No. 25-____

IN THE

Supreme Court of the United States

ERIK MAUND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a jury has been exposed to extra-record information—here, information presented with the court's apparent imprimatur, without the court's or parties' knowledge, and without any opportunity for a curative instruction or cross-examination—is a criminal defendant entitled to a new trial upon a showing that the extraneous information influenced the jury's deliberations to his detriment, or must a court also consider whether the outcome would have been different but for the extraneous information?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner, who was the defendant and appellee below, is Erik Charles Maund.

Respondent, who was the plaintiff and appellant below, is the United States of America.

LIST OF RELATED PROCEEDINGS

United States v. Erik Charles Maund, United States Court of Appeals for the Sixth Circuit, Case No. 24-5932 (Feb. 23, 2026).

United States v. Erik Charles Maund, United States District Court for the Middle District of Tennessee, Case No. 3:21-cr-00288 (Sep. 17, 2024).

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INTRODUCTION

The Sixth Amendment "guarantees that 'the accused shall enjoy the right to a . . . trial, by an impartial jury . . . [and] be confronted with the witnesses against him . . . .'" *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (ellipses in original; quoting U.S. Const. amend. VI). Thus, "'the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.'" *Id.* (quoting *Turner v. Louisiana*, 379 U.S. 466, 472 (1965)). Likewise, under the Fifth Amendment "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

There is no dispute these constitutional rights were violated here. After a jury convicted Erik Maund of conspiring to commit murder-for-hire, the district court discovered that the evidence binders that the jury took back to the jury room included *unadmitted* evidence—including testimony whose use at trial, the district court had held, would have allowed Maund to introduce powerful (but otherwise-inadmissible) rebuttal evidence. Pet. App. 47a–48a, 66a. All this evidence was sent to the jury with the court's apparent imprimatur and without the knowledge of the court or the parties. And because the error was only discovered *after* the verdict was entered, none of this extra-record information was subject to a curative instruction or cross-examination.

After discovering this error, the district court recalled the jurors and interviewed them; it ultimately found that the jury considered this extraneous information. Pet. App. 58a–59a. It thus granted a new trial, concluding that the error resulted in "fundamental unfairness." Pet. App. 67a–68a.

On the government's appeal of the new-trial order, all agreed that a constitutional violation occurred—and the Sixth Circuit acknowledged that it "is plausible that" the extraneous information "mildly undermine[d] one of Maund's affirmative theories of defense." Pet. App. 25a. Nevertheless, it reversed on a single ground: "Because the evidence against Maund was considerable, we conclude that the jury's verdict against Maund *would not have been different absent the error*, making it harmless." Pet. App. 25a–26a (emphasis added; quotation marks and citation omitted).

This decision raises a question of great importance for criminal defendants that has divided the lower courts: Where a jury has been exposed to extra-record information, what question should the court ask in deciding whether to grant a new trial? Should it (1) ask whether the extraneous information *influenced the jury's deliberations* to the defendant's detriment, or (2) ask whether the trial's *outcome would have been different* but for the extraneous information?

The Court's precedents indicate that the former question is the correct one. In *Mattox v. United States*, 146 U.S. 140, 150 (1892), the Court reversed a

conviction because the jury considered extraneous information that "was injurious to the defendant," without asking whether the admitted evidence would have produced a conviction absent the error. Indeed, the Court noted the "many cases" in which "unauthorized communications having a tendency to adverse influence . . . have been held *fatal to verdicts*." *Id.* (emphasis added). In *Remmer v. United States*, 347 U.S. 227, 229 (1954) (*Remmer I*), the Court held that a jury's exposure to extraneous information is "presumptively prejudicial," and in *Remmer v. United States*, 350 U.S. 377, 381–82 (1956) (*Remmer II*), the Court itself ordered a new trial after finding that a juror was "affected in his freedom of action as a juror" by "extraneous influences"—again without speculating whether the defendant would still have been convicted without the extraneous influence. Similarly, in *Smith v. Phillips*, 455 U.S. at 215, the Court suggested that the question in *Remmer* cases is whether the jury was tainted by "actual bias." And in *United States v. Olano*, 507 U.S. 725, 738–39 (1993), its most recent entry in this area, the Court stated that its "'intrusion' jurisprudence" assesses "prejudice" by asking "Did the intrusion affect the jury's deliberations and thereby its verdict?"

The Court's "jury intrusion" cases have thus consistently focused on the extraneous information's effect on the jury's deliberations, not on post hoc speculation regarding the counterfactual outcome of a hypothetical trial.

That said, the Court's decisions do not directly answer the question presented. And in the absence of a clear answer from this Court, the lower courts have produced a longstanding, entrenched split. Some courts—such as the First, Second, and Ninth Circuits, as well as a number of state courts of last resort—follow *Remmer II* by asking whether the extra-record information affected the jury's deliberative process, without further inquiring as to whether the outcome would have been different. *See, e.g., United States v. Dutkel*, 192 F.3d 893, 899 (9th Cir. 1999) (holding that "[i]n order to grant relief, the court need not conclude that the verdict . . . would have been different," but should ask whether any juror "'was . . . affected in his freedom of action as a juror'" (ellipsis in original; quoting *Remmer II*, 350 U.S. at 381)).

Other courts—such as the Third and Tenth Circuits, as well as the Sixth Circuit below—refuse to order a new trial if (in the court's view) the admitted evidence is so overwhelming the result "'would not have been different' absent the error." Pet. App. 22a–23a (quoting Sixth Circuit harmless-error case). And still other courts simply list a series of factors or quote this Court's statement in *Olano* without clarifying whether a new trial is required whenever the intrusion "affect[s] the jury's deliberations," or whether the government can avoid a new trial by showing the "verdict" would not have been different. 507 U.S. at 739.

This case is an ideal vehicle to resolve this confusion. The relevant facts are undisputed, since all

agree the jury did in fact consider the extra-record information. The Sixth Circuit also acknowledged that this information undermined Maund's theory of defense and thus operated to his detriment. Pet. App. 25a. The question presented is thus dispositive, because the Sixth Circuit's sole basis for reversal was its conclusion that Maund would have been convicted anyway. Pet. App. 25a. And because the Sixth Circuit's decision arose from a government appeal in a federal case where the issue was timely raised, there are no waiver or standard-of-review issues that would complicate this Court's review.

A criminal defendant's right to confront and cross-examine the evidence against him before an impartial jury "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner*, 379 U.S. at 472. The approach taken by the decision below threatens to reduce this principle to an empty formality, for it allows courts to excuse violations of fundamental constitutional rights based on judges' personal assessments of the defendants' guilt. Neither the Constitution nor this Court's precedents sanction this approach. The Court should grant the petition and hold that a new trial is required (or at least permissible) if extra-record information influenced the jury to the defendant's detriment.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *United States v. Maund*, 167 F.4th 941 (6th Cir. 2026), and is

reproduced at Pet. App. 1a–27a. The decision of the United States District Court for the Middle District of Tennessee is reported at *United States v. Maund*, No. 3:21-CR-00288, 2024 WL 4217518 (M.D. Tenn. Sept. 17, 2024), and is reproduced at Pet. App. 28a–68a.

JURISDICTION

On November 17, 2023, a federal jury found Maund guilty of conspiracy to commit murder-for-hire. Pet. App. 31a–32a. The district court granted Maund a new trial on September 17, 2024. Pet. App. 68a. The government appealed, and the Sixth Circuit reversed on February 23, 2026. Pet. App. 27a. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . [and] to be confronted with the witnesses against him."

STATEMENT

I. Factual Background

This case arises from a murder-for-hire conspiracy involving the deaths of Holly Williams and her boyfriend, William Lanway.

In February 2020, Petitioner Erik Maund had a brief relationship with Williams, an escort, in Nashville, Tennessee. R.457, #2981. Lanway was intensely jealous of Williams' work as an escort, and he would send messages extorting her clients with threats to expose their liaisons with Williams. R.457, #2982, 3107–08, 3144–46.

Maund was one of those extorted clients. He sought advice on how to respond to this extortion from his business partner, Jim DiMeo. R.458, #3283, 3285–87. And instead of advising Maund to go to the police, DiMeo recommended that Maund seek assistance from Gilad Peled, a private security contractor who did work for Maund and DiMeo's business. R.458, #3286–87, 3300, 3325–27, 3520–22.

Maund eventually hired Peled, and Peled in turn assembled a team of five men, four of whom were former U.S. special forces operatives, to assist him in responding to Lanway's extortion—Bryon Brockway, Bryon's brother Chad Brockway, Adam Carey, David Conaway, and Anthony Repinski. R.458, #3335–36, 3337–38; R.460, #3971–75. In early March 2020, Peled sent Carey, Conaway, and Repinski to

Nashville, Tennessee to attempt to contact Williams and Lanway. R.460, #3976–84. The group's attempts were unsuccessful. R.458, #3343; R.460, #3994–95.

On March 11 and March 12, respectively, Conaway and Repinski left Nashville. R.460, #3978; R.461, #4223. That left Brockway and Carey in Nashville, and close to midnight on March 12 the pair went to Williams' apartment, where both Williams and Lanway were staying. R.457, #3173–74. That night, Williams and Lanway were both murdered. CA6 Dkt. 25 (Gov't Br.), #19–20.

II. Proceedings Below

A. The Indictment and Trial

On July 25, 2022, the government filed a superseding indictment, charging Maund, Peled, Brockway, and Carey on three counts: conspiracy to kidnap Williams and Lanway; kidnapping; and conspiracy to commit murder-for-hire. According to the government, Maund paid Peled to have Williams and Lanway murdered, and Brockway and Carey carried out the murders in Nashville.

On December 14, 2022, Peled changed his plea to guilty, signifying his cooperation with the government. The district court later denied motions to sever filed by each defendant and held that they would be tried jointly. R.176; R.279. On November 1, 2023, the case against Maund, Brockway, and Carey proceeded to trial. R.393, #2275.

The government's evidence against Carey and Brockway was quite strong. For example, the government presented video- and audio-recording evidence that Carey and Brockway both admitted to their roles in the murders, and presented surveillance footage and other electronic evidence that placed them at Williams' apartment in the days leading up to the murders. *See* CA6 Dkt. 25 (Gov't Br.), #58–60.

The government's case against Maund was far weaker. Maund's theory at trial was straightforward: He argued that he simply paid Peled to find a solution to Lanway's extortion, that he was unaware of any plans to murder Williams or Lanway, that Carey and Brockway came up with the idea to murder Williams and Lanway on their own, and that Peled took advantage of the murders to extort additional money from Maund. *See* R.457, #2993–94; R.460, #4010–11 (Conway testifying that Carey was a "loose cannon" who suggested murdering the people responsible for the extortion attempts); R.460, #4003 (Conway testifying Carey was reckless, impulsive, and unilaterally committed to using violence); R.461, #4121 (Conaway testifying similarly). Indeed, it was undisputed at trial that Peled never allowed Maund to talk with anyone who was on the ground in Nashville—Bryon Brockway, Chad Brockway, Carey, Conaway, or Repinski. *See* R.458, #3438.

For its part, the government did not allege that Maund personally participated in the events in Nashville. Nor did the government dispute that Maund was not present during the murders, that

Maund did not appear in any surveillance footage, that Maund never spoke to Brockway, Carey, Conaway, or Repinski, and that Maund was not tied to any communications or physical evidence related to the murders.

Instead, the government's case against Maund rested entirely on four pieces of evidence: (1) DiMeo's testimony that he contacted Peled to help Maund handle Lanway's extortion; (2) Maund's transfers of money to Peled; (3) Peled's testimony regarding a single disputed conversation he allegedly had with Maund the night before the murders (a conversation Maund has always denied); and (4) a recorded call that Peled placed to Maund at the behest of the FBI after Peled was arrested and more than six months after the murders occurred. *See* Pet. App. 24a–35a (recounting these four pieces of evidence); CA6 Dkt. 25 (Gov't Br.), #61–62 (same); CA6 Dkt. 52 (Gov't Reply Br.), #24–25 (same).

The first two of these pieces of evidence had negligible value, for they established minor points that Maund did not dispute and that were consistent with his theory of the case—*i.e.*, that, at DiMeo's suggestion, Maund paid Peled to assist him with Lanway's extortion.

Thus, the government heavily relied on its two other pieces of evidence—Peled's disputed testimony and his after-the-fact recorded call with Maund. Both had problems.

Peled's testimony was severely undermined by Maund's demonstration that Peled is an admitted and serial fabulist who lied to everyone around him. Peled himself, for example, testified that "I lied" about Maund having spoken with Bryon Brockway. R.458, #3438; *see also* R.458, #3399–400 (admitting to lying about conversations with Maund). And Maund showed that Peled represented himself as a former Israeli special forces soldier who had helped Charlie Sheen and a Russian billionaire deal with extortion attempts—representations that were likewise utter fabrications. *See* R.458, #3465–68 (Peled admitting "I did lie about that."); c*ompare* R. 458 #3284–85 (DiMeo testimony) *to* R.458, #3468–69 (Peled testimony).

Maund also showed that Peled falsely told Chad Brockway that he was investigating human trafficking. *Compare* R.458, #3449–50 (Peled testifying he never told Chad Brockway the engagement involved human trafficking) *with* R.464, #4668 (Chad Brockway testifying Peled contacted him about possible "victim of human sex trafficking" and was hired by "her family"). And Maund demonstrated that though Peled claimed to have given a Chad-Brockway-drafted intelligence report to Maund, there was no evidence that Peled in fact did so. R.464, #4695–99.

With Peled's credibility in tatters, the government emphasized Peled's post-arrest call with Maund, but that call is not close to dispositive: It occurred months after the murders, was undertaken at the behest of the FBI, and did not include any confession or similar

statement from Maund. *See* CA6 Dkt. 25 (Gov't Br.), #27–28 (recounting call). Rather, the call simply included ambiguous statements from Maund: During the call, Peled falsely told Maund that "one of the shooters in Nashville" had demanded $25,000 more, to which Maund replied, "I'll pay the guy 25,000, but I think it needs to go away after that." *Id.*

The distinctly weaker nature of the case against Maund was underscored by the district court's and the jury's decisions. The district court granted Maund a judgment of acquittal as to the conspiracy-to-commit-kidnapping count. R.465, #4580–4638; R.464, #4658–63. And on November 17, 2023, after deliberating all day and sending a note to the district court with several substantive questions, *see* R.465, #4883–84, the jury found Maund *not guilty* of the kidnapping count. R.435, #2688; R. 465 #4893. The jury did, however, find Maund guilty on the remaining conspiracy to commit murder-for-hire count. *See* R.437, #2687. In contrast, the jury found Brockway and Carey guilty as to all three counts. *See* R.439, #2693–2695; R.441, #2699–2701.

