Judge Quattlebaum's question in which you said yes? · If the instruction had been don't go on social media and this juror did that that would require a Remmer. · That's what I understood you said. · Is that right?

CHIEF JUDGE GREGORY: · Judge. · Judge Motz, you trailed off. · Would you repeat your question?

JUDGE MOTZ: · Yes. · I thought -- and this was going off the end of Judge Quattlebaum's question and he can correct me if I misunderstood his question. · But I thought I understood your answer to be that if the juror was instructed not to go on social media and then he was learned that the juror did go on social media, that would require a Remmer hearing.

MR. McVEY: · Not in and of itself, no. · I think it would --

JUDGE MOTZ: · Well, you said that would be a different case and it seems --

MR. McVEY: · Well, it might --

JUDGE MOTZ: · -- the big difference is whether it was a Remmer hearing or not a Remmer hearing.

MR. McVEY: · Yes. · I may have misunderstood your question. · If --

JUDGE MOTZ: · It wasn't my question.

Judge Quattlebaum, was that not your question?

JUDGE QUATTLEBAUM: · Yeah. · I was just trying to see what -- what the Government's position was --

JUDGE MOTZ: · Right.

JUDGE QUATTLEBAUM: · -- as to whether the evidence involved violation of the District Court's admonitions, how that factored into the inquiry.

JUDGE MOTZ: · Sure.

CHIEF JUDGE GREGORY: · That seems to be -- That's my whole thing is that there it would be a different case, it seems like, because you have improper conduct from which you could have circumstances that they may have been exposed. · But the gateway is still improper conduct.

JUDGE MOTZ: · Okay. · But what I'm trying to understand is --

CHIEF JUDGE GREGORY: · I'm not talking with you, Judge Motz. · I'm just talking about if, like --

You agree then, Mr. McVey, whether there's a different case --

MR. McVEY: · Yes.

CHIEF JUDGE GREGORY: · -- or not, you'd have to meet it factually. · That is under Remmer it would be different.

MR. McVEY: · That does make a difference.

CHIEF JUDGE GREGORY: · Right.

MR. McVEY: · I misunderstood and I'm --

JUDGE MOTZ: · So does that make a difference that you would get a Remmer hearing in?

MR. McVEY: · Yes, I believe it would.

JUDGE MOTZ: · That's what I mean. · That's what I mean.

JUDGE NIEMEYER: · Just --

MR. McVEY: · Yes, I believe it would.

JUDGE NIEMEYER: · Just a minute. · You know, the jury were never instructed to stay off social media.

CHIEF JUDGE GREGORY: · That's right.

JUDGE NIEMEYER: · They were instructed to stay off social media about the case.

MR. McVEY: · That's correct.

JUDGE NIEMEYER: · Everybody --

CHIEF JUDGE GREGORY: · That's Judge Quattlebaum's point, yeah.

JUDGE NIEMEYER: · Yes. · And if -- I mean, if somebody gets on and says I'll pick you up after school Tweeting to a daughter or whatever, that wouldn't violate any instruction and wouldn't be relevant. · And in this case, the only Tweets we have are two relating to football.

MR. McVEY: · Yes.

CHIEF JUDGE GREGORY: ·And, Mr. McVey, thank you so much. · Appreciate it.

MR. McVEY: · Thank you.

JUDGE WYNN: · Excuse me, Judge, Chief. · I'd like to ask a question before we conclude.

CHIEF JUDGE GREGORY: · All right.

JUDGE WYNN: · If you don't mind.

CHIEF JUDGE GREGORY: · Sure.

JUDGE WYNN: · I just want to delve a little bit in terms of where we are in terms of we're kind of delving between what the technology is here, this whole business of following and not following.

There seems to be an allegation from at least Mr. Lin's position that there was at least a following that was going on during trial. · You don't seem to dispute that. · And so, when we look at this, I think

about plenty of jurors -- of the jurors that indicate they have no exposure. · We can get into the lawyer question of, well, were the specifics really -- did she really, specific, answer the question? · I don't think we want to go down that road of saying jurors have -- can be held to a specific question with specific lawyer-like answers to them when we know what the purpose of this whole over-arching duty is, it's a fair trial. It's to make sure you're not exposed to things that may.

