No. 21-581

In the Supreme Court of the United States

ALLEN H. LOUGHRY, II, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the district court abused its discretion by denying petitioner's motion for an evidentiary hearing under *Remmer* v. *United States*, 347 U.S. 227, 229 (1954), to inquire into possible outside influence on a juror.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-2) is reported at 996 F.3d 729. The order of the court of appeals granting rehearing en banc (Pet. App. 3-4) is not published in the Federal Reporter but is reprinted at 837 Fed. Appx. 251. The opinion of the court of appeals panel (Pet. App. 5-38) is reported at 983 F.3d 698. The order of the district court (Pet. App. 39-69) is not published in the Federal Supplement but is available at 2019 WL 177476.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 2021. The petition for a writ of certiorari was filed on October 18, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted on one count of mail fraud, in violation of 18 U.S.C. 1341; seven counts of wire fraud, in violation of 18 U.S.C. 1343, and two counts of making a false statement to a federal agent, in violation of 18 U.S.C. 1001(a)(2). Judgment 1-2. He was sentenced to 24 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. A panel of the court of appeals affirmed. Pet. App. 5-38. On rehearing en banc, an equally divided court affirmed. *Id.* at 1-2.

1. Petitioner was the Chief Justice of the Supreme Court of Appeals of West Virginia. Pet. App. 39. In 2017, petitioner came under scrutiny based on allegations that included lavish renovations of his chambers, the removal of a desk and couch from the Supreme Court building to his home, and improper use of state vehicles and credit cards. *Id.* at 7, 9. In June 2018, the West Virginia Judicial Investigation Commission began an inquiry into petitioner's conduct, and in August 2018, the West Virginia legislature commenced impeachment proceedings against petitioner and three other sitting justices. *Id.* at 40.

In 2018, petitioner was federally indicted for a subset of his activities. A grand jury in the Southern District of West Virginia charged petitioner with three counts of mail fraud, in violation of 18 U.S.C. 1341; 17 counts of wire fraud, in violation of 18 U.S.C. 1343; one count of witness tampering, in violation of 18 U.S.C. 1503; and three counts of making a false statement to a federal agent, in violation of 18 U.S.C. 1001(a)(2). C.A. App. 40-54. Three of the counts related to petitioner's requests

for travel reimbursement from private institutions for travel that he conducted in state-owned vehicles; 15 counts related to petitioner's personal use of a state-issued fuel card; and the remaining counts related to his removal of a historic desk from the Supreme Court building and attempts to obstruct the investigation into the removal of the desk and the renovation of his chambers. *Ibid.*

The jury found petitioner guilty on 10 counts: one count of mail fraud, relating to travel reimbursement from a private institution; seven counts of wire fraud, all relating to the use of a state fuel card for personal gasoline purchases; and two counts of making false statements, relating to the investigation of his use of a state vehicle and his treatment of the historic desk. Pet. App. 9. Three counts were dismissed before trial, the jury found petitioner not guilty on all but one of the remaining counts, and the district court eventually entered a judgment of acquittal on that remaining count. *Ibid.*

2. After trial, someone approached petitioner's counsel and suggested that he look at the Twitter account of one of the members of the jury, Juror A. Pet. App. 9. Counsel did so. *Ibid.* Petitioner's counsel found that, several months before the trial, Juror A had liked or retweeted tweets concerning the state supreme court scandal and the resulting state impeachment proceedings. *Id.* at 10-11. During voir dire, Juror A had disclosed that she had knowledge of the impeachment proceedings, but answered "yes" when asked whether she could set aside that knowledge and reach a verdict based only on the evidence presented at trial. *Id.* at 9.

Petitioner's counsel also found that Juror A "follow[ed]" the Twitter accounts of two local reporters.

Pet. App. 11. Those reporters tweeted about the case "a combined total of 73 times during the trial." *Id.* at 34. One of the reporters tweeted on October 9, 2018, during the trial, that "[t]here seems to be quite a bit of evidence against the Justice." *Id.* at 16. The evidence submitted by petitioner's counsel showed that Juror A had used Twitter at other times during the trial—specifically, that she had tweeted, retweeted, and liked tweets relating to football on October 3 and 6—but did not contain a record of Twitter access on October 9 or any interaction with the reporters' tweets at any point during the trial. *Id.* at 11, 14.