B. The *Remmer* Error and the District Court's Grant of a New Trial

After the trial concluded, the district court clerk received several requests for trial exhibits from the media. *See* R.561, #6391. In responding to these requests, court staff discovered that the evidence delivered to the jury room for deliberations did not match the evidence admitted at trial. R.561, #6391. In

particular, there were three exhibits admitted into evidence that were not provided to the jury, and nine exhibits not admitted into evidence that were provided to the jury (and a thirteenth exhibit that was incorrectly sent to the jury without the court-ordered redactions). R.502, #5799; Pet. App. 34a.

Below, the parties' arguments focused on two unadmitted exhibits that were erroneously provided to the jury—Carey Exhibits 3 and 4. These exhibits are an audio recording and transcript, respectively, of an October 2021 conversation between Conaway (who was then cooperating with the government) and Brockway. R.461, #4109–10. During this conversation, Brockway stated "*Adam [Carey] didn't know any of this shit.*" R.461, #4109–10 (emphasis added).

Although the government introduced other parts of this conversation as evidence, to address *Bruton* concerns it redacted this statement about Carey from the exhibits it introduced into evidence. Carey, believing the redacted statement helped to exculpate him, sought to introduce the unredacted versions as Carey Exhibits 3 and 4. R.461, #4107–10.

Maund objected to Carey's attempt to introduce these exhibits, and argued that introducing them "opened the door as to what Adam [Carey] did know" about the crimes. R.461, #4110–11. He argued that if Carey introduced those exhibits, he should be allowed to introduce rebuttal evidence that the district court had initially precluded—namely, Peled's testimony

about a July 2020 meeting where Carey said of the murder victims: "Don't worry about it. *Nobody cares about them. They're low, common criminal. Nobody cares about them.*" R.458, #3531 (emphasis added); *see also* R.458, #3272–73 (district court initially precluding this testimony). Maund sought to introduce this callous statement because it provided strong support for his argument that Carey was an erratic, impulsive, insecure malcontent who committed the murders without Maund's authorization or knowledge.

The district court agreed with Maund, ruling that introducing Carey Exhibits 3 and 4 "would open the door" to allow Maund to introduce Peled's testimony of Carey's knowledge. R.461, #4114. Faced with this choice, Carey chose not to introduce them. Thus, neither the Carey exhibits nor Carey's "Nobody cares about them" statement were admitted into evidence.

As the district court discovered two months after the trial, however, Carey Exhibits 3 and 4 were erroneously provided to the jury even though they were not admitted into evidence. In contrast, Carey's "Nobody cares about them" statement—which the district court previously ruled to be conditionally admissible on the admission of Carey Exhibits 3 and 4—was *not* delivered to the jury.

On May 15, 2024, the district court held a hearing to question the jurors about their exposure to the unadmitted evidence. It found "that at least one of the jurors reviewed the unredacted transcript" (Carey

Exhibit 4) and that "it is also likely that jurors listened to the unredacted recording" (Carey Exhibit 3). Pet. App. 58a–59a. It also found that if one "juror's recollection is accurate, it would have exposed all of the jurors to the unredacted recording." Pet. App. 59a. Accordingly, it found that Carey 3 and 4 were considered by the jury; after all, these exhibits bore "the apparent imprimatur of the Court," Pet. App 65a, and the jury was specifically instructed to consider all the evidence that was provided to them, R.454, #2915–16. The government has not disputed these factual findings.

On September 17, 2024, the district court issued its decision granting Maund (and Carey and Brockway) a new trial, emphasizing that "the errors in this case *did* result in fundamental unfairness." Pet. App. 65a (emphasis in original). It did not address Maund's arguments that prejudice resulted from the jury's review of the improper exhibits, but instead held that because the effects of the constitutional violation were "too hard to measure" it constituted "structural error" such that no prejudice analysis was required. Pet. App. 67a–68a.

C. The Sixth Circuit's Decision Reversing the New-Trial Order

The government appealed the district court's decision granting a new trial. On appeal, Maund argued that the Sixth Circuit should affirm because, even setting aside the district court's structural-error determination, the "jury's consideration of Carey 3

and 4 plainly 'affect[ed] the jury's deliberations and thereby its verdict.'" CA6 Dkt. 42 (Maund Br.), #27 (quoting *United States v. Olano*, 507 U.S. 725, 739 (1993)). Maund pointed out that the jury undisputedly considered Carey 3 and 4, and that this consideration operated to Maund's detriment; after all, it was precisely because Carey 3 and 4 undermined Maund's theory of defense that the district court had held that admitting those exhibits would *open the door to Maund introducing evidence that would have otherwise been inadmissible*. *Id.*, #28–29. Maund explained that this alone sufficed to justify a new trial, and that it would contravene Sixth Circuit caselaw to refuse relief on the theory that Maund would have been convicted anyway. *Id.*, #30–31 (citing, *inter alia*, *Nevers v. Killinger*, 169 F.3d 352, 372 (6th Cir. 1999), and *Ewing v. Horton*, 914 F.3d 1027, 1032 (6th Cir. 2019)). And Maund contended that even under the government's approach, the government did not come close to proving beyond a reasonable doubt that Maund would have been convicted in the absence of these constitutional violations. *Id.*, #33–35.

The Sixth Circuit began its discussion by accepting the district court's factual findings and observing that "[e]veryone agrees this case suffered serious error." Pet. App. 11a. It also acknowledged that the constitutional violations in this case were in some respects more troubling than in other *Remmer* cases because "(1) the influence on the jury occurred with the imprimatur of the Court, and (2) the error was discovered post-verdict, leaving no opportunity

for a curative instruction." Pet. App. 15a (quotation marks and citation omitted).

Nevertheless, the Sixth Circuit reversed. Pet. App. 27a. It did not address Maund's argument that the dispositive question in *Remmer* cases is whether the evidence was considered by the jury and detrimental to the defendant's case—facts that are indisputably present here. Instead, it simply announced that a *Remmer* violation can be excused if the court finds that the result "'would not have been different' absent the error." Pet. App. 23a (quoting *United States v. Campbell*, 122 F.4th 624, 630 (6th Cir. 2024)).

The Sixth Circuit spent just two short paragraphs explaining why it thought Maund would still have been convicted. It conceded that it was "plausible" that Carey 3 and 4 "mildly undermine one of Maund's affirmative theories of defense: that Carey committed the murders on his own, without Maund's input." Pet. App. 25a. But it concluded that "because the error consisted of only one or two sentences, it is doubtful these sentences significantly diminished this theory of Maund's defense." Pet. App. 25a. For this reason, and because it deemed the four pieces of evidence against Maund "considerable" evidence, it reversed the grant of a new trial. Pet. App. 25a–26a.

REASONS FOR GRANTING THE PETITION

The Court should grant review of the Sixth Circuit's decision. That decision deepens the current conflict among the lower courts, which are intractably

divided on how to assess "prejudice" in cases involving jury consideration of extra-record information. This question is critical because such cases arise with unfortunate frequency and because (as here) relief often turns on this question. And because this question was dispositive to the Sixth Circuit's decision, this case presents an ideal vehicle to resolve this lower-court conflict. The Court should thus grant the petition and hold that prejudice is established where extra-record information influenced the jury's deliberations to the defendant's detriment.

I. The Court's Precedents Indicate That a Defendant Is Prejudiced When a Jury Considers Detrimental Extraneous Information

Though this Court has never directly addressed the question presented in this petition, its precedents do suggest an answer: Where a jury has considered extra-record information, the prejudice inquiry focuses on whether the evidence influenced the jury's deliberations—not on whether the reviewing court believes the outcome would have been different.

Start with *Mattox v. United States*, an oft-cited decision that was one of the Court's first to address juror consideration of extraneous information. 146 U.S. 140 (1892). There, the Court reversed a murder conviction because a bailiff had told the jury that the defendant had previously killed others, and because a newspaper article opining on the strength of the

evidence was read to the jury during deliberations. *Id.* at 150–51.

The Court began by emphasizing that "[i]t is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can *any ground of suspicion* that the administration of justice has been interfered with be tolerated." 146 U.S. at 149 (emphasis added). It explained that for this reason, American courts consistently refused to tolerate extraneous intrusions on jury deliberations: Citing the then-definitive work on criminal procedure, the Court noted that exposing the jury "to tampering may be reason for a new trial, variously held as absolute; or prima facie, and subject to rebuttal by the prosecution; or contingent on proof indicating that a tampering really took place." *Id.* at 149–50. It observed that at least one state high court had even held that the "invasion of the right of trial by jury . . . absolutely vitiate[s] the verdict in all cases, without regard to whether any improper influences were actually exerted over the jury or not." *Id.* at 150. In summary, the Court noted that "[t]he text-books refer to many cases in which . . . unauthorized communications having a *tendency to adverse influence* . . . have been held *fatal to verdicts*." *Id.* (emphases added).

The Court had no difficulty applying this rule to reverse the conviction. The fact that "the tendency of that [newspaper] article was injurious to the defendant" sufficed to require reversal. 146 U.S. at

150. Notably, the Court did not ask whether the government's evidence was overwhelming, nor undertake any inquiry into whether the result would have been different had the jury not been exposed to the extraneous information. *See id.* at 150–53. And the Court took the same approach the following year in *Bates v. Preble*, reversing a criminal conviction, without considering the strength of the government's case, because the trial court "allowed the whole of [a] book to go to the jury without any . . . protection of the . . . pages not put in evidence." 151 U.S. 149, 157–58 (1894) (holding "error was not cured by the instructions to the jury not to examine any part of the book, except what was put in evidence" because the book's unadmitted parts "contained matter which . . . was calculated to create in the minds of the jury a strong prejudice against the defendants").

The Court returned to this issue a half-century later in *Remmer I*, where it again underscored that "[t]he integrity of jury proceedings must not be jeopardized by unauthorized invasions." 347 U.S. 227, 229 (1954). Citing *Mattox*, the Court held that "any private communication . . . with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." *Id.* It explained that this presumption "is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was

harmless to the defendant." *Id.* The Court then remanded the case for a hearing to "determine whether the incident complained of"—an attempted bribe of a juror and a subsequent FBI investigation during the trial—"was harmful to the petitioner, and if after the hearing it is found to have been harmful, to grant a new trial." *Id.* at 230.

On remand from *Remmer I*, the district court declined to grant a new trial because it found "the incident complained of was entirely harmless so far as the petitioner was concerned and did not have the slightest bearing upon the integrity of the verdict." 350 U.S. 377, 379 (1956). This Court disagreed and held that the defendant was "entitled to a new trial." *Id.* at 382. Again, the Court focused on whether the extraneous information affected the juror's deliberations, not on whether the defendant would have been convicted in the absence of the extraneous information: The dispositive fact was that "neither [the juror] nor anyone else could say that he was not affected in his freedom of action as a juror." *Id.* at 381.

About a decade later, the Court underscored the importance of keeping juries free of outside influences in *Turner v. Louisiana*, where it reiterated that a juror's "verdict must be based upon the evidence developed at the trial." 379 U.S. 466, 472 (1965). "This is true," the Court emphasized, "regardless of the heinousness of the crime charged, *the apparent guilt of the offender* or the station in life which he occupies." *Id.* (emphasis added). The Court thus reversed a state murder conviction because the jury had been

supervised by deputies who were also witnesses for the prosecution: "[E]ven if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association . . . ." *Id.* at 473.

The Court reinforced this point the following year in *Parker v. Gladden*, where it reversed a state murder conviction because a juror had overheard the bailiff say he thought the defendant was guilty. 385 U.S. 363, 365 (1966) (per curiam). Again without considering the overall weight of the evidence against the defendant, the Court held reversal was required simply because the bailiff's conduct "involve[d] such a probability that prejudice will result that it is deemed *inherently lacking in due process*." *Id.* (emphasis added; quotation marks and citation omitted).

More recently (though still more than thirty years ago), the Court issued two decisions that touch on this subject while reaffirming the *Mattox/Remmer* approach—*Smith v. Phillips*, 455 U.S. 209 (1982), and *United States v. Olano*, 507 U.S. 725 (1993).

In *Smith*, the Court reversed a decision that had granted habeas relief to a state prisoner because a juror had applied for a job in the prosecuting attorney's office during the trial without disclosing that fact until after the verdict. 455 U.S. at 209. The Court acknowledged that "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to

prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.* 217. It simply held that the state court provided the appropriate response to the defendant's complaint of juror bias—namely, "a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 220. Because the state court found the juror was in fact not biased, *id.* at 213–14, this Court held that habeas relief was improper, *id.* at 218.

Olano presented a question slightly further afield—"whether the presence of alternate jurors during jury deliberations was a 'plain error' [affecting substantial rights] . . . under Federal Rule of Criminal Procedure 52(b)." 507 U.S. at 727. Though the error in *Olano* involved a violation of Rule 24(c)'s requirement that alternate jurors be discharged before deliberations begin, the Court analogized that violation to its constitutional cases involving "outside intrusions upon the jury," which the Court has "generally analyzed for prejudicial impact." *Id.* at 738–39 (citing, *inter alia*, *Remmer I*, *Parker, Turner*, and *Smith*). The Court then stated that in analyzing prejudice "the ultimate inquiry" is whether "the intrusion *affects the jury's deliberations and thereby* its verdict?" *Id.* at 739 (emphasis added). And the Court held that the defendants (who bore the burden of proof under Rule 52(b)) failed to satisfy this inquiry because they "made no specific showing that the alternate jurors in this case either *participated in the*

jury's deliberations or *'chilled' deliberation* by the regular jurors." *Id.* (emphases added).[1]

In short, for more than a century this Court's decisions have indicated that prejudice is established where extraneous information influences the jury to the defendant's detriment, and no decision of this Court has ever disavowed such an approach.