But, there is a difference between pre-trial exposure, which is fair game during voir dire, and exposure during trial. · And, obviously, we do want an educated jury. · We want one that's interested, but we don't want them reading about the case during the trial. · And if there is evidence here she is following, and as you indicated, two reporters who are reporting constantly on this particular -- and this is no ordinary case. · This is not the little bank robbery down the street that someone happen to be doing and she's following. This is a case that's all in the media, as I understand it, and they are constantly reporting on it.

And there may be a difference in a case of this magnitude and one that's not of this agnitude, but Remmer was decided in 1954, 67 years ago. · I have every confidence they had no clue what a following or a Tweet or even an Internet was back then, and yet we as judges now have to apply what we hope to be illuminated rules then that would fit differing circumstances and different situations.

What we confront today is a simple question and I think it is, when you look at it, is it -- Why don't we have a hearing? · I'll end by asking this question: · How long would such a hearing take in this instance in your best guesstimate? · This is one instance I'll ask you to give a guesstimate because I'm not seeing a long hearing at all for this sort of situation.

And then, secondly, is there any dispute as to the fact -- as to the allegation that she was, at least following, whether passive or actively, during this trial?

MR. McVEY: · With regard to your question about the length of the hearing, I would say probably not more than an hour, if that.

And there is no dispute that she followed both reporters on Twitter; however, what is not seen is that she actively followed them. · There is no evidence whatsoever at anytime that she –

JUDGE WYNN: · Well, let me just ask the counter-question: · Is there any evidence that she did not actively? · We do know at some point she did. · Is there any indication she did not?

MR. McVEY: · There is -- Well, the indication that she did not is there's nothing to show that she engaged with them. · She did engage with other -- with other Tweets.

JUDGE WYNN: · I understand that. · But you don't have to engage to follow actively, do you?

MR. McVEY: · You don't. · And I would --

JUDGE WYNN: · And, I mean, so when you say engage, there's no light up there. · People follow Twitter Tweets actively all the time and they don't engage at all; is that not correct?

MR. McVEY: · That is correct.

JUDGE NIEMEYER: · What is the evidence --

JUDGE WYNN: · So my question is that --

Let me -- Please, Judge Niemeyer, if you don't mind, I'd like to continue this line of questioning because I think the technology here is something important for this Court to understand when we are applying rules from a 1954 case in 2021. · And while I appreciate the different perspective here, I see the potential for an explosion of an abuse on the part of those who come in to judge and give fair trials.

The first question: · When you go into specifics, you know, did you specifically ask about impeachment? · Did you ask about this? · You know, the whole thing is: · Were you exposed? · I mean, you know, is there something here that can -- that can influence your decision here? · I mean, we can get beyond the lawyer answer. · We're talking jurors.

And so, then we get into the business. · We got two active reporters reporting every day. · She has followed them actively. · We don't have evidence that she's following them actively here during the trial, but we don't know if she is or not.

So then we get to the question: · Should there be a hearing? · You said an hour, but, candidly, you, I think, admitted that you said it's probably less than an hour. · I probably think 15 minutes to 30 minutes would be it for the determination of an issue of this magnitude. · So that's where I've gone with this. · How do you respond?

MR. McVEY: · Well, Your Honor, a couple respects.

Number one, Remmer still is the law. · And Judge Copenhaver in the District Court reviewed everything that was before him with regard to this particular case, and that's -- that's what this concentration is on. · He reviewed all the evidence that was provided to him, he considered everything that had happened during the course of the trial, considered all that we discussed today, and determined that under Remmer a hearing was not required.

And in order to show that a hearing would be required, it would have to say that Judge Copenhaver abused his discretion in carefully considering all matters before him or the matters that weren't before him and, particularly, any evidence whatsoever that this juror had actively engaged or even passively

engaged. · There's no evidence that she passively engaged with Twitter. There are a number of feeds that come up. · There's no information whatsoever that she was engaged with anything particularly with regard to this – these two reporters.