Petitioner moved for a new trial, arguing, among other things, that he had been denied a fair trial because Juror A had accessed social media during the trial. Pet. App. 57. He also argued for the first time in his reply brief that, "[i]f the Court determines that the record is insufficient," "an evidentiary hearing [should] be held to further develop the record." *Id.* at 64.

The district court denied the motion for a new trial and the request for an evidentiary hearing. Pet. App. 39-69. The court found "no evidence * * * that Juror A posted anything related to the case" during the trial and "no evidence that Juror A was exposed to any content related to the case." *Id.* at 48. The court observed that petitioner "speculates * * * that Juror A *may have* seen information related to the case when accessing Twitter during the trial," but explained that such speculation did not amount to a "threshold showing of juror misconduct." *Id.* at 69. In the absence of such a showing, the court "decline[d] to expend its resources" to allow petitioner to "pry" into Juror A's conduct and "fish for evidence" of impropriety. *Ibid.*

3. In an opinion that was later vacated, a panel of the court of appeals affirmed. Pet. App. 5-38.

As relevant here, the court of appeals rejected petitioner's contention that he was entitled to an evidentiary hearing based on Juror A's use of social media during trial. Pet. App. 13-24. The court explained that, to obtain a hearing, petitioner was required to make "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." *Id.* at 15 (quoting *United States* v. *Johnson*, 954 F.3d 174, 179 (4th Cir. 2020)). The court of appeals determined that the district court had not abused its discretion in finding that petitioner had failed to satisfy that standard. *Id.* at 24.

The court of appeals emphasized that the district court had "repeatedly instructed" the jury to "avoid social media 'about this case,'" and it "presume[d] that the jury followed these instructions." Pet. App. 16. The court of appeals acknowledged that Juror A "'followed' two local reporters, one of whom tweeted on October 9 (during trial) that 'there seems to be quite a bit of evidence against the Justice." *Id.* at 14 (brackets omitted). The court agreed with the district court, however, that petitioner "presented no evidence * * * that Juror A accessed Twitter on October 9 and was thereby exposed to that tweet." *Ibid.* The court accordingly found that petitioner "failed to make a credible allegation that an improper contact occurred." *Id.* at 24.

Judge Diaz dissented in part. Pet. App. 32-38. In his view, petitioner was "entitled to a * * * hearing to ascertain the full extent of Juror A's Twitter activity during the trial." *Id.* at 32.

4. The court of appeals granted rehearing en banc and vacated the panel opinion. Pet. App. 3-4. The court was equally divided and accordingly affirmed. *Id.* at 2.

ARGUMENT

Petitioner contends (Pet. 12-27) that the district court abused its discretion by denying him an evidentiary hearing into Juror A's Twitter activity during the trial. Petitioner's contention is incorrect, and the court of appeals' affirmance of the district court's decision by an equally divided court does not conflict with any decision of this Court or any other court of appeals. His factbound claim does not warrant further review, and the petition for a writ of certiorari should be denied.

1. The Sixth Amendment guarantees the accused in a criminal case the right to be tried by an "impartial jury." U.S. Const. Amend. VI. The jury must reach its verdict based on "evidence and argument in open court," not based on "outside influence." *Patterson* v. *Colorado ex rel. Attorney General of the State of Colorado*, 205 U.S. 454, 462 (1907).

That principle, however, "does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982). Rather, "the remedy * * * is a hearing in which the defendant has an opportunity to prove actual bias." *Id.* at 215. Such a hearing is known as a "*Remmer* hearing," after *Remmer* v. *United States*, 347 U.S. 227 (1954). In that case, an unidentified person approached a juror during a federal criminal trial and had offered him a bribe to bring in a favorable verdict. *Id.* at 228; see *Smith*, 455 U.S. at 215. This Court held that the defendant was entitled to "a hearing" to determine "the circumstances, the impact thereof upon the juror,

and whether or not it was prejudicial." *Remmer*, 347 U.S. at 230.