II. Lower Courts Are Split on How to Approach the Prejudice Inquiry in Extraneous-Information Cases

Despite the guidance from this Court's cases, the lower courts are deeply divided on how to analyze prejudice in extraneous-information cases. Some courts, which generally emphasize *Remmer I* and *Remmer II*, hold that prejudice exists if the extraneous information would have detrimentally influenced a reasonable juror's deliberations—regardless of the strength of the government's evidence or whether the outcome would have been different. Other courts, which generally emphasize *Olano*'s reference to "affect . . . the verdict," hold that

[1] *Olano*'s use of "thereby" is notable, because "thereby" means "by that means." *Thereby,* Merriam-Webster Dictionary. Especially in light of the decision's focus on the jury's deliberations (and its failure to mention anything about the strength of the government's evidence), *Olano* thus indicates that an error that detrimentally affects the jury's deliberations *inherently* affects the verdict. Had the Court intended to suggest that the prejudice inquiry turns on whether the result would have been different—an approach inconsistent with decades of prior caselaw—it surely would have said so explicitly.

these sorts of constitutional violations can be disregarded if a court concludes the defendant would have been convicted anyway. And still other courts simply list various factors, sometimes quoting *Olano*, without indicating whether the strength of the government's case is dispositive.

A. Some courts hold that prejudice means detrimentally influencing the jury

Among all the lower courts, the Ninth Circuit has most clearly and comprehensively addressed this question, concluding that the prejudice inquiry is simply whether the evidence was relevant such that it would influence a reasonable jury's deliberative process. In *United States v. Dutkel*, a jury tampering case decided after *Phillips* and *Olano*, the Ninth Circuit held that "[i]n order to grant relief, the court *need not conclude that the verdict . . . would have been differen*t but for the jury tampering, but rather that the *course of deliberations was materially affected by the intrusion*." 192 F.3d 893, 899 (9th Cir. 1999) (emphasis added). Applying a "strong presumption that the jury tampering affected the jury's decision-making," *Dutkel* required the government to show that "there is no reasonable possibility that [the jury] 'was . . . affected in [its] freedom of action as a juror'"—otherwise, "the court must vacate [the defendant's] conviction. *Id.* (quoting *Remmer II*, 350 U.S. at 381).

The Ninth Circuit has since reaffirmed this approach, observing that "*Dutkel,* like the two

Remmer cases, does not so much as mention, anywhere in its analysis, the weight of the evidence at trial." *United States v. Henley*, 238 F.3d 1111, 1118 (9th Cir. 2001). Thus, "[t]he government has the burden of establishing not that the appellants would have been convicted with or without the [extraneous information], but rather, as *Dutkel* instructs, that there is no 'reasonable possibility' that [the juror] was 'affected in his freedom as a juror.'" *Id.*[2]

The Second Circuit has adopted a similar approach, holding that "[i]t is well-settled that any extra-record information of which a juror becomes aware is presumed prejudicial," but that a "government showing that the information is harmless will overcome this presumption." *United States v. Greer*, 285 F.3d 158, 173 (2d Cir. 2002). In determining whether the government has shown harmlessness (*i.e.*, a lack of prejudice), the Second Circuit applies "an objective test, assessing for itself the likelihood that the *influence will affect a typical juror*." *Id.* (emphasis added; citing *Bibbins v. Dalsheim*, 21 F.3d 13, 17 (2d Cir. 1994) (per curiam)). In other words, the government must show there was

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[2] The Ninth Circuit's en banc decision in *Godoy v. Spearman* cites *Dutkel* and establishes a broadly applicable two-step framework in which any extraneous contact or information that raises a "credible risk of influencing the verdict" triggers a presumption of prejudice, with the government then bearing a heavy burden of establishing harmlessness by showing that the contact or information had no actual influence on deliberations. 861 F.3d 956, 966–69, 966 n.5–6 (9th Cir. 2017) (en banc).

"no information that could have been improperly used in deliberations." *Id.* at 174.

Applying this framework, a district court in the Second Circuit ordered a new trial due to jury tampering, even though "the government's evidence . . . was overwhelming." *United States v. Morrison*, 984 F. Supp. 2d. 125, 136-37 (E.D.N.Y. 2013). In explaining why the government's evidence is irrelevant, it pointed out that "[i]n *Remmer II*, . . . the Court did not even consider in directing that Remmer receive a new trial the strength of the government's case or whether the bribe offer may have altered the outcome of the trial." *Id.* at 131–32. And the Second Circuit affirmed this decision even while acknowledging the "overwhelming proof on the counts of conviction." *United States v. Morrison*, 580 F. App'x 20, 22 (2d Cir. 2014).

The First Circuit, too, has emphasized that prejudice occurs where the extraneous information "compromised the jury's deliberative process." *United States v. Jadlowe*, 628 F.3d 1, 22 n.32 (1st Cir. 2010). And it has specifically held that "[h]arm to the deliberative process could occur *even in the face of powerful evidence of guilt*." *Id.* (emphasis added); *see also id.* ("The jury process almost certainly would be tainted, for example, by an instruction allowing discussion of the ultimate issue of guilt before all of the evidence was presented, regardless of the strength of the government's case.").

Further, several state courts of last resort—including Alaska, Connecticut, Maryland, and Nevada—take a similar approach. *See Burney v. State*, 563 P.3d 86, 108–09 (Ala. Ct. App. 2025) (citing Ninth Circuit caselaw and remanding for new trial because extraneous evidence influenced deliberative process); *State v. Berrios*, 129 A.3d 696, 278 (Conn. 2016) (holding state must "prove that there was no reasonable possibility that the tampering affected *the impartiality* of the jury" (emphasis added)); *Jenkins v. State*, 825 A.2d 1008, 1026–27, 1035, 1041 (Md. 2003) (citing favorably to *Dutkel*, holding "determinative issue here is . . . whether [the juror] would be more likely . . . render a verdict favorable to the State" due to intrusion); *Meyer v. State*, 80 P.3d 447, 456 (Nev. 2003) ("[T]he district court's factual inquiry is limited to determining the extent to which jurors were exposed to the extrinsic or intrinsic evidence. . . . [T]he district court must determine whether the average, hypothetical juror would be influenced by the juror misconduct.").

B. Other courts hold that consideration of detrimental extraneous information can be excused if the government's evidence is overwhelming

In contrast with the Ninth Circuit's approach, other courts focus on whether the extraneous information was outcome determinative—that is, whether, in light of the strength of the government's case, the extraneous information was a but-for cause of the defendant's conviction.

For example, the Tenth Circuit has stated that any presumption of prejudice can be overcome if the government proves that "the extraneous information was harmless beyond a reasonable doubt" by, for example, "show[ing] the existence of overwhelming evidence of the defendant's guilt." *United States v. Scull*, 321 F.3d 1270, 1280 (10th Cir. 2003) (brackets, quotation marks, and citation omitted); *see also United States v. Honken*, 381 F. Supp. 2d 936, 1054 (N.D. Iowa 2005) (applying *Scull*'s approach and refusing to remedy *Remmer* error because the evidence was "overwhelming and . . . no juror harbored any 'residual doubt' about the 'merits' verdict, nor does the court").

The Third Circuit has endorsed the Tenth Circuit's approach, holding that "a heavy 'volume of incriminating evidence' . . . can undermine a claim of prejudice." *United States v. Lloyd*, 269 F.3d 228, 238, 241 (3d Cir. 2001) (quoting *United States v. Thornton*, 1 F.3d 149, 156 (3d Cir. 1993); citing *United States v. Hornung,* 848 F.2d 1040, 1045 (10th Cir. 1988)).

Below, the Sixth Circuit took this same approach, holding that if "'the outcome would not have been different without the [error],' then the error is harmless." Pet. App. 23a (quoting *United States v. Campbell*, 122 F.4th 624, 630 (6th Cir. 2024), a case applying the Sixth Circuit's standard harmless-error framework to a different sort of error).

Notably, the approach the Sixth Circuit took below deviated from its prior practice, which had used an

approach similar to the Ninth Circuit's: In *Nevers v. Killinger*, the Sixth Circuit *rejected* a state court decision denying relief under *Remmer* on the ground that the "evidence of guilt was overwhelming," explaining a defendant "need point to *nothing more* than" evidence that the jury considered extrinsic material that "has a direct and rational connection between it and an adverse verdict[.]" 169 F.3d at 372–73 (emphasis added; quotation marks and citations omitted). Though Maund explained *Nevers*' significance, *see* CA6 Dkt. 42 (Maund Br.), #19–20, the decision below did not address it, *see* Pet. App. 18a–19a.

Some state courts of last resort have also held that prejudice is shown only where the constitutional error altered the trial's outcome. *See, e.g., State v. Soto*, 513 P.3d 684, 705 (Utah 2022) (holding that "[t]he State might argue that its evidence of the defendant's guilt was so strong that the improper contacts made no difference in the jury's verdict").

C. Still other courts list factors without explaining what "prejudice" means in this context

Finally, some courts do not provide further elaboration on the meaning of prejudice at all, instead simply reiterating *Olano*'s dictum and pointing to factors to consider. The Fourth Circuit, for example, has simply instructed lower courts to consider a number of factors in determining prejudice in this context, without clarifying what ultimate questions

courts should be asking. *See, e.g., United States v. Johnson*, 2022 WL 17546916, at *5 (4th Cir. Dec. 9, 2022). And in *United States v. Sylvester*, the Fifth Circuit stated that the "ultimate inquiry" is "whether the intrusion will affect the jury's deliberations and verdict." 143 F.3d 923, 934–35 (5th Cir. 1998) (quoting *Olano*, 507 U.S. at 739). The Fifth Circuit did not, however, explain what it thinks this language means—in particular, whether prejudice is established where the extraneous information reasonably influenced the jury. *Cf. Farese v. United States*, 428 F.2d 178, 180 (5th Cir. 1970) (granting new trial because jury discovered money hidden in a shirt that had been admitted into evidence, explaining that American "courts have traditionally upheld the position that *verdicts should be set aside where it is shown that the impartiality of jurors may have been affected or where tainted material has come before the jury*" (emphasis added)).

III. This Case Is an Excellent Vehicle for Resolving This Important Question

The Court's decisions in *Smith* and *Olano* more than thirty years ago are the most recent occasions the Court has even glancingly touched on this issue. In the years since, the lower courts have produced an entrenched, undisputed split. The time to resolve this split is now, because the issue is now fully percolated, and this case presents the ideal vehicle for doing so. There are no factual disputes, nor alternative grounds, nor procedural complexities that would

divert the Court's attention from the question presented.

First, there is no dispute that the jury considered extra-record information that was detrimental to Maund's defense. The district court found as much, and the Sixth Circuit did not disagree. *See* Pet. App. 9a ("[T]he Court concludes that at least one of the jurors reviewed the unredacted transcript of the excerpt of the recording . . . which was Carey Exhibit 4. . . . Two jurors recognized the appearance of the USB drive that was Carey Exhibit 3 and one juror said that it was used to play a recording"); *id.* ("[T]he jurors generally recalled listening to a recording to USB, which may have been unadmitted Carey Exhibit 3 containing Brockway's statement that 'Adam didn't know any of this shit.'"). The Sixth Circuit also specifically acknowledged that "[i]t is plausible that Carey Exhibits 3 and 4 mildly undermine one of Maund's affirmative theories of defense: that Carey committed the murders on his own, without Maund's input." Pet. App. 25a. And for good reason: It was precisely because Carey Exhibits 3 and 4 undermined Maund's defense that the trial court ruled *at trial* that introduction of this evidence would open the door to allow Maund to introduce *otherwise-inadmissible* evidence showing Carey had little regard for human life.

As explained above, under the approach adopted by the Ninth Circuit and other courts, these undisputed facts are dispositive: Maund was prejudiced because the jury considered extraneous

information that was detrimental to his defense. The error thus undermined the "integrity of jury proceedings," and a new trial is required, without any further inquiry into whether the verdict would or would not have been the same without the extraneous information. *Remmer I*, 47 U.S. at 229.

Second, because the government does not dispute the district court's factual findings that the jury considered the unadmitted exhibits, there are no ancillary issues it could raise that could complicate the Court's review. The only question here is what "prejudice" means in the context of extraneous information influencing jury deliberations.

Third, the procedural posture of this case makes it an ideal vehicle. Because this is a direct appeal in a federal criminal case, this case (unlike, for example, *Smith*) does not raise the additional standard-of-review issues present in federal habeas corpus review of state-court convictions. And because this is a government appeal of a district court order *granting* a new trial, this case (unlike, for example, *Olano*) does not raise separate issues under Federal Rule of Criminal Procedure 52, or require second-guessing how the district court exercised its discretion.

This case thus presents an excellent opportunity for the Court to answer a question of tremendous importance to criminal defendants and recurring significance to district courts. This question is present in every case involving a *Remmer* violation, and such cases arise with all-too-common frequency: Westlaw

indicates that 2,264 federal and state decisions have cited to *Remmer I*, and 829 federal and state decisions have cited *Remmer II*. *See also* 62 A.L.R. 1466 (American Law Reports database of decisions involving "communications between jurors and others as ground for new trial or reversal in criminal case" spanning 355 pages). And technological changes have increased the risks that extra-record information reaches jurors. *See, e.g., United States v. Loughry*, 983 F.3d 698, 712 (4th Cir. 2020) (observing that "social media does heighten the risk that jurors will be exposed to external information about the case"), *vacated on reh'g en banc*, 2021 WL 2005932 (4th Cir. May 20, 2021).

Further, answering the question presented would also serve as the necessary first step in resolving the widely acknowledged lower-court confusion regarding the role, if any, presumptions play in evaluating prejudice in *Remmer* cases. *See, e.g., State v. Soto*, 513 P.3d 684, 704 n.18 (Utah 2022) ("[T]here is a circuit split in the federal courts regarding the presumption of prejudice."); Wright & Miller, 3 Fed. Prac. & Proc. Crim. § 587 (5th ed.) ("[C]ourts disagree about what other types of jury irregularities should receive the presumption of prejudice."); Pet. App. 22a ("Ours is the only circuit that places on the defendant the burden of proving bias at the *Remmer* hearing rather than requiring the Government to show harmlessness." (cleaned up)). The Court, of course, must first decide *what* "prejudice" consists of before deciding *how* that question should be answered (*i.e.*, who bears the burden). This case provides the Court

a vehicle to answer the first question, as well as the opportunity to answer the latter "presumption" question should the Court so choose.[3]

IV. This Case Is an Especially Egregious Example Illustrating Why the Court Should Resolve the Circuit Split and Reject the Sixth Circuit's Approach

The Sixth Circuit's decision to reinstate Maund's conviction—and effectively retry the question of his guilt on a cold appellate record— is a prime example of the grave problems that arise when courts seek to excuse serious constitutional violations on the basis of their own judgments of the strength of the government's case.