JUDGE NIEMEYER: · What was the evidence that she followed these reporters?

MR. McVEY: · I'm sorry, Your Honor?

JUDGE NIEMEYER: · What was the evidence in the record that she followed these reporters?

MR. McVEY: · Well, there was evidence presented by the Defendant that that was part of a number of people or entities that she followed during the course of Twitter, but there was nothing to show –

JUDGE NIEMEYER: · Well, let me just go back to that. · Do any of those Twitters show her following the reporters?

MR. McVEY: · No.

CHIEF JUDGE GREGORY: · Right. · That's the question. · The question is not the allegation but whether the evidence is known.

MR. McVEY: · Yeah. · There -- There's no -- There's no evidence of it.

JUDGE WYNN: · Have you ever said that before? Seems like that's the first time I've seen that. You seem to indicate -- When that allegation was made, did you dispute the fact that the allegation of the statements made that she was following during trial?

JUDGE DIAZ: · I think there may be a confusion as to what "following" means.

JUDGE KEENAN: · Yeah.

MR. McVEY: · Yeah.

JUDGE DIAZ: · I mean, she followed these reporters.

JUDGE WYNN: · That's exactly right.

JUDGE DIAZ: · The question is whether or not during the trial she actually saw what was being --

JUDGE NIEMEYER: · Well, my question --

JUDGE DIAZ: · -- fed through her Twitter account.

JUDGE NIEMEYER: · My question is: · What is the evidence she followed the reporters at all at anytime? · What's the evidence?

CHIEF JUDGE GREGORY: · Right.

JUDGE WYNN: · She has Tweets during the trial. Is that not evidence?

JUDGE NIEMEYER: · Not to -- Not to the reporters. · She didn't.

MR. McVEY: · Not to the reporters.

CHIEF JUDGE GREGORY: · Not to the reporters. You can Tweet, but you don't have the following about the Tweet.

JUDGE NIEMEYER: · My question is: · Is there any evidence she followed these two reporters at anytime?

MR. McVEY: · The only evidence that was presented is the allegations of the Defendant in their pleadings with the District Court.

CHIEF JUDGE GREGORY: · Thank you, Mr. McVey.

JUDGE WYNN: · And did you dispute that? · Did you dispute that?

MR. McVEY: · We did not.

JUDGER MOTZ: · I thought you conceded it in front of us.

MR. McVEY: · We did not. · That's fair.

JUDGE KEENAN: · Yeah, I did, too.

MR. McVEY: · Yes.

JUDGE MOTZ: · I'm sorry. · What's your answer?

MR. McVEY: · Yes, that's correct.

JUDGE MOTZ: · That you do concede it?

MR. McVEY: · Yes.

CHIEF JUDGE GREGORY: · You concede what?

JUDGE NIEMEYER: · How do you concede it if it's not been demonstrated? · Why don't you just not dispute it?

MR. McVEY: · It's just not disputed, yes.

JUDGE NIEMEYER: · All right. · That's what I thought you meant.

JUDGE WYNN: · That's a different word than "concede."

MR. McVEY: · There's been no dispute about whether she followed them.

JUDGE WYNN: · That's a very different word.

You said you conceded. · It looked to me as though you did. · You didn't dispute it; I can tell you that. · The only -- The best evidence against it is coming from the judges here who's questioning it, but you didn't do that. · I don't know where that's coming from.

JUDGE NIEMEYER: · And that's the question.

CHIEF JUDGE GREGORY: · The question is, though, will we -- on the -- on the abuse of discretion, what the District Court had as evidence before it.

MR. McVEY: · Yes.

CHIEF JUDGE GREGORY: · Isn't that the issue -- (Indiscernible.)

MR. McVEY: · That is the issue.

CHIEF JUDGE GREGORY: · Right. · Okay. · Thank you so much, Mr. McVey. · We appreciate it.

MR. McVEY: · Thank you.

CHIEF JUDGE GREGORY: · Mr. Lin, you have some time reserved.

MR. LIN: · Thank you, Chief.