Consistent with other courts of appeals, the court below has determined that a defendant is entitled to a *Remmer* hearing if he makes a "credible allegation" that there was an unauthorized contact "of such a character as to reasonably draw into question the integrity" of the trial proceedings. *United States* v. *Johnson*, 954 F.3d 174, 179 (4th Cir. 2020) (citation omitted); see, *e.g.*, *United States* v. *Bradshaw*, 281 F.3d 278, 289 (1st Cir.) ("colorable claim of jury taint"), cert. denied, 537 U.S. 1049 (2002); *United States* v. *Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983) ("specific, nonspeculative impropriety"), cert. denied, 466 U.S. 971 (1984); *United States* v. *Sylvester*, 143 F.3d 923, 932 (5th Cir. 1998) ("credible allegations of jury tampering"); *United States* v. *Lanier*, 870 F.3d 546, 549 (6th Cir. 2017) ("colorable claim of extraneous influence") (citation omitted); *United States* v. *Davis*, 15 F.3d 1393, 1412 (7th Cir.) ("colorable allegation of taint"), cert. denied, 513 U.S. 896 (1994); *United States* v. *Schoppert*, 362 F.3d 451, 459 (8th Cir.) ("showing that [the] allegation is credible and that the prejudice alleged is serious enough to warrant whatever action is requested"), cert. denied, 543 U.S. 911 (2004); *Tarango* v. *McDaniel*, 837 F.3d 936, 947 (9th Cir. 2016) ("credible risk of influencing the verdict"), cert. denied, 137 S. Ct. 1816 (2017); *Stouffer* v. *Trammell*, 738 F.3d 1205, 1213 (10th Cir. 2013) ("credible evidence of jury tampering"); *United States* v. *Barshov*, 733 F.2d 842, 851 (11th Cir. 1984) ("colorable showing of extrinsic influence"), cert. denied, 469 U.S. 1158 (1985).

In addition, the court of appeals—again, consistent with other circuits—reviews for abuse of discretion a district court's denial of an evidentiary hearing.

Johnson, 954 F.3d at 179; see *Bradshaw*, 281 F.3d at 292-293 (1st Cir.); *Wheel* v. *Robinson*, 34 F.3d 60, 64-65 (2d Cir. 1994), cert. denied, 514 U.S. 1066 (1995); *United States* v. *Smith*, 354 F.3d 390, 395 (5th Cir. 2003), cert. denied, 541 U.S. 953 (2004); *Lanier*, 870 F.3d at 549 (6th Cir.); *United States* v. *Bishawi*, 272 F.3d 458, 463 (7th Cir. 2001), cert. denied, 535 U.S. 1086 (2002); *Schoppert*, 362 F.3d at 459 (8th Cir.); *Tracey* v. *Palmateer*, 341 F.3d 1037, 1044-1045 (9th Cir. 2003), cert. denied, 543 U.S. 864 (2004); *Stouffer*, 738 F.3d at 1213 (10th Cir.); *Barshov*, 733 F.2d at 852 (11th Cir.).

2. In the particular circumstances of this case, the district court did not abuse its discretion in finding that petitioner had not raised a credible claim that Juror A had an unauthorized contact with local journalists on Twitter. The court repeatedly instructed jurors to avoid social-media use—which it did not prohibit—to learn anything about "this case." Pet. App. 13 (emphasis omitted); see, *e.g.*, *id.* at 60 ("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."); *id.* at 62 ("[A]void all social networking with respect to" the case.); *ibid.* ("Avoid all social networking having to do with the case."); *ibid.* ("It continues to be especially important that you observe the Court's directive that you avoid all media coverage about this case."); *id.* at 63 ("Avoid all news media and social networking having to do with this case."); *ibid.* ("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.").

No evidence showed that Juror A disregarded those admonishments. To the contrary, the court twice asked the jurors—first on October 3 and then again on October 8—whether they had been complying with those instructions. Pet. App. 61-62. The jurors answered that they had. *Ibid.* None of the evidence cited by petitioner (Pet. 17) overcomes the presumption that jurors comply with instructions and the jurors' affirmative representation that they had been obeying the court's instructions to avoid coverage of this case.

Petitioner first cites (Pet. 17) evidence that, months before the trial, Juror A had "liked" tweets relating to petitioner's impeachment. But Juror A acknowledged during voir dire that she had heard about petitioner's impeachment proceedings, and she agreed that she could set aside that knowledge when deciding this case. Pet. App. 25-26. Her activities before trial do not suggest that she provided a false answer during trial about her compliance with the court's directive to avoid social-media coverage of the case.

Petitioner also notes (Pet. 17) that "Juror A used Twitter on at least two days during the six-day trial." But as the court of appeals observed, "[a]ll of this activity related to football, and none referred to any facts about the case or, more broadly, the scandal at large." Pet. App. 16. The district court had not instructed the jurors to avoid social media altogether; rather, it instructed them to avoid coverage of this case. *Id.* at 20. Juror A's tweets about football do not suggest that she defied the court's instructions to avoid coverage of this case.