To begin, the Sixth Circuit's approach led it to weigh the evidence itself from a paper record and ask whether the outcome would have been different but for the extraneous information. It characterized the evidence against Maund as "considerable" (and sufficient to render the error irremediable) on the basis of four terse sentences:

> At trial, the government played a recorded call between Maund and Peled in which Maund incriminated himself. Peled also gave

[3] The decision below avoided directly raising the "presumption" question by declining to "decide definitively which standard should apply," instead assuming "without deciding that the most stringent standard . . . applies." Pet. App. 22a (quotation marks and citation omitted).

> testimony, separate from his unadmitted testimony regarding Carey's knowledge, directly implicating Maund in the murder-for-hire scheme. In addition, one of Maund's coworkers testified that, at Maund's request, the coworker contacted Peled so that Peled could help Maund handle Lanway's extortion attempts. And the government introduced evidence, including bank records, showing that Maund transferred $150,000 to Peled on the afternoon of the murders.

Pet. App. 24a–25a. This brief paragraph essentially adopted wholesale the government's equally cursory description of the evidence. *See* CA6 Dkt. 25 (Gov't Br.), #61–62; CA6 Dkt. 52 (Gov't Reply Br.), #24–25.

As explained above, *see infra* at pp.8–13, this characterization of the evidence against Maund is belied by the trial record. The evidence that Maund contacted and paid Peled is scarcely even relevant, for it is consistent with Maund's own defense theory: that he contacted and paid Peled but never authorized or knew of any plan to murder Williams and Lanway. The key piece of evidence inconsistent with Maund's theory was the trial testimony of Peled—who admitted to repeated lies and whose credibility Maund eviscerated at trial. That left the government to rely on Peled's recorded, after-the-fact call with Maund, and Maund's statements on that call were ambiguous and do not come close to establishing his guilt beyond a reasonable doubt.

These four pieces of evidence were also the same evidence the government adduced to support the two counts on which Maund was acquitted: kidnapping and conspiracy-to-kidnap. The government drew no distinction at trial between the evidence supporting the murder-for-hire charge and the evidence supporting the counts on which Maund was acquitted or which were dismissed. It is difficult to see how the same evidence could be overwhelming as to one count but insufficient as to two others. This evidence, therefore, could hardly be deemed "considerable."

Moreover, even accepting *arguendo* the Sixth Circuit's characterization of the evidence as "considerable," even the lower courts that take this approach hold that the government must show that the extraneous information was "harmless *beyond a reasonable doubt*" by showing "the existence of *overwhelming*" evidence. *Scull*, 321 F.3d at 1280 (emphases added). The Sixth Circuit's decision falls far short of this standard: It neither said the evidence against Maund was "overwhelming" (it plainly was not), nor that Maund's conviction in a hypothetical error-free trial was clear "beyond a reasonable doubt" (it again plainly was not). *See* Pet. App. 25a–26a.

Further, the Sixth Circuit weighed the evidence, effectively retrying Maund on a cold record, without giving the district court the opportunity to evaluate the evidence and exercise its discretion in the first instance. That plainly was error. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012) (criticizing appellate court for acting "not as a court of review but as one of first

view"). Here, the district court—who presided over the trial, heard all the evidence, and questioned the jurors—found that the error resulted in fundamental unfairness. Pet. App. 65a–66a. The Sixth Circuit had no basis to substitute that judgment with its own.[4]

Indeed, beyond illustrating the problems with this approach, these two aspects of the decision below—its failure to find the errors harmless beyond a reasonable doubt and its usurpation of the district court's discretion and fact-finding authority—each separately justify summary reversal. *See, e.g., Clark v. Sweeney*, 607 U.S. 7, 10 (2025) (per curiam).

* * *

Justice was not done here. The Constitution entitled Maund to confront the evidence against him in a fair trial before an impartial jury based solely on the admitted evidence. There is no dispute that these constitutional rights were violated; everyone agrees that the jury, without the court's or his counsel's knowledge, considered extra-record information that undermined Maund's theory of defense. The district judge, the person with the best vantage point, found these violations resulted in "fundamental unfairness" and granted a new trial. Pet. App. 65a–66a. But the

[4] The Sixth Circuit also improperly disregarded the district court's ruling that admitting Carey Exhibits 3 and 4 would open the door to Maund's rebuttal evidence, which it had previously excluded. That ruling recognized these exhibits undermined Maund's defense.

Sixth reinstated Maund's murder conviction because it thought—based on a cursory evaluation of a cold record—that there was "considerable" evidence of Maund's guilt. Pet. App. 25a–26a. The Court should grant the petition, reverse the decision below, and reiterate the rule it articulated more than a century-and-a-quarter ago—"unauthorized communications having a tendency to adverse influence" are "fatal to verdicts." *Mattox*, 146 U.S. at 150.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED FEBRUARY 23, 2026

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-5932

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ERIK CHARLES MAUND; BRYON BROCKWAY; ADAM CAREY,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 3:21-cr-00288—William Lynn Campbell Jr., District Judge.

December 11, 2025, Argued;

February 23, 2026, Decided and Filed

Before: MOORE, THAPAR, and RITZ, Circuit Judges.

Appendix A

OPINION

RITZ, Circuit Judge. A jury convicted Erik Maund, Adam Carey, and Bryon Brockway of various offenses related to a murder-for-hire. During jury deliberations, however, the district court inadvertently gave the jury several unadmitted exhibits and failed to provide some of the admitted exhibits. The district court only realized its error months after the verdict. Upon receiving notice of the error, defendants each moved for a new trial. After a hearing to determine the jury's exposure to the unadmitted exhibits, the district court found its error to be structural and granted a new trial. The government appealed, arguing that the error was not structural, the harmless-error standard applies instead, and the error was harmless. We agree and reverse.

I.

This case involves a murder-for-hire scheme resulting in the deaths of Holly Williams and her boyfriend William Lanway. In February 2020, Maund had an affair with Williams in Nashville. After the affair, Lanway blackmailed Maund, demanding money in exchange for not disclosing the affair to Maund's family. Maund then hired Gilad Peled to deal with the blackmail problem. Peled, in turn, hired several people—including Brockway, Carey, Anthony Repinski, and David Conaway—to surveil Williams and Lanway. In March 2020, Maund paid Peled to have Williams and Lanway murdered, and Brockway and Carey carried out the murders in Nashville that month.

Appendix A

A.

A grand jury indicted Maund, Brockway, and Carey for a murder-for-hire conspiracy, kidnapping, and a kidnapping conspiracy resulting in death. The district court denied the defendants' motions to sever and tried the defendants jointly. In November 2023, a jury convicted all three defendants of the murder-for-hire conspiracy; the jury also convicted Brockway and Carey of kidnapping and conspiracy to commit kidnapping.

A little over two months after the convictions, however, the district court discovered that the evidence delivered to the jury room for deliberations did not exactly match the evidence admitted at trial. The court had erroneously provided the jury with ten unadmitted exhibits[1] and failed to deliver three admitted exhibits.[2] Two of the unadmitted exhibits erroneously given to the jury (Carey Exhibits 3 and 4), and their relation to a separate proffer of evidence (Peled's testimony about Carey's knowledge of the crime), are the primary focus of this appeal.

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1. Several of these unadmitted exhibits included unredacted versions of admitted exhibits. The ten unadmitted but provided exhibits included: Gov. Ex. 254 (photo from Carey property); Gov. Ex. 257 (same); Gov. Ex. 359 (CD listing Maund's wire transfers); Carey Ex. 3 (unredacted recording); Carey Ex. 4 (unredacted transcript); Maund Ex. 8 (bank records); Maund Ex. 9 (same); Maund Ex. 51 (spreadsheet of messages between victims); Maund Ex. 59 (video surveillance of Williams's apartment); and Maund Ex. 78 (same).

2. The three admitted but not provided exhibits included: Gov. Ex. 103 (CD with messages between parties), Gov. Ex. 112 (CD with phone records), and Maund Ex. 81 (USB with aerial surveillance of Maund's residence).

B.

At trial, the government presented significant evidence of defendants' guilt, most of which was not compromised by the court's error. We briefly summarize that evidence here.

The government presented both documentary and testimonial evidence inculpating Maund, Carey, and Brockway. For example, the government introduced recorded and transcribed conversations in which Maund, Carey, and Brockway separately discussed their involvement in the murder-for-hire plot. In these conversations, Carey and Brockway each further agreed to an additional, government-invented murder-for-hire scheme. Additionally, Peled (who pled guilty) gave testimony directly implicating Maund, Carey, and Brockway in the crimes, and Repinski and Conaway (who were not charged) gave testimony directly implicating Carey and Brockway. This testimony was corroborated via emails and messages between defendants about the plot. Moreover, one of Maund's coworkers testified that he had introduced Maund to Peled so that Peled could help Maund handle Lanway's extortion attempts.

The government's evidence also placed Carey and Brockway near the crimes when they occurred. For example, Carey and Brockway stayed in Nashville immediately prior to and during the murders, and then left immediately after. Brockway also rented a car in Nashville that matched the vehicle captured on surveillance footage driving near the site where the victims' bodies were found.

Further, the government produced surveillance footage placing Carey outside Williams's apartment immediately prior to the murders.

Finally, the government introduced financial records inculpating Brockway and Carey and showing that Maund transferred around $150,000 to Peled on the afternoon of the murders.

C.

This appeal primarily concerns two statements, both relating to Carey's knowledge of the crimes. The first statement—Brockway saying that "Adam [Carey] didn't know any of this shit"—was part of Carey Exhibits 3 and 4. RE 496-3, Carey Ex. 4, PageID 5721. The second statement—Carey saying "nobody cares about [the murder victims]"—came from a portion of Peled's testimony proffered outside the jury's presence. RE 458, Trial Tr., PageID 3531 (citation modified). We discuss the procedural history of each statement below.

In October 2021, Conaway cooperated with the government to covertly record a conversation with Brockway. Versions of this conversation in recorded and transcribed form became Government Exhibits 131 and 132, which were redacted and admitted, and Carey Exhibits 3 and 4, which were unredacted and unadmitted. In the conversation, Brockway discussed the Nashville murder-for-hire scheme and agreed to participate in an additional, government-invented murder-for-hire scheme proposed by Conaway.

The critical part of the conversation is a single sentence where Brockway says: "Adam [Carey] didn't know any of this shit." RE 496-3, Carey Ex. 4 (Unredacted), PageID 5721; RE 363-4, Gov. Ex. 132 (Redacted), PageID 2084. This statement suggested a relative lack of knowledge on Carey's part regarding the murder-for-hire scheme.

The defendants each moved to exclude the entirety of Brockway's conversation, which the government presented as Government Exhibits 131 (the recording) and 132 (the transcript). But the court denied the defendants' motions and admitted the government exhibits. Importantly, though, Government Exhibits 131 and 132 did not contain the at-issue statement ("Adam didn't know any of this shit."), because the government voluntarily redacted this sentence to avoid any potential Confrontation Clause problems under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

After the court admitted Government Exhibits 131 and 132, the defendants disagreed over the redaction of "Adam didn't know any of this shit." Carey, apparently believing that this redacted statement helped exculpate him, sought to introduce it at trial via Carey Exhibits 3 (a USB-drive recording) and 4 (a one-page transcript). These two exhibits each contained a short excerpt of Brockway's conversation with the unredacted statement.[3]

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3. In Carey Exhibit 4, Brockway's statement ("Adam didn't know any of this shit.") was underlined in blue ink, but it is unclear whether this edit occurred before or after the jury received the transcript.

But Maund and Brockway argued that introducing Brockway's statement "opened the door as to what Adam [Carey] did know" about the crimes. RE 461, Trial Tr., PageID 4109-14; RE 458, Trial Tr., PageID 3264-72. Maund and Brockway further argued that if Carey introduced Carey Exhibits 3 and 4, thereby placing Carey's knowledge of the crimes at issue, they should be allowed to introduce evidence rebutting Carey's lack of knowledge. Specifically, Maund and Brockway wanted to introduce Peled's testimony that, in July 2020, when Peled asked Carey whether Carey had heard any news about the murders, Carey responded: "Don't worry about it. Nobody cares about them. They're low, common criminal. Nobody cares about them." RE 458, Trial Tr., PageID 3531.

Carey objected to the admission of Peled's testimony relating to Carey's knowledge and moved to exclude it. The government agreed not to introduce Peled's testimony about Carey's July 2020 statement in its case-in-chief unless Carey opened the door to it by placing his knowledge at issue, thus leaving the defendants to sort out the dispute over these statements.

To preserve the record amid this dispute, defendants presented both Brockway's statement of Carey's lack of knowledge and Peled's testimony of Carey's knowledge outside the presence of the jury. Carey proffered Carey Exhibits 3 and 4, containing Brockway's statement, and Maund and Brockway elicited Peled's testimony relating to Carey's knowledge.

The district court ruled that if Carey introduced Carey Exhibits 3 and 4, he would put his knowledge at issue, and Maund and Brockway could then introduce Peled's testimony of Carey's knowledge. In other words, the court left it up to Carey: either the court would admit Carey Exhibits 3 and 4 *and* Peled's testimony relating to Carey's knowledge, or the court would admit none of the above. Carey chose not to introduce Carey Exhibits 3 and 4, so the court admitted neither the Carey exhibits nor Peled's testimony about Carey's knowledge.

D.

But the district court failed to properly carry out its ruling on the Carey Exhibits. Despite not admitting Carey Exhibits 3 and 4, the district court erroneously provided the jury with both exhibits, along with other unadmitted exhibits, during deliberations. But Peled's testimony about Carey's statement—which the court previously ruled to be conditionally admissible on the admission of Carey Exhibits 3 and 4—was not delivered to the jury.

Over two months after the jury convicted all three defendants, the district court realized its error. On January 29, 2024, the court held a hearing to notify the parties of the error. The court allowed the parties to file motions regarding the error and requested that the parties refrain from filing any other post-trial motions until the court resolved those motions.

Each defendant filed a motion for a new trial under Federal Rule of Criminal Procedure 33. The defendants

argued that the error warranted a new trial for several reasons, including per se prejudice, structural error, a due process violation, and actual prejudice. In response, the government argued for a hearing under *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954), to determine the harmfulness of the error. Defendants replied, reiterating their various arguments for a new trial and arguing against a *Remmer* hearing.