REBUTTAL ORAL ARGUMENT OF
ELBERT LIN, ESQ.
ON BEHALF OF THE APPELLANT

MR. LIN: · I'd like to start with the abuse of discretion standard. · I think what's important to point out here is that Judge Copenhaver did not apply the right standard. · He did not even quote the phrase "credible or genuine allegation." · He focused entirely on sort of a brand of what Judge Quattlebaum was asking about, which was whether there was a violation -- violation of a jury instruction.

A proven violation of a jury instruction, I think, would be very strong evidence in favor of a Remmer hearing, but I don't think it is required. Remmer protects against an extra judicial contact. It protects the Sixth Amendment. · It does not protect against a violation of a jury instruction.

There is some dispute here about what the jury was instructed on. · Obviously, it's in the record. But I don't think you have to have a proven violation of the jury instruction to get a Remmer hearing, and that is the analysis that Judge --

CHIEF JUDGE GREGORY: · Mr. Lin, let me ask you this question 'cause Judge Wynn is a guru about this cybernetics -- and that in itself, I don't have the knowledge he has, but let me ask this question: · I like simplicity and try to make this thing live in terms of 1954, a long time ago, and now the world is -- But isn't it similar to saying that if a juror read the newspaper about the story about the impeachment, just an incredible amount of times, 11 times, whatever, but then at the trial said whatever I read about the impeachment, not ask about this trial facts but about the impeachment, I can set it aside and do that? · And if later we found out that that juror did not end her subscription to the newspaper, that would be circumstantial evidence that she must be still reading about it.

MR. LIN: · No, Your Honor. · I think there's a couple differences there.

CHIEF JUDGE GREGORY:· What's the difference?

MR. LIN:· Well, the first, I think, is that the question in the voir dire, can you put aside what you said before, I don't think -- even if you take that question at face value and give it the full weight, Your Honor, that you're suggesting, that doesn't -- that's not a question that says and are you going to stop reading the newspaper.· The question that you posed in your hypothetical is: Can you put aside the things you read before? In our argument, the McDonough claim is separate --

CHIEF JUDGE GREGORY:· You're not following what I'm saying.· Yeah, if you put aside that.· I'm saying, though, 'cause that's what you're doing. You don't have the improper conduct.· You're saying because she still follows that that means that's enough circumstantially that she must have continued to read it.· I'm saying couldn't you make that same circumstantial evidence, the fact that she didn't end her subscription during the trial –

MR. LIN:· No, Your Honor.

CHIEF JUDGE GREGORY:· -- if that's the same logic?

MR. LIN:· No, Your Honor.· And I think there's a different --

CHIEF JUDGE GREGORY:· Now, tell me why not. Deal with the logic of that.· You tell me why that's not the logically extension of that.

MR. LIN:· Of course.· I think the different -- the logic -- the analogy that would be more apt in your situation if she maintained her subscription would be did she maintain a Twitter account.· That would be the logical -- But here, what we have evidence of is that she actually got on Twitter on multiple occasions, and so something closer to that would be that she --

CHIEF JUDGE GREGORY:· But the fact, though, is, Mr. Lin, I know a little bit about Twitter, just a little bit.· But if you -- if you follow someone simply means that in your Twitter app you can get their Tweets, but that doesn't mean that every time you go on and make a Tweet -- Unless you scroll through all of your feeds, you're not necessarily reading who you follow.

MR. LIN:· Yes, Your Honor.

CHIEF JUDGE GREGORY:· For example, you're gonna get -- on most iPhones you maybe get two or three of the recent Tweets.· You would have to scroll into your feed.· It may -- In other words, so you're making a lot of inference on top of inference.· You're saying that every time she Tweeted, before she Tweeted she went through all of her feeds, found that, read it.· You see what I'm saying?

It's -- It's -- Obviously, this is a very important case, but it seems to me there's no real limiting factor as long as "follow" doesn't mean follow being like I'm reading everything.· It means I have access to an algorithm the Tweeter allows me to get those Tweets.· And you can also get Tweets related to the same subject that people may have done.· That could be any juror.

MR. LIN:· With respect, Your Honor, I disagree, and I think it's --

CHIEF JUDGE GREGORY:· Well, what do you disagree?· What did I -- What did I describe about Twitter that you disagree with?