Petitioner focuses (Pet. 17) on Juror A's having previously set her Twitter account to follow two local reporters who tweeted about the case "73 times during

trial," and emphasizes (Pet. 9) that, on October 9, one of the reporters tweeted: "There seems to be quite a bit of evidence against the justice." But petitioner cites no evidence establishing that Juror A read any of the reporters' tweets or even that she accessed her Twitter account on October 9. Pet. App. 16. To the contrary, as noted above, the direct evidence on that issue consists of Juror A's twice affirmatively representing that she had been complying with the district court's instructions to avoid media coverage of the trial. See p. 8, *supra*. Petitioner's speculation (Pet. 23) that Juror A absorbed the contents of the reporters' tweets through nonactive engagement should not overcome Juror A's own contrary assurances that she was not reading media coverage about the trial.

3. Contrary to petitioner's contention (Pet. 14-19), the decision below does not conflict with the Sixth Circuit's decision in *United States* v. *Harris*, 881 F.3d 945 (2018). As an initial matter, the en banc court of appeals affirmed by an equally divided court. See Pet. App. 2; see also *id.* at 2 n.* (noting that three of the court's 15 judges were recused). An affirmance by an equally divided court is not entitled to precedential weight and thus cannot create a circuit conflict. See, *e.g.*, *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 234 n.7 (1987); *United States* v. *Lee*, 943 F.2d 366, 370 (4th Cir. 1991). Nor could the panel opinion have created a circuit conflict, because it was vacated upon the granting of rehearing en banc. See 4th Cir. Local R. 35(c) ("Granting of rehearing en banc vacates the previous panel judgment and opinion.").

The decision below is in any event consistent with the Sixth Circuit's decision in *Harris*. In *Harris*, the Sixth Circuit explained that a defendant is entitled to a

Remmer hearing only if he presents a "colorable claim" or a "'credible allegation'" of extraneous influence. 881 F.3d at 953 (citation omitted). As the panel in this case noted, that standard is "entirely consistent" with the standard applied by the Fourth Circuit: whether the defendant has made "'a credible allegation that an unauthorized contact was made.'" Pet. App. 20 (citation omitted).

Petitioner errs in contending (Pet. 13) that the Fourth Circuit, unlike the Sixth Circuit, precludes a defendant from relying on "circumstantial evidence" of improper contact with a juror. Neither the panel nor the district court adopted any such categorical rule. They instead determined that, given the district court's instructions and the jurors' assurances that they had complied with those instructions, the circumstantial evidence in this case failed to create a credible or colorable inference of improper extrinsic influence.

Petitioner also errs in contending (Pet. 14) that the Sixth Circuit in *Harris* "granted a *Remmer* hearing based on circumstantial evidence that was far weaker than the evidence in this case." As the panel observed, "[t]he facts in *Harris* * * * are readily distinguishable from those" in this case. Pet. App. 20. In *Harris*, the evidence showed that, during the trial, the juror's girlfriend had found and read the defendant's LinkedIn profile. 881 F.3d at 953. Because the juror's girlfriend "had no personal connection" to the defendant and the case "had received little publicity," her actions suggested that the juror "must have discussed the trial with h[er]." *Id.* at 952; see Pet. App. 19. Had he not at least revealed to her the identity of the defendant in the case on which he was serving as a juror—in violation of the standard district-court instructions to jurors—she

would have had no evident reason to do any online research about the defendant at all. In this case, in contrast, petitioner has provided no comparable evidence indicating that Juror A "must have discussed" the case with anyone else or violated the court's instructions in any other way.

4. At bottom, petitioner does not object to the legal standard applied by the panel; rather, he contends that it misapplied that standard when it found that petitioner had not raised a credible allegation of extrinsic influence on the jury. That factbound contention does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). That is particularly so given that the panel and the district court both agreed that petitioner was not entitled to an evidentiary hearing. See *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in *Johnston*] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)).

Petitioner's suggestion (Pet. 19-24) that further review in this case would provide necessary guidance on the application of *Remmer* to social-media usage is belied by his own confirmation (Pet. 23-24) that he seeks only a narrow, fact-specific decision that he apparently believes would not call into question the majority of social-media scenarios. And he identifies no court of

appeals that has addressed similar facts, let alone required burdensome, intrusive, after-the-fact in-court explanation of jurors' potential misrepresentations about their compliance with social-media instructions. Any widespread guidance on social-media issues is best accomplished through model instructions of the sort approvingly cited by the panel in this case, see Pet. App. 17-18, not through a decision of this Court tied to the specific facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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