The district court held a *Remmer* hearing on May 15, 2024, to question the jurors individually about their exposure to the error. Upon questioning, the jurors generally recalled listening to a recording on USB, which may have been unadmitted Carey Exhibit 3 containing Brockway's statement that "Adam didn't know any of this shit." At least two jurors also testified they specifically recalled seeing the Carey Exhibit 3 USB drive. In contrast, most of the jurors did not recall seeing any transcripts, such as Carey Exhibit 4, during deliberations. Summarizing its factual findings after the hearing, the district court stated:

> From the testimony at the hearing, the Court concludes that at least one of the jurors reviewed the unredacted transcript of the excerpt of the recording of the October 25, 2021 meeting between Brockway and Conaway, which was Carey Exhibit 4. It is also likely that jurors listened to the unredacted recording. Two jurors recognized the appearance of the USB drive that was Carey Exhibit 3 and one juror said that it was used to play a recording.

> If that juror's recollection is accurate, it would have exposed all of the jurors to the unredacted recording.

United States v. Maund et al., No. 3:21-CR-00288, 2024 U.S. Dist. LEXIS 167287, 2024 WL 4217518, at *12 (M.D. Tenn. Sept. 17, 2024). The government does not dispute these factual findings on appeal.

The district court also committed a second, separate error at the *Remmer* hearing. At trial, each party presented its exhibits in different colored physical binders—red for Maund, black for Carey, white with a blue slip for Brockway, and white with no blue slip for the government—and the jury received the separate binders in deliberations. Post-verdict, the court clerk consolidated all three defense binders into a single red binder. The court, however, did not realize this consolidation occurred post-verdict; it erroneously led the parties to believe that the jury had received a single red binder of defense exhibits—containing the unadmitted evidence— during deliberations. As a result, at the *Remmer* hearing the defendants focused their juror questioning on the single red binder. The district court, though, ruled that this error did not materially affect the hearing.

Ultimately, the district court found that the primary trial error—the jury's exposure to unadmitted exhibits with no curative instruction—was structural and granted defendants' motions for a new trial. The district court reasoned that "the effects of the error are simply too hard to measure" and did not offer any alternative harmless-

error analysis. *Maund*, 2024 U.S. Dist. LEXIS 167287, 2024 WL 4217518, at *15.

E.

On appeal, the government alleges that the trial error was not structural and that the district court abused its discretion in granting a new trial without conducting a harmless-error analysis. Further, the government urges us to find the error harmless beyond a reasonable doubt as to each defendant, because of the overwhelming evidence of guilt and because Carey Exhibits 3 and 4 were unlikely to have affected the jury's decision.

The defendants urge us to affirm the district court's structural error ruling. In the alternative, defendants argue that the error, even if not structural, was harmful, so a new trial is appropriate.

II.

Everyone agrees this case suffered serious error. The main question is what to do about it. Although we generally review a district court's grant of a new trial in a criminal case for abuse of discretion, we review de novo the district court's application of the proper legal standard, including the determination whether harmless-error review applies. *United States v. Willis*, 257 F.3d 636, 642 (6th Cir. 2001); *see also United States v. Munoz*, 605 F.3d 359, 366 (6th Cir. 2010). Accordingly, we review the district court's structural error determination de novo, and the ultimate grant of a new trial for abuse of discretion. *See*

Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (treating structural error as a legal question).

A.

Under Federal Rule of Criminal Procedure 33, a district court may "grant [ ] a new trial where substantial legal error has occurred" if the "interest of justice [so requires]." *United States v. Robinson*, 99 F.4th 344, 367 (6th Cir. 2024) (citation modified); Fed. R. Crim. P. 33. But not all trial errors, not even all "constitutional errors[,] . . . require reversal of the conviction." *Sullivan v. Louisiana*, 508 U.S. 275, 278-79, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (citing *Chapman v. California*, 386 U.S. 18, 22-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). Indeed, most "trial errors—even non-structural constitutional errors—are subject to harmless error analysis." *United States v. Miller*, 531 F.3d 340, 346 (6th Cir. 2008) (citation modified). A structural error, though, will automatically warrant a new trial, "despite the effect of the error on the trial's outcome." *See United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015) (citation modified). Here, no structural error occurred, so harmless-error review applies.

1.

Only a narrow set of trial errors "defy analysis by harmless-error standards." *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *see also United States v. Kimbrel*, 532 F.3d 461, 469 (6th Cir. 2008). These so-called "structural errors" require

"automatic reversal," *O'Neal v. Balcarcel*, 933 F.3d 618, 628 (6th Cir. 2019), because they "affect[] the framework within which the trial proceeds," *Fulminante*, 499 U.S. at 310, and "render[] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," *Recuenco*, 548 U.S. at 219 (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Put another way, structural errors undermine "certain basic, constitutional guarantees" such that they should never "be deemed harmless beyond a reasonable doubt." *Weaver v. Massachusetts*, 582 U.S. 286, 294-95, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017); *see also Neder*, 527 U.S. at 7. In this way, structural errors are "exceptions to th[e] general rule" of harmless-error review. *United States v. Campbell*, 122 F.4th 624, 630 (6th Cir. 2024), *cert. denied*, No. 25-5179, 2025 WL 2824393 (U.S. Oct. 6, 2025). If an error is found to be structural, be it a *Remmer* error, *Bruton* error, or other error, harmless-error analysis does not apply. *See Weaver*, 582 U.S. at 299.

There are three independent reasons an error may be structural. *Id.* at 295. First, an error may be structural where "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," for example "the defendant's right to conduct his own defense." *Id.* Second, an error may be "structural if the effects of the error are simply too hard to measure," for example where "a defendant is denied the right to select his or her own attorney." *Id.* Third, an error may be "structural if the error always results in fundamental unfairness," for example where "an indigent defendant is denied an attorney." *Id.* at 296. However, "an

error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id.* (citation modified).

Remmer errors are not structural. *See Doan v. Brigano*, 237 F.3d 722, 736 (6th Cir. 2001), *overruled on other grounds by Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Under *Remmer*, a trial error occurs when an "unauthorized invasion[] on the jury proceedings," like an extraneous influence, affects "a defendant's Sixth Amendment right to a fair trial by a panel of impartial, indifferent jurors." *In re Sittenfeld*, 49 F.4th 1061, 1066 (6th Cir. 2022) (citation modified). "In this circuit, a *Remmer* hearing is required when a defendant presents a colorable claim that extraneous information or contact had an obvious or likely adverse effect on the jury." *Id.* (citation modified). A *Remmer* hearing requires the court to determine whether "improper contact caused actual prejudice to the verdict," thereby "warrant[ing] a new trial." *Id.* at 1066-67 (citation modified).

Similarly, *Bruton* errors are not structural. *See Brown v. United States*, 411 U.S. 223, 231, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973); *Harrington v. California*, 395 U.S. 250, 253-54, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969). Under *Bruton*, a trial error occurs when "a defendant is deprived of his Sixth Amendment right of confrontation" because "the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial." *Samia v. United States*, 599 U.S. 635, 647, 143 S. Ct. 2004, 216 L. Ed. 2d 597 (2023) (quoting *Richardson v. Marsh*, 481 U.S. 200, 207, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987)).

But "a nontestifying codefendant's statement does not violate the Confrontation Clause where it does not name the defendant, and implicates him *only* in light of other evidence presented at trial." *United States v. Alkufi*, 636 F. App'x 323, 335 (6th Cir. 2016). In any event, where a *Bruton* error occurs, a new trial is not automatic. Rather, courts examine the circumstances of the case to determine whether the error was harmless. *See Harrington*, 395 U.S. at 253-54.

Here, the jury inappropriately received unadmitted evidence containing a nontestifying codefendant's statement identifying another codefendant by name. This implicates both *Remmer* and *Bruton*. But we need not specifically decide which type of error occurred, because both *Remmer* and *Bruton* errors require harmless-error analysis. *Cf. United States v. Hendrickson*, 822 F.3d 812, 824 & n.5 (6th Cir. 2016) (applying the most stringent harmless-error standard without deciding whether a constitutional error occurred).

The defendants may be correct that the error here is distinct from the typical *Remmer* error in at least two ways: (1) the influence on the jury occurred with "the imprimatur of the Court," CA6 R. 40, Brockway Br., at 21-22, and (2) the error was discovered post-verdict, leaving no opportunity for a curative instruction. But the unique features of this case do not preclude us from analyzing the district court's error as a *Remmer* error. In fact, we have held that "it is the communication's potential to impact upon a juror's ability to perform his or her duties impartially, rather than the form or source of the

communication, that dictates the necessity for conducting a *Remmer* hearing." *United States v. Walker*, 1 F.3d 423, 429 (6th Cir. 1993) (citation modified).

Moreover, the defendants' alternative suggestion that the error here was not a *Remmer* error because it was not extraneous to the court misunderstands *Remmer* jurisprudence. Although "the distinction between external and internal influences [can be] elusive," *Cunningham v. Shoop*, 23 F.4th 636, 684 (6th Cir. 2022) (Kethledge, J., concurring) (citation modified), "generally speaking, information is deemed extraneous if it derives from a source external to the jury," even if not external to the court, *see Warger v. Shauers*, 574 U.S. 40, 51, 135 S. Ct. 521, 190 L. Ed. 2d 422 (2014) (citation modified). So, under Federal Rule of Evidence 606(b)(1), a juror may not disclose any jury-internal influences that "come[] from the jurors themselves," such as one juror "pressur[ing]" other jurors into a guilty verdict. *United States v. Bailey*, No. 19-2280, 2022 U.S. App. LEXIS 18441, 2022 WL 2444930, at *9 (6th Cir. July 5, 2022) (quoting *United States v. Brooks*, 987 F.3d 593, 604 (6th Cir. 2021)). But a juror may disclose any jury-external influences, such as "when a juror's family member is threatened" or when "a bailiff tells the jurors that the defendant is wicked." *Bailey*, 2022 U.S. App. LEXIS 18441, 2022 WL 2444930, at *9 (citation modified) (first citing *Tanner v. United States*, 483 U.S. 107, 123, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987); then quoting *Parker v. Gladden*, 385 U.S. 363, 363, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966)).

As the defendants here point out, *Remmer* errors often arise from court-external influences. *See, e.g.*, *Sittenfeld*, 49 F.4th at 1067 (juror posted and received comments on Facebook during deliberations); *Ewing v. Horton*, 914 F.3d 1027, 1029 (6th Cir. 2019) (jurors conducted internet research on the case); *United States v. Kechego*, 91 F.4th 845, 851 (6th Cir. 2024) (jurors used phones during deliberations). But the touchstone of a *Remmer* error is when jurors are exposed to an influence external to the jury, even if it is internal to the court.

2.

Here, the district court held, and defendants contend, that the court's error was structural because, under *Weaver*, the effects were too hard to measure. *See Weaver*, 582 U.S. at 295. Although we have not previously considered whether an error like this—jury exposure to unadmitted exhibits with no curative instruction—is structural, we find that it is not.

Again, very few errors meet *Weaver*'s too-hard-to-measure threshold for structural error. *See id.* at 299. The two primary examples of too-hard-to-measure structural errors are denial of choice of counsel and denial of a proper jury verdict. *See, e.g., McCoy v. Louisiana*, 584 U.S. 414, 427, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018); *Sullivan*, 508 U.S. at 281. The error here—erroneous jury exposure to unadmitted exhibits—fits neither of these too-hard-to-measure categories, and defendants cite no binding precedent holding otherwise. Instead, defendants propose that we should recognize a new type of too-hard-to-measure structural error.

But the error here is not too hard to measure. In fact, we frequently expect lower courts to measure the effects of *Bruton* and *Remmer* errors via harmless-error analysis. *See, e.g., United States v. Lanier*, 870 F.3d 546, 551 (6th Cir. 2017) (ordering the district court to measure the prejudice of a juror's communication with an outside attorney via a *Remmer* hearing); *Cunningham*, 23 F.4th at 662 (ordering a district court to conduct a *Remmer* hearing to determine the effect of juror bias); *United States v. Olano*, 507 U.S. 725, 738, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) ("We generally have analyzed outside intrusions upon the jury for prejudicial impact."); *Harrington*, 395 U.S. at 254 ("[W]e conclude that this violation of *Bruton* was harmless beyond a reasonable doubt.").

For example, in *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999), *abrogated on other grounds by Harris v. Stovall*, 212 F.3d 940, 942-43 (6th Cir. 2000), we affirmed the district court's post-verdict harmless-error analysis where the jury received unadmitted negative news reports and rumors of the defendants' racial bias, with no curative instruction. *Id.* at 369-70. We held that these extraneous influences did not amount to structural error because the error did not "permeat[e] the entire process and thus was more closely akin to errors which occurred during the presentation of the case to the jury," which are typically "subject to harmless error review." *Id.* at 369. The same is true here. If a court can determine the harmfulness of unadmitted news reports and racial bias rumors, a court can determine the harmfulness of a few unredacted

sentences,[4] even if those sentences were contained in what appeared to be legitimate exhibits.

Although the specific error in this case is unique among our cases, that alone is not sufficient to find structural error. Indeed, finding structural error each time we encountered a factually-unique trial error "would be inconsistent with our traditional categorical approach to structural errors." *Neder*, 527 U.S. at 14; *see also United States v. Blanton*, 719 F.2d 815, 822 (6th Cir. 1983) ("Every criminal trial is, of course, at least to some degree unique.").

The Ninth Circuit's decision in *United States v. Noushfar*, 78 F.3d 1442 (9th Cir. 1996), *amended*, 140 F.3d 1244 (9th Cir. 1998), cited by the defendants, does not alter this conclusion, because *Noushfar* is both nonbinding and distinguishable. The panel in *Noushfar* held that "[s]ending [fourteen] unplayed tapes to the jury room" over "vigorous objections" and with "no instructions" was structural error, because it represented a "complete abdication of judicial control over the process" that had immeasurable effect. *Id.* at 1445-46. Here, the court inadvertently presented the jury with unadmitted exhibits; this did not amount to judicial abdication of control. And the Ninth Circuit itself has cabined *Noushfar* to its facts. *See Eslaminia v. White*, 136 F.3d 1234, 1237

4. We do not address the entirety of the district court's trial error (all ten unadmitted exhibits erroneously delivered to the jury and three admitted exhibits not delivered to the jury) because defendants only meaningfully argue that a portion of the error (exposure to Carey Exhibits 3 and 4) was structural or harmful.

& n.1 (9th Cir. 1998) (declining to find structural error where the jury considered unadmitted taped comments and limiting *Noushfar* to its specific facts, including the large quantity and incriminating character of the extrinsic evidence in *Noushfar*).