MR. LIN:· I don't disagree with what you said about Twitter.· I think the facts here are different.· I think it's not just a juror who has an active Twitter account who may or may not have gotten onto Twitter.

What we have here is we know the juror was on Twitter on multiple days.· We know that these

individuals Tweeted 73 times between them, which is a lot, and that means that their Tweets are showing up more often. · We know that she had the proclivity and the inclination and the interest to look for and read Tweets about Justice Loughry. · I think those are the facts that make this different from the case that you're worried about, Your Honor.

JUDGE NIEMEYER: · Well, those are not the facts because we just established the record did not show she followed the reporters. · There's no evidence that she followed the reporters. · Though, what she did do is she followed some news stories or some individuals during the summer, four times in four months, and it was about the impeachment and the ethics investigation. · And we have evidence that she did not follow them even after the trial.

There is zero evidence that she followed these reporters, and you're trying to suspect that because she uses Tweet, looked at some news during the summer, she, therefore, Tweeted these reporters during trial. · It just doesn't follow.

MR. LIN: · Your Honor, it was alleged that she follows them because you can see on her Twitter account that she follows. · We have --

JUDGE NIEMEYER: · Where's the evidence of that? That's my point.

MR. LIN: · We have --

JUDGE NIEMEYER: · There's no -- I couldn't find any evidence. · And I'm asking you where is the evidence that she followed a Bass and --

MR. LIN: · McElhinny, Your Honor.

JUDGE NIEMEYER: · -- McElhinny?

MR. LIN: · Your Honor, we allege it and the Government didn't dispute it; just as the Government did not --

JUDGE NIEMEYER: · That is not a fact. · I want to see the fact. · Do you have a fact in the record?

MR. LIN: · I don't have the JA cite here, but we do have --

JUDGE NIEMEYER: · Well, I -- There is none and you happen to know the record, don't you?

MR. LIN: · I do, Your Honor.

JUDGE NIEMEYER: · And is there a single Tweet where either Bass or McElhinny is being read or Tweeted or okayed or looked at?

MR. LIN: · Your Honor, there is no dispute here that there is no Bass or McElhinny Tweet that she liked.

JUDGE NIEMEYER: · They didn't dispute it, but it's still no evidence. · In other words, you're saying basically that doesn't matter because his other arguments were better.

But my question to you and I'd just like you to answer the one question: · Does the record show that she followed these two reporters?

MR. LIN: · I don't believe there is evidence in the record of her following.

Now, I think it is important to point out the difference between following and a public like, which we've talked about, I think, at length today.

And we --

JUDGE NIEMEYER: · I understand that, but that doesn't create the evidence. · That's a possibility. The evidence is what we're looking at in the record and your allegation is continuous that she followed these reporters who were reporting regularly every day; that was your allegation.

MR. LIN: · Yes, Your Honor.

JUDGE NIEMEYER: · We have zero evidence of that.

MR. LIN: · That was our allegation. · It was undisputed, and I think it's also important to remember --

JUDGE WYNN: · Well, that's sort of the nub of what this is about. · You make an allegation, it's undisputed, and then you don't have anything else.

But really what we're getting at, if you want to use the analogy it's been brought up on a newspaper, and the whole business is: · Yeah, she's getting a newspaper, but we know she's reading the sports section. · And here's where we're having a different -- difference of opinion is correct.

But the question we don't know: · Is she scrolling through and seeing everything? · I mean, she could have and that's the key issue here is that she could have. · She's got a newspaper in her hand and she -- we know she's looking at the sports page on this day and we also know the pre-trial evidence and the whole bit here. · And the question is: · Could she have gone through and gone through it? · That's all a Remmer hearing is doing. · I don't know why this is so difficult to simply say let's just have a small hearing to find out if she did.

The question of the "following" stuff we can go on all day long. · We all know she didn't unfollow. · There's no evidence here unfollowing has occurred. · So the evidence points in the direction she's following, which is why the Government hasn't disputed it and why we can go to direct evidence of following. · Yeah, we can try to find that. · We don't need that in this instance because this is -- this is not a question of whether or not you're guilty or innocent. · It's not a question of that. It's a simple hearing to ask a question: · Did you look at those other sections while you were going through this newspaper? · That's all it is.