Furthermore, the error in this case had a less pervasive effect than other structural errors. Again, only "a limited class of fundamental constitutional errors" that "infect the entire trial process and necessarily render a trial fundamentally unfair" rise to the threshold of structural error. *Neder*, 527 U.S. at 7-9 (citation modified). To illustrate, structural errors include: a judge's "unconstitutional failure to recuse," *United States v. Liggins*, 76 F.4th 500, 505 (6th Cir. 2023) (citation modified); "the presence of a biased juror," *Cunningham*, 23 F.4th at 660 n.9; denial of "the right to represent oneself," *Hendrickson*, 822 F.3d at 825; jury instructions which alter the government's burden of proof, *Doan v. Carter*, 548 F.3d 449, 455 (6th Cir. 2008); discriminatory jury selection practices under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), *see Kimbrel*, 532 F.3d at 469; and "denial of a public trial," *Greer v. United States*, 593 U.S. 503, 513, 141 S. Ct. 2090, 210 L. Ed. 2d 121 (2021) (quoting *United States v. Davila*, 569 U.S. 597, 611, 133 S. Ct. 2139, 186 L. Ed. 2d 139 (2013)). Each of these errors "affect[s] the framework within which the trial proceeds," while the error here is "simply an error in the trial process itself." *Fulminante*, 499 U.S. at 310.

Lastly, we have declined to find structural error in similar cases of discrete trial error. For example, we have

held that the physical absence of a defendant's attorney at a hearing is not "structural error unless the State was responsible for counsel's absence." *Clark v. Lindsey*, 936 F.3d 467, 470 (6th Cir. 2019). Similarly, we found no structural error where a district court "fail[ed] to submit a sentencing factor to the jury," *Campbell*, 122 F.4th at 630 (citation modified), nor did we find structural error where the district court omitted an element of the charge, *United States v. Kuehne*, 547 F.3d 667, 681 (6th Cir. 2008).

In sum, the error in this case was not so unquantifiable as to be structural. We therefore ask whether the error was harmless.

B.

Because the district court erroneously found structural error and offered no harmlessness determination, we perform a first-principles harmless-error analysis. *See, e.g., Hendrickson*, 822 F.3d at 824 (deciding harmlessness in the first instance); *United States v. Taylor*, 127 F.4th 1008, 1018 (6th Cir. 2025) (same).

1.

We first address the conflicting burden-of-proof standards for *Remmer* and *Bruton* errors in this circuit. The "general rule" is that the government bears the burden to prove a constitutional error harmless "beyond a reasonable doubt." *Campbell*, 122 F.4th at 630 (citation modified); *Chapman*, 386 U.S. at 24 ("[B]efore a federal constitutional error can be held harmless, the court must

be able to declare a belief that it was harmless beyond a reasonable doubt."). We follow that general burden-of-proof standard for *Bruton* errors, *United States v. Henderson*, 626 F.3d 326, 333 (6th Cir. 2010), but for *Remmer* errors we have held that the "defendant . . . carrie[s] the burden of proving actual prejudice," even though such errors are constitutional errors. *Sittenfeld*, 49 F.4th at 1066-67; *see also United States v. Corrado*, 227 F.3d 528, 536 (6th Cir. 2000). Ours is the "only circuit that places on the defendant the burden of proving bias at the *Remmer* hearing rather than requiring the Government to show . . . harmless[ness]." *United States v. Lanier*, 988 F.3d 284, 295 (6th Cir. 2021) (citation modified).

But we need not decide definitively which standard should apply here, because we can "[a]ssum[e] without deciding that the most stringent standard for harmless-error review applies." *Hendrickson*, 822 F.3d at 824 & n.5 (declining to decide which burden of proof applied "because any error was harmless even under the more demanding standard"). The error here was harmless under either standard.

2.

An error is harmless beyond a reasonable doubt where "the properly admitted evidence of guilt is so overwhelming" that "the prejudicial effect of the [error] is . . . insignificant by comparison." *United States v. Macias*, 387 F.3d 509, 520 (6th Cir. 2004) (citation modified). If "there is a reasonable possibility that the improperly admitted evidence contributed to the conviction," then

the error is not harmless. *Id.* (citation modified). But if "the outcome would not have been different without the [error]," then the error is harmless. *Campbell*, 122 F.4th at 630 (citation modified); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Here, although the trial error is procedurally worrisome, the mild nature of the prejudice and the significance of the government's other evidence make this error harmless to each defendant.

a.

Of the three defendants, the error is most clearly harmless to Carey because the government presented significant other evidence of guilt and the error arguably helped, rather than prejudiced, him.

Evidence of guilt. At trial, the government played a recording of Carey discussing his own involvement in the crimes. In the recording, Carey also agreed to a second, fictional murder-for-hire. Additionally, several witnesses gave testimony directly implicating Carey in the murder-for-hire scheme. Finally, the government produced surveillance footage placing Carey at a victim's apartment prior to the murders.

Prejudice of the error. The jury's erroneous receipt of Carey Exhibits 3 and 4 directly supported Carey's defense theory that he lacked knowledge of the crimes. And, because the jury did not receive Peled's testimony regarding Carey's knowledge, this evidence supporting Carey's lack of knowledge went largely unrebutted. The

court's error thus created the exact situation that Carey advocated for at trial: introduction of Carey Exhibits 3 and 4 without Peled's testimony of Carey's knowledge. Moreover, Carey may have even waived his objection to any *Bruton* error by voluntarily arguing for the admission of Brockway's facially identifying statement in Carey Exhibits 3 and 4. *See Bailey v. Mitchell*, 271 F.3d 652, 657-58 (6th Cir. 2001) (noting that defendants may waive objections to Confrontation Clause violations).

Thus, the error was harmless to Carey.

b.

Because Carey Exhibits 3 and 4 do not directly inculpate Maund, and because the government presented significant other evidence of guilt, we find the error is also harmless to Maund. But unlike Carey and Brockway, the jury convicted Maund of only murder-for-hire conspiracy, not kidnapping or kidnapping conspiracy, so we consider the impact of the error only on the single conviction.

Evidence of guilt. At trial, the government played a recorded call between Maund and Peled in which Maund incriminated himself. Peled also gave testimony, separate from his unadmitted testimony regarding Carey's knowledge, directly implicating Maund in the murder-for-hire scheme. In addition, one of Maund's coworkers testified that, at Maund's request, the coworker contacted Peled so that Peled could help Maund handle Lanway's extortion attempts. And the government introduced evidence, including bank records, showing that Maund

transferred $150,000 to Peled on the afternoon of the murders.

Prejudice of the error. The primary error here was the jury's improper receipt of a single Carey-exculpatory statement without receiving Peled's Carey-inculpating testimony. This error relates to Maund's murder-for-hire conviction only tangentially, because Carey Exhibits 3 and 4 do not directly inculpate or exculpate Maund. It is plausible that Carey Exhibits 3 and 4 mildly undermine one of Maund's affirmative theories of defense: that Carey committed the murders on his own, without Maund's input. But the link between this theory of defense and Carey Exhibits 3 and 4 is tenuous at best. And, because the error consisted of only one or two sentences, it is doubtful these sentences significantly diminished this theory of Maund's defense.

Maund also argues that he was further prejudiced because the *Remmer* hearing was constitutionally deficient under *United States v. Lanier*, 988 F.3d 284 (6th Cir. 2021), but we disagree. The mix-up regarding binder colors at the *Remmer* hearing did not deprive defendants of a constitutionally meaningful *Remmer* hearing. Because many of the jurors did not even remember the color of the binders, that the defendants questioned jurors specifically about a red binder does not rise to the *Lanier* level of "shackl[ing]" defendants' investigation into the external influence. *Id.*

Because the evidence against Maund was considerable, we conclude that the jury's verdict against Maund "would

not have been different" absent the error, making it harmless. *Campbell*, 122 F.4th at 630 (citation modified).

c.

For Brockway, the significance of the government's evidence also overwhelms any possible prejudice from the error, making it harmless.

Evidence of guilt. At trial, the government introduced Government Exhibits 131 and 132, which captured Brockway discussing his involvement in the crimes and agreeing to another murder-for-hire scheme. Peled gave testimony directly implicating Brockway in the murder-for-hire scheme. The government also introduced evidence that Brockway was in Nashville during the murders, and left Nashville after the murders. And the government's evidence showed that, while in Nashville, Brockway rented a car that matched the vehicle captured on surveillance footage driving near where the victims' bodies were found.

Prejudice of the error. Of the three defendants, Brockway has the strongest claim of potential prejudice, because he was accused of physically kidnapping and murdering the victims in tandem with Carey. One of Brockway's primary theories of defense was that Carey committed the murders alone, without Brockway. And because the jury received Carey Exhibits 3 and 4, in which Brockway himself stated that Carey lacked certain knowledge of the crimes, these exhibits prejudiced Brockway by directly contradicting this pillar of his defense. But, considering the other overwhelming

evidence of guilt, we find that this single statement, that "Adam [Carey] didn't know any of this shit" during a murder-for-hire scheme, RE 496-3, Carey Ex. 4, PageID 5721, was "insignificant by comparison," *Macias*, 387 F.3d at 520 (citation modified).

Accordingly, we find the error harmless as to Brockway too.

III.

The error here was neither structural nor harmful to any defendant. For the above reasons, we reverse the district court's grant of a new trial and remand for further proceedings.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION, FILED SEPTEMBER 17, 2024

IN THE UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

No. 3:21-cr-00288

UNITED STATES OF AMERICA

v.

ERIK MAUND, BRYON BROCKWAY, ADAM CAREY

Filed September 17, 2024

MEMORANDUM AND ORDER

I. INTRODUCTION

The Sixth Amendment to the U.S. Constitution expressly guarantees "the accused" fundamental protections that courts throughout our history have acknowledged protect each citizen's right to a "fair trial." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006). Modern criminal trials, including the one in this case, are often complex affairs with testimony from numerous witnesses, multiple defendants, hundreds of exhibits (physical and electronic), numerous evidentiary issues

and strong advocacy from excellent attorneys. Given that complexity, mistakes can happen, which results in the oft repeated truism: "A defendant is entitled to a fair trial but not a perfect one." *Lutwak v United States*, 344 U.S. 604, 619 (1953). But the right to a fair trial does not – and cannot – yield to the complex nature of a modern criminal trial. Nor can that complexity compromise the bedrock principle that a "fair trial" involves a jury considering only "the 'evidence developed' against a defendant . . . from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.'" *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (citation omitted).

The Bill of Rights to the U.S. Constitution places a high premium on individual rights and the protection of liberty. At its core, a criminal charge seeks to deprive a citizen of liberty. While the government indicted these defendants for crimes that could result in lengthy jail sentences upon conviction, constitutional protections do not concern themselves with whether a criminal defendant is charged with these types of crimes or charges that may result in a lesser sentence. A fair trial protects principles of liberty in every criminal case.

The fairness of a trial is not solely for the protection of individual liberty of a defendant, as important as that is. Ensuring a fair trial bolsters the confidence of our citizens in our judicial system and assures them that our system of self-government provides a common place where differences—be they criminal or civil—can be adjudicated peacefully and publicly under rules designed to be fair to all parties. In many cases, like this one, the rights and

concerns of victims also demand a fair trial. Put simply, citizens, the parties, and victims must have confidence that the result of a criminal trial—be it a conviction or an acquittal—resulted from a trial that respected everyone's rights and comported with foundational constitutional protections.

In this case, an administrative mistake caused certain exhibits not admitted into evidence to be given to the jury as it began deliberations. The Court understands the gravity and impact of that mistake, as well as its impact on the parties, the victims, and potentially the public's view of the trial. Our criminal justice system demands that courts acknowledge when they fail to provide a fair trial and take appropriate action to remedy that failure. The rights of all involved demand no less.

II. PROCEDURAL HISTORY

A. The Charges and Trial

On November 29, 2021, Erik Maund, Gilad Peled, Bryon Brockway, and Adam Carey were indicted on charges arising out of the alleged March 2020 kidnapping and murder of two victims in Nashville, Tennessee. (Doc. No. 3). The Government filed a Superseding Indictment on July 25, 2022. (Doc. No. 127). The Superseding Indictment charged the Defendants with three counts: (1) conspiracy to commit murder-for-hire in violation of 18 U.S.C. § 1958; (2) kidnapping conspiracy in violation of 18 U.S.C. § 1201(a) and (c); and (3) kidnapping resulting in death in violation of 18 U.S.C. § 1201(a)(1) and (2). (*Id.*).

The Government's theory was that in March 2020, Erik Maund, a married businessman, received extortion demands from William Lanway, who had become aware of Maund's involvement with Holly Williams in Nashville, Tennessee. At the recommendation of a friend, Maund hired Gilad Peled, who owned a security company called Speartip Security, to help him with the problem. Peled, in turn, enlisted the help of Bryon Brockway. After some initial intelligence gathering by others, Brockway and Adam Carey traveled to Nashville, Tennessee. The Government contends that ultimately Maund agreed to pay Peled $750,000 to have William Lanway and Holly Williams murdered and that Peled communicated the order to Brockway and Carey who then kidnapped and murdered Mr. Lanway and Ms. Williams.

In December 2022, Gilad Peled entered a plea of guilty pursuant to a plea agreement with the Government. (Doc. No. 211). The remaining defendants—Erik Maund, Bryon Brockway, and Adam Carey—proceeded to trial. At the close of the Government's proof, the Court granted Maund's motion for judgment of acquittal under Fed. R. Crim. P. 29 as to the charge in Count 2 for conspiracy to commit kidnapping. (Tr. Trans. Vol. 9 (Nov. 14, 2023), Doc. No. 463 at PageID# 4580-4638; Tr. Trans. Vol. 10 (Nov. 15, 2023), Doc. No. 464 at PageID# 4658-63). On November 17, 2023, the jury returned verdicts on the remaining charges. (*See* Redacted Verdict Forms, Doc. Nos. 437 (Maund), 439 (Brockway), 441 (Carey)). The jury found Maund not guilty of kidnapping (Count 3); Brockway and Carey were found guilty of conspiracy to commit kidnapping (Count 2), and kidnapping resulting in death (Count 3); and all three

defendants were found guilty of conspiracy to commit murder-for-hire (Count 1). (*Id.*).