MR. LIN: · Chief, I see my time has expired. If I could just wrap up with one sent -- or two sentences?

CHIEF JUDGE GREGORY: · Oh, sure. · Sure. Absolutely.

MR. LIN: · Thank you.

Unless there are further questions. · I don't -- I don't want to --

JUDGE DIAZ: · Mr. Lin, I do have a question actually about this evidence issue. · So, I mean, you would have been -- I assume if you had been put to the test you would have been able to prove that, in fact, this juror was following these reporters, but you were relieved of that burden by the Government's concession; isn't that right?

MR. LIN: · Yes, Your Honor. · I was not trial counsel, but, yes, I think that applies.

CHIEF JUDGE GREGORY: · Are you -- Are you really saying that? · Are you really saying that you --

JUDGE NIEMEYER: · Are you?

CHIEF JUDGE GREGORY: · -- made a decision to --

JUDGE NIEMEYER: · If you did have the evidence, you didn't put it on?

UNIDENTIFIED MALE JUDGE: · You didn't put it on?

CHIEF JUDGE GREGORY: · Well, Counsel, you better be very careful with that response. · I mean, you said that you --

JUDGE DIAZ: · No, no, no. · What I said was I suppose the lawyer could have been put to that test, but he wasn't because the Government conceded the point. · So why did he need to put on evidence?

JUDGE NIEMEYER: · I want to know what evidence the Defendant had at that time that she reported. What evidence did you have in your bag that you didn't put on because of the Government's statement?

MR. LIN: · Your Honor, I don't know what trial counsel had at the time, but I will --

JUDGE NIEMEYER: · Well, let me ask you this: Do you have any knowledge at this time that there was evidence?

MR. LIN: · I don't have knowledge of what he had, but you can -- We do -- We did have access to her Twitter account because her Twitter account was public. · You can click on the list of followers.

JUDGE NIEMEYER: · And it doesn't show that she was a follower of these reporters.

MR. LIN: · It does. · Her Twitter account did show that she was a follower of these reporters. You can click on the -- there's a banner at the top and it says, "Follows." · You can click on that and it shows the list of individuals that she --

JUDGE NIEMEYER: · Where is that in evidence?

MR. LIN: · That page--

JUDGE MOTZ: · He just -- (Indiscernible) -- about it.

MR. LIN: · That page is not in the evidence, Your Honor. · It was -- (Indiscernible.)

JUDGE WYNN: · Let me -- Let me ask on this because I think this is where we're going out. · The questions -- Judge Niemeyer asked some good questions and the Government should have done its job and maybe asked those questions. · The question is whether we do it. · But that evidence is public information, isn't it? · Isn't it already out there?

MR. LIN: · Yes, it is. · It's available on her --

JUDGE WYNN: · I mean, you can find it right now. · So if it's out there, I guess the Government -- I'm telling you the Government made the decision because it was public information out there. · This is nothing hidden and now it's gone. · I think you can go find out now.

CHIEF JUDGE GREGORY: · Are you suggesting --

JUDGE WYNN: · Is that not correct?

CHIEF JUDGE GREGORY: · Are you suggesting we can take --

JUDGE WYNN: · But I want to ask that question, Judge.

CHIEF JUDGE GREGORY: · (Indiscernible.)

JUDGE WYNN: · Can you not find out -- Can you not find out now?

MR. LIN: · I believe her Twitter account is still public, which we believe that it is. · Yes, you could find out about it right – literally right now.

JUDGE WYNN: · So you can't get hung up on that point because that is out there. · It was out there during the trial, and there's an obvious reason why the Government didn't -- he conceded it, 'cause it was there.

But it's -- But the following is really not the issue here. · The following -- We really get hung up on, well, is this evidence enough where you don't know is enough now to conduct a hearing to find out? · That's all we're -- That's where we are, not a question of the following. · There's no question; she followed.