B. Post-Trial Evidence Review

Following the conclusion of the trial, the Clerk of Court received a number of requests for trial exhibits from the media.[1] While gathering the requested exhibits, the Chief Deputy Clerk observed discrepancies between the exhibit list prepared during the trial and the exhibits provided to the jury. Court staff undertook an extensive review to determine whether the discrepancy was merely a problem with the exhibit list itself or whether there was a discrepancy between the exhibits admitted at trial and those provided to the jury.

The Court set a hearing for January 29, 2024.[2] At the hearing, the Court informed the parties that the Court had identified discrepancies in the exhibits provided to the jury. (Hearing Trans. (Jan. 29, 2024), Doc. No. 487). Counsel for the parties discussed their recollection of reviewing the exhibits before exhibits were provided to the jury.[3] (*Id.*). The attorneys confirmed that they reviewed the exhibits either after closing arguments or after the

1. Over 260 exhibits were admitted at trial. (*See* Amended Exhibit and Witness List, Doc. No. 504).

2. The hearing was originally set for January 22, 2024, and was continued to January 24, 2024, and then to January 29, 2024. (Doc. Nos. 456, 480, 482).

3. During the May 15, 2024 hearing, the attorneys again discussed their recollection of their review of the exhibits. (Hearing Trans. (May 15, 2024), Doc. No. 542 at PageID# 6241-44).

close of proof. (*Id.*). The Court then provided the parties with a Notice Regarding Trial Exhibits which stated:

The parties are advised of the following discrepancies in exhibits provided to the jury.

1. The following exhibits were admitted into evidence and not provided to the jury:

(a) Government Exhibit 103 – CD with pinger messages

(b) Government Exhibit 112 – CD with phone records (CD provided to jury was blank)

(c) Maund Exhibit 81 – Aerial surveillance footage of Maund's residence

2. The following exhibits were not admitted into evidence and were provided to the jury:

(a) Government Exhibit 254 – photo from execution of search warrant at Carey property

(b) Government Exhibit 257 – photo from execution of search warrant at Carey property

(c) Carey Exhibit 3 – Unredacted recording of Brockway / Conaway conversation

(d) Carey Exhibit 4 – Partial transcript of unredacted recording of Brockway / Conaway conversation

(e) Maund Exhibit 8 – JP Morgan Chase Bank records for Speartip (from USB drive)

(f) Maund Exhibit 9 – JP Morgan Chase Bank records for Speartip (from USB drive)

(g) Maund Exhibit 51 – Excel spreadsheet of text messages to and from Holly Williams from June 6, 2018, through March 11, 2020 (from USB drive)

(h) Maund Exhibit 59 – Video surveillance footage from Holly Williams' apartment (from USB drive)

(i) Maund Exhibit 78 – Video surveillance footage from Holly Williams' apartment (from USB drive)

(Doc. No. 502). The Court later became aware that Government Exhibit 359, from which a reference to the date the murders occurred was to have been redacted, was included with the government exhibits in its unredacted form. This exhibit was inadvertently not included in the Notice, but was identified by defendants before a subsequent hearing.[4]

4. On May 15, 2024, the morning of the *Remmer* hearing, counsel for Maund notified the Court of an irregularity with the exhibits provided to the jury that had not been included in the Notice provided to the parties in January. Government Exhibit 359, which was a CD containing a list of dates of wire transfers from Maund to Peled's company, Speartip, and the statement

Appendix B

The Court allowed the parties until February 19, 2024 (three weeks from the date of the hearing), to file motions concerning the information provided in the Notice, and ordered that the motions should be limited only to the exhibit discrepancies. (*See* Doc. No. 485). The deadline to file other post-trial motions was continued until after the resolution of the issues raised during the January 29, 2024 hearing. (*Id.*).

Each of the defendants filed a motion for new trial based on the exhibit discrepancies. (Doc. Nos. 491 (Brockway), 493 (Maund), 496 (Carey)). The Government filed a consolidated response. (Doc. No. 500). And each of the defendants filed a reply. (Doc. Nos. 506 (Carey), 511 (Brockway), 513 (Maund)). Briefing was complete on March 18, 2024.

The defendants universally argued that the Court should grant a new trial without a further hearing because the discrepancies in the exhibits submitted to the jury constituted structural error. Defendants further argued that a subsequent hearing would be constitutionally inadequate given the circumstances surrounding the evidence at issue, the time that had passed since the trial, post-trial publicity, and the restrictions on inquiry into jury deliberations imposed by Fed. R. Evid. 606. The government disagreed, pointing to Sixth Circuit authority stating that if there is prima facie evidence

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"homicides occur" on the date of the murders, should have had the extraneous statement redacted. A note on the CD indicated that it was "not redacted, should be redacted per transcript." (Hearing Trans. (May 15, 2024), Doc. No. 542 at PageID# 6080-86).

that an unauthorized communication may have affected the verdict, the court must hold a hearing pursuant to *Remmer v. United States*, 347 U.S. 227 (1954). (Gov't Response, Doc. No. 500 (citing *Ewing v. Horton*, 914 F.3d 1027, 1031 (6th Cir. 2019)).

C. Duty to Investigate Extrinsic Influence on Jury

The Sixth Circuit has made clear that "[w]hen a trial court is presented with evidence that an extrinsic influence has reached the jury which has a reasonable potential for tainting that jury, due process requires that the trial court take steps to determine what the effect of such extraneous information was on that jury." *Ewing*, 914 F.3d at 1030 (quoting *Nevers v. Killinger*, 169 F.3d 352, 373 (6th Cir. 1999), abrogated on other grounds by *Harris v. Stovall*, 212 F.3d 940 (6th Cir. 2000)). "In other words, [w]here a colorable claim of extraneous influence has been raised, [an evidentiary hearing] must be held to afford the defendant an opportunity to establish actual bias." *Id.* (quoting *United States v. Davis*, 177 F.3d 552, 557 (6th Cir. 1999)); *see also United States v. Walker*, 1 F.3d 423, 430 (6th Cir. 1993) (finding the trial court had a duty to conduct a hearing when the jury was inadvertently provided evidence that had not been admitted at trial). The hearing is often referred to as a *Remmer* hearing. *Ewing*, 914 F.3d at 1030.

The Court concluded that a *Remmer* hearing was a necessary first step and scheduled that hearing for May 15, 2024. (*See* Doc. Nos. 518, 523, 526).

D. The Exhibits at Issue

As previously indicated, three exhibits were admitted into evidence, but not provided to the jury, nine exhibits were provided to the jury that had not been admitted into evidence, and one exhibit did not include redactions that had been ordered by the Court. The parties focus on the alleged prejudice arising from Carey Exhibits 3 and 4.[5,6] To understand why, some background is necessary.

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5. Carey also argues prejudice from the jury being inadvertently provided Government Exhibits 254 and 257, which were photographs of boxes of ammunition taken at Carey's residence pursuant to a search warrant the day of his arrest on December 10, 2021. The Court denied Carey's motion to exclude these photographs (Doc. No. 384), but the Government voluntarily opted not to seek to admit them. It did, however, admit four substantially similar photographs into evidence. (Gov't Exs. 250, 255, 256, 258). Even if the jury did specifically consider the unadmitted photos, the Court finds these two exhibits did not result in structural error, nor was there a potential for such consideration to affect the verdict.

6. Maund also argues that he was prejudiced by the submission of an unredacted version of Government Exhibit 359, which was a CD containing a summary of electronic funds transfers and the dates of those transfers from Maund to Peled's Speartip bank account. The words "Homicides occur," which indicate the date of the homicides relative to the financial transactions, were redacted during presentation of the exhibit during trial. (*See* Tr.Trans. Vol. 9 (Nov. 14, 2023), Doc. No. 463 at PageID# 4538). Given that there was no dispute about the date of the homicides, the Court finds no structural error or prejudice from the jury's potential consideration of the unredacted document.

Appendix B

1. Pretrial Evidentiary Rulings

Gilad Peled pled guilty to the charges in the superseding indictment. (Doc. No. 211). The remaining defendants—Erik Maund, Bryon Brockway, and Adam Carey—requested separate trials based on concerns of antagonistic defenses, spillover evidence, and constitutional concerns from statements of non-testifying codefendants implicating another defendant as identified in *Bruton v. United States*, 391 U.S. 123, 137 (1968). (*See* Doc. No. 137 (Carey); Doc. No. 139 (Maund); Doc. No. 251 (Brockway); Doc. No. 334 (Carey motion to reconsider)). The Court found severance was not warranted and denied the motions. (Orders, Doc. Nos. 176, 279, 383). In denying the motions for severance, the Court found that the *Bruton* issues raised by the parties could be addressed with appropriate redactions. (*Id.*).

Before the trial began, the defendants collectively filed over one dozen motions in limine seeking to exclude evidence. (Doc. Nos. 283, 284, 285, 286, 287, 288, 292, 297, 298, 299, 300, 351, 352, 360, 387, 407). Among the evidence defendants sought to exclude were recordings of conversations in which the Government contends Bryon Brockway and Adam Carey agreed to participate in an additional murder-for-hire scheme similar to the one charged in this case. (Doc. Nos. 292, 297, 299). There is no dispute that the new murder-for-hire scheme was entirely fictional, but the Government asserted that, in agreeing to the fictional murder-for-hire scheme, Brockway and Carey made statements about the murders at issue here. (*See* Notice by the United States of Intent to Offer Evidence Pursuant to Rule 404(B), Doc. No. 204).

Appendix B

The Government filed transcripts that corresponded to the five recorded statements it intended to play at trial.[7] The recordings were redacted to address constitutional concerns that arise when statements of a non-testifying codefendant directly implicate another defendant. *See Bruton*, 391 U.S. at 137. The Court ruled that these recorded conversations would be admitted. (*See* Pretrial Conf. Trans. (Oct. 23, 2023), Doc. No. 486 at PageID# 5580; Order, Doc. No. 385 (denying motions to exclude and ordering additional redactions of irrelevant portions of those conversations)).

One of these recordings was of a meeting between Bryon Brockway and David Conaway, a cooperating

7. The Government filed transcripts that corresponded to the five recorded statements it intended to play at trial:

> (1) Recorded phone call between David Conaway and Adam Carey on Sept. 21, 2021 (Doc. No. 363-1 (Trial Exhibit 126 (for identification only));
>
> (2) Recorded phone call between David Conaway and Bryon Brockway on Sept. 22, 2021 (Doc. No. 363-2 (Trial Exhibit 128 (identification only);
>
> (3) Recorded meeting between David Conaway and Adam Carey on Sept. 29, 2021 (Doc. No. 363-3 (Trial Exhibit 130 (identification only));
>
> (4) Recorded meeting between David Conaway and Bryon Brockway on Oct. 25, 2021 (Doc. No. 363-4 (Trial Exhibit 132 (identification only));
>
> (5) Recorded call between David Conaway and Bryon Brockway on Nov. 20, 2021 (Doc. No. 363-5 (Trial Exhibit 134 (identification only)).

government witness, on October 25, 2021. (Gov't Exs. 131 (recording), 132 (transcript)). Among the redactions from this recording was a statement by Bryon Brockway in which he referred to "Adam" by name. (*Id.*). The context of the reference to "Adam" is as follows. After seemingly detailing the execution of the murders that are the subject of the charges in this case, Brockway told Conaway that the value of using a vehicle—being "mobile" as opposed to "static"—was that "they're never going to figure out where the original X was." (Gov't Exs. 131, 132). Brockway then stated, "Uh, Adam didn't know any of this shit." (Carey Exs. 3 (recording), 4 (transcript)). The statement, "Adam didn't know any of this shit," was redacted from the recording and the transcript offered by the Government.

2. Newly Disclosed Evidence

Days before the trial was set to begin, the Government informed the defendants that on October 23, 2023, Gilad Peled recalled "an additional fact that [the government] had not learned from any session prior to the session on 10/23." (Sealed Doc. No. 387-1). Specifically, Peled told the government that Peled recalled:

> [H]e saw Bryon Brockway and Adam Carey together again a few months after the murders. He described it as being in the summer time (but did not know the specific date) and that they ate at a waterfront restaurant in the Lake Travis area of Austin, Texas. He generally described the restaurant and its location, but, at the time, could not recall the

> name of the restaurant. He stated that on that occasion, Peled, Brockway, and Carey had lunch together and during this lunch Mr. Peled asked Brockway and Carey if they had heard anything about the murder investigation. Mr. Peled said he remembered Mr. Carey saying words to the effect (paraphrased): 'No and we never will. No one cares about those two people.'"

(*Id.*). Subsequent investigation disclosed that on July 9, 2020, Brockway and Carey made purchases at a restaurant matching the description given by Peled. (*Id.*). The Government initially told the defendants that it intended to ask Peled about this conversation. But following Adam Carey's motion to exclude the statement or, alternatively, to continue the trial (Sealed Doc. No. 387), the Government stated that it would not elicit testimony about Carey's alleged statement in its case-in-chief and suggested the motion be denied as moot. (Sealed Doc. No. 390). The Government also submitted that no other party should be able to use the statement for any purpose "given Defendant Carey's motion and the United States position in this filing." (*Id.*). However, the Government held open the possibility that its position concerning the statement might change if, for example, "any defendant opens the door for it to be needed." (*Id.*).

Based on the Government's representation that it would not seek to introduce Carey's statement from the July 2020 meeting in its case-in-chief, the Court denied Carey's motion without prejudice to raising contemporaneous objections at trial should any party seek to admit evidence of the alleged statement. (Doc. No. 392).

3. Evidentiary Rulings and Evidence at Trial

Jury selection for the joint trial began on November 1, 2023.[8] (*See* Doc. No. 393). The parties presented opening arguments on Friday, November 3, 2023. (Tr. Trans. Vol. 3 (Nov. 3, 2023), Doc. No. 457). Before opening arguments, counsel for Defendant Maund informed the Court that Maund wanted to present evidence of the July 2020 meeting between Peled, Brockway, and Carey. (*Id.* at PageID# 2969, 3244-48). Maund argued that the fact of the meeting, which excluded Maund, together with Carey's statement, is exculpatory or at least relevant as to Maund's guilt. (*Id.* at PageID# 3247-50). Maund was not the only defendant who thought Carey's alleged statement was helpful to his defense. Bryon Brockway also argued that the statement indicated that Brockway did not shoot the victims and was therefore "fair game." (*Id.* at PageID# 3250). Counsel for Brockway explained that, based on the opening statements, he expected Carey to argue that Brockway "somehow put a figurative gun to Adam Carey's head and made him do this." (*Id.* at PageID# 3252). Brockway argued that the meeting gives rise to an inference that "these people are talking together about the crime," therefore it is only fair to include what Carey said at the meeting because it contradicts Carey's theory that Brockway made him commit the murders. (*Id.*).