JUDGE WILKINSON: · Well, we're having a semantic debate over "following" and what that means. · I mean, I follow certain sports writers in the daily paper and the Washington Post and I look for their columns and I look for their reports and I follow certain comic strips on a day-to-day basis and I -- you know. · I don't see anything particularly wrong with that because, you know, I like certain reporters and I come to trust their bylines and I come to trust their columns and what their take is.

And I suppose that would be -- you know, in common parlance, I would be following them. · But I think there was a certain amount of ambiguity and obfuscation as to what "follow" means and there are perfectly innocent ways to follow people.

MR. LIN: · Your Honor, if I could answer your question as directly as I can. · Following has a particular meaning on the Twitter platform. · It means that you have chosen, you actually have to click something for, you know, a particular individual's Twitter account and that means that the algorithm, which we don't know how it works. It's private to Twitter, the company. · That means that the algorithm will put a Tweet by that person -- (Indiscernible.) · If you don't follow somebody as -- (Indiscernible) -- Twitter matter, those Tweets don't show up in your feed unless somebody has typed or re-Tweeted that other individual's Tweets. · So following has a very specific meaning on Twitter.

JUDGE WILKINSON: · Well, I understand.

JUDGE WYNN: · I hope -- I hope --

JUDGE WILKINSON: · But it also --

JUDGE WYNN: · I hope that's --

JUDGE WILKINSON: · It also has a perfectly pre-Twitter meaning, which can be carried over to the Twitter universe. · When you follow something, it doesn't necessarily carry a sinister connotation.

MR. LIN: · Understood, Your Honor. · We're not suggesting that. · We're using "follow" in the Twitter vernacular and so --

JUDGE WYNN: · In other words, it's not a sematic disagreement. · It has a specific meaning in a Twitter account. · It's like hitting subscribe, the subscribe button from the perspective of the Twitter account.

MR. LIN: · I think that's one very fair way of putting it, Judge Wynn.

CHIEF JUDGE GREGORY: · All right. · Counsel, last time I gave you a minute and you took the chance to open a door up, unless somebody else has questions. · Now, do you have something else to say, or are you gonna do the same thing this time?

MR. LIN: · I'm sorry, Your Honor. · I will conclude. · I will conclude.

CHIEF JUDGE GREGORY: · Okay. · I'm trying to be generous with you, but, you know, don't -- don't go too far with it, okay?

MR. LIN: · Thank you, Your Honor.

CHIEF JUDGE GREGORY: · All right. · Go ahead.

MR. LIN: · The last point I wanted to make is: I think the Government had conceded in his opposition argument today that circumstantial evidence can be enough. · And he also said that you can consider pre-trial and post-trial activity on Twitter. · He's not disputing either of those things.

And I think the difficulty here is when you put this against the Harris case in the Sixth Circuit, I think the facts here are far more compelling.

And the last thing I will say is that I think it is very difficult to imagine a situation of which there is enough circumstantial evidence of passive Twitter activity beyond what we have here. And if a hearing is denied here, a hearing will not be -- no defendant will be able to get enough facts together to look into a juror's passive Twitter activity.

Thank you, Your Honor.

CHIEF JUDGE GREGORY: · Thank you so much, Mr. Lin, and thank you, Mr. McVey, for your argument and your presentation. · We appreciate your help on these thorny issues.

And we can't come done and greet you, as we would love to, but nonetheless did we appreciate you very much. · We ask that you be safe and stay well. · Thank you so much.

We'll ask the clerk to adjourn the court for today.

THE CLERK OF COURT:· Yes, sir.· The Court's day is adjourned until tomorrow morning.· God save the United States and this Honorable Court.

(Whereupon, the case was submitted and the proceedings were adjourned.)

C E R T I F I C A T E

I, Jillian Seidman, a Florida Professional Reporter, do hereby certify that I was authorized to and did transcribe the foregoing proceedings and that the transcript is a true and accurate record to the best of my ability.

Dated this 15th day of July, 2021.

/s/ *Jillian Seidman*
JILLIAN SEIDMAN, CVR-CM, FPR
Florida Professional Reporter