Because Peled was not scheduled to testify for several days, the Court deferred consideration of the issue of

8. The trial was originally scheduled to being on October 31, 2023, but was continued to November 1, 2023, without objection by the parties. (*See* Doc. No. 340).

whether Maund or Brockway would be permitted to elicit testimony from Peled about the July 2020 meeting and Carey's alleged statement. (*Id.* at PageID# 2971, 3255-56).

The following Monday morning, Carey returned with a written motion to preclude the co-defendants from introducing the statement, or, in the alternative, declare a mistrial and sever his case from that of his co-defendants. (Doc. No. 444).[9] Carey reiterated his argument that the untimely disclosure, which he did not contend was the fault of the government, could only be remedied by either exclusion of the evidence of the meeting altogether or by severance. (*Id.*; *see also* Tr. Trans. Vol. 3 (Nov. 3, 2023), Doc. No. 457 at PageID# 3255).

The Court ruled that the defendants would be permitted to cross examine Peled on the fact that the meeting occurred, when it occurred, and who was there, but could not elicit testimony about what was said at the meeting—specifically Adam Carey's alleged statement. (Tr. Trans. Vol. 4 (Nov. 6, 2023), Doc. No. 458 at PageID# 3272). The Court stated that if Carey presented evidence concerning the theory that he forecasted during opening statements—that Brockway made him commit murder—

9. Carey's first motion was directed at the Government presenting evidence of Carey's alleged statement. (Sealed Doc. No. 387). Carey's second motion was directed at his co-defendants. (Doc. No. 444). Due to difficulties with the electronic docketing system, this motion was presented to the Court and the parties on November 6, 2023, but not electronically docketed until a later date, which resulted in non-sequential docket number assigned to the motion.

the Court would reconsider whether to allow evidence of Carey's alleged statement during the July 2020 meeting and held open the possibility that Peled could be recalled to testify. (*Id.* at PageID# 3272-74).

Peled testified on November 6, 2023. (Tr. Trans. Vol. 4 (Nov. 6, 2023), Doc. No. 458). The questioning about the July 2021 lunch meeting was succinct and appeared to be aimed at attacking Peled's credibility:

> Perry Minton (counsel for Maund): . . . at the time of the interview, December 10, 2021, you said you didn't know Adam Carey; correct?
>
> Peled: That is correct.
>
> Minton: But you had eaten lunch with Adam Carey. You said you didn't know him, and you said you could recognize them by pictures. You recall that?
>
> Peled: Yes.
>
> Minton: Okay. And you said you didn't know him, but you had had lunch with him, had you not?
>
> Peled: I had lunch with him about six months after the case. And once I remembered that, I – I brought it up to the prosecutors and told them that that was the case.

Minton: And the funny thing is, is that you didn't remember that, supposedly, until about two weeks ago?

. . .

Minton: Well, but what you're saying, though, doesn't make sense because you had an opportunity at the time on December the 10th to talk about that – hold on. And then you had the opportunity with one of the finest lawyers in the country –

Peled: That is correct.

Minton: Mr. Rusty Hardin. Okay. You had met with the government. And what you're – that's the window. That's the window for you to – you're saying that jail does these terrible things to you, but yet you remember it almost two years later, or longer than that now.

Peled: That is correct. That is correct.

Minton: Is that another lie that you told on December 10th, sir?

Peled: Absolutely not.

Minton: It's not?

Peled: It's not a lie. As soon as I remembered – as soon as any detail of this case came to my

> mind, I spoke with my lawyers immediately and brought it to their attention.

(*Id.* at PageID# 3440-41).

To preserve his testimony about the specific things discussed during the meeting, Peled testified about the July 2020 meeting out of the presence of the jury. (*Id.* at PageID# 3529-31). Peled confirmed that it was just himself, Carey, and Brockway at the meeting and stated that when he "asked if there was any news, if they have any development in the case, [that Carey] said, 'Don't worry about it. Nobody cares about them. They're low, common criminal. Nobody cares about them.'" (*Id.* at PageID# 3531).

A few days later, the Court had occasion to revisit the ruling on the admissibility of Carey's alleged statement at the July 2020 lunch meeting. As explained above, to address *Bruton* concerns, Brockway's statement that "Adam didn't know any of this shit," had been redacted from the recording that the Government played for the jury of the October 25, 2021 meeting between Brockway and Conaway. (Gov't Ex. 131). But Carey wanted the jury to hear that he "didn't know any of this shit" and sought to introduce a clip of the same conversation without that specific redaction. (Tr. Trans. Vol. 7 (Nov. 9, 2023), Doc. No. 461 at PageID# 4109-10).

Brockway did not object to the statement coming in, but argued that introduction of the statement opened the door to "what Adam did know in the conversation in July

at the restaurant." (*Id.* at PageID# 4109-10). Counsel for Brockway explained, "The only reason it becomes relevant for them to put [that statement] in is to go, 'He didn't know anything. He didn't know what was happening. Mr. Brockway said so.' And then I have the obligation to show that he did know. And he did know. He knew that they weren't going to hear from them again." (*Id.* at PageID# 4110). "[T]he context of the conversation that they're in is talking about cars, being mobile and the ex and all this different stuff. And then he says, 'And Adam didn't know anything about this.' That's going to put me squarely in the position to have to show he, in fact, did. This goes right back to that theory of the hapless rube.'" (*Id.* at PageID# 4111). The Court agreed that Carey introducing the statement "Adam, didn't know any of this shit" would open the door to the defense putting on evidence of Adam Carey's alleged statement during the July 2020 meeting and left Carey with the choice of whether to introduce the statement. (*Id.* at PageID# 4114 ("It's your difficult choice Mr. Perry [counsel for Adam Carey], but it's your choice, nonetheless.")).

Later that day, outside the presence of the jury, Carey made an offer of proof of Brockway's statement on October 25, 2021, that "Adam didn't know any of this shit." Carey submitted a USB drive with the unredacted recording (Carey Ex. 3) and a one-page transcript of this portion of the recording (Carey Ex. 4), which were marked for identification. (*Id.* at PageID# 4282-83).

These exhibits were among those inadvertently provided to the jury. At the time of the Court's post-trial

review, the transcript (Carey Ex. 4) was marked in blue ink with "C4" in the upper corner and the words, "Adam didn't know any of this shit," were underlined in blue ink. (*See id.*).

E. Post-Trial Hearing

The Court held a *Remmer* hearing on May 15, 2024, at which the individuals who served on the jury were called to testify. (Doc. No. 536, 537; Hearing Trans. (May 15, 2024), Doc. No. 542).

1. Scope of Questioning

The scope of jury testimony during an inquiry into the validity of the verdict is circumscribed by Federal Rule of Evidence 606(b), which provides that "a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict[,]" with the exception that a "juror may testify about whether [ ] extraneous prejudicial information was improperly brought to the jury's attention." Fed. R. Evid. 606(b)(2)(A). Courts applying this rule have not limited the inquiry strictly to "whether" extraneous information was brought to the jury's attention. Instead, mindful that the purpose of the *Remmer* hearing is to determine the impact of the extraneous information on the verdict, courts allow juror testimony concerning the degree of exposure to the extraneous information and whether the information was considered by the jury, but not testimony about a

juror's own mental processes concerning the verdict. *See e.g.*, *In re Sittenfeld*, 49 F.4th 1061, 1068 (6th Cir. 2022) (stating that, "[p]ursuant to Federal Rule of Evidence 606(b), the district court forbade counsel from asking about jury deliberations, except whether the deliberations had included reference to any extraneous prejudicial information or other outside influences on the jury"); *United States v. Cooper*, 868 F.2d 1505 (6th Cir. 1989) (when government attorney's notes were inadvertently provided to the jury, the trial court asked jurors whether they had seen or read the notes); *see also*, *United States v. Blackwell*, 459 F.3d 739, 769 (6th Cir. 2006) (stating that "[a]lthough a juror may testify about extraneous, prejudicial information brought into the deliberations, the juror may not testify about his or her own mental processes, i.e., how the jury reached his or her verdict"); *United States v. Davis*, 177 F.3d 552, 557 (6th Cir. 1999) (remanding for *Remmer* hearing at which defense counsel may question jurors to establish that "improper extra-judicial comments influenced the jurors' deliberations").

With this in mind, the Court ordered that juror testimony would be limited to *whether* they considered the specified exhibits, but not *how* they considered them. (Order, Doc. No. 518). The scope of questioning would be limited to: (1) whether and to what degree the jury viewed the specified exhibits; and (2) whether and to what extent the deliberations included reference to any of these exhibits. (*Id.*). The Court ordered that the questioning would not include questions about the content of any deliberations or mental processes concerning the specified exhibits. (*Id.*).

2. Exhibit Presentation

Before questioning of the jurors began, counsel for Maund posed questions about the presentation of the exhibits to the jury – specifically about handwritten notes and markings on the binder slip sheet, divider tabs, exhibits, and sticky notes affixed to the exhibits. (Hearing Trans. (May 15, 2024), Doc. No. 542 at PageID# 6080-86). The Chief Deputy Clerk, who participated in the exhibit review, provided information in response to these questions. (*Id.*). The courtroom deputy, who was responsible for managing the exhibits during and immediately after the trial, was not available during the hearing.

The Chief Deputy Clerk stated that the exhibit binders were as they appeared when received back from the jury. (*Id.* at PageID# 6087-88). She was asked about the writing on the front of the red defense exhibit binder and confirmed that she did not write on the binder and did not know who wrote it. (*Id.* at PageID# 6088). She stated that she added blank post-it notes to Maund Exhibit 151 and placed the Maund USB drive and a copy of the USB drive in separate envelopes, but did not make any of the notes on the binder tabs or on the cover of the binder.[10]

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10. The Chief Deputy Clerk stated that the following markers were present when she received the exhibit binders from the courtroom deputy: (1) tabs with handwritten notes stating, "on flash drive"; (2) a tab stating "Brockway"; (3) a sticky note, but no tab, delineating "Maund 79"; (4) and a sticky note on Carey exhibit 6 that states "C6." (Hearing Trans. (May 15, 2024), Doc. No. 542 at PageID# 6092-93).

(*Id.* at PageID# 6088-93). The Chief Deputy Clerk also confirmed that she did not make any markings on Carey Exhibit 4. (*Id.* at PageID# 6093).

At the hearing, the Chief Deputy Clerk and the Court understood that the evidence and evidence binders as they were reviewed post-trial were in the same form as when they were presented to the jury. When the Court initiated a review of the exhibits in response to media inquiries, the Government exhibits were in the two white binders used at trial, and the defense exhibits were all in a red binder, with handwritten tabs delineating the separate exhibits for each defendant. The red binder had the cover sheet created by Maund's defense team. Handwritten additions to this cover sheet stated: "Brockway Exhibits," "Carey Exhibits," and "(flash drive included)."

During the trial, however, each defendant had a separate exhibit binder in a different color. Maund's exhibits were in a red binder. Brockway's exhibits were in a black binder. And Carey's exhibits were in a white binder with a blue slip sheet.

The Court understood before and during the *Remmer* hearing that the defense exhibits were combined and sent to the jury in a single binder—the red binder. After the hearing, however, while attempting to gather information in response to questions from Maund's counsel about the handwriting and sticky notes in the binder that could not be identified by the Chief Deputy Clerk, the Court learned, for the first time, that the defense exhibits were combined into a single binder *after* the verdict. And it was at that time, *after* the trial, that the handwritten markings on

the slip sheet, and the internal dividers for "Brockway" and "Carey" were added. (*See* Doc. No. 541).

Unfortunately, this misunderstanding had the consequence that when the jurors were questioned about whether they had viewed certain defense exhibits, they were asked if they recalled looking in a "red binder," when the exhibits at issue had not been provided to them in a red binder.[11]

3. Testimony

During the hearing, the jurors testified individually concerning their review of the exhibits at issue. (Hearing Trans. (May 15, 2024), Doc. No. 542). The Court asked a series of questions and then counsel for each of the parties had the opportunity to ask additional questions.[12]

The jurors were questioned about their review of the evidence in general, as well as their knowledge of specific

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11. Defendants argue that the misunderstanding about the presentation of exhibits and the delay in time between the trial and the *Remmer* hearing rendered the hearing constitutionally ineffective.

12. Before the hearing, the parties submitted lists of proposed question for the court to ask the jurors. (*See* Doc. Nos. 532, 535). The morning of the hearing, the Court provided the parties with a list of the questions it intended to ask and gave the parties the opportunity to raise objections to the proposed questions. The Court modified the wording of certain questions to address the parties' comments. (*See* Hearing Trans. (May 15, 2024), Doc. No. 542 at PageID# 6062-6080).

unadmitted exhibits that were included with the admitted exhibits. The jurors universally agreed that they did not look at all of the exhibits during their deliberations, instead they focused on certain exhibits. Virtually all of the jurors recalled that the jury listened the recording of the October 25, 2021 meeting between Brockway and Conaway during their deliberations. The jurors were asked if they recalled seeing five specific exhibits: the two photos of ammunition (Gov't Exs. 254, 257); the USB drive containing the unredacted excerpt of the recording of the October 25, 2021 meeting (Carey Ex. 3); the one-page transcript of the excerpt (Carey Ex. 4); and the unredacted summary of bank transfers from Maund to Peled (Gov't Ex. 359). All of the jurors agreed that their memory of the trial and deliberations had faded.

a. Photos of Ammunition

Juror Nos. 2, 3, and 12 recalled viewing photos of ammunition, but did not specifically recall Government Exhibits 254, 257. (Hearing Trans. (May 15, 2024), Doc. No. 542 at PageID# 6132, 6163, 6219-20). Similarly, Juror No. 13 could not recall with certainty whether he looked at photos of ammunition during deliberations or only during the trial. (*Id.* at PageID# 6230). The remaining jurors stated that they either did not look at photos of ammunition during deliberations or did not recall having done so. (*Id.* at PageID# 6101, 6111, 6122, 6144, 6154, 6172, 6192, 6209).

b. Transcripts

Eleven of the twelve jurors testified that they did not see or did not recall seeing any transcripts during

deliberations.[13] (*Id.* at PageID# 6099-6100, 6111, 6121, 6143, 6153, 6163, 6170, 6190, 6206-07, 6218, 6228-29). Juror No. 2 testified that she saw a transcript in the jury room but spent very little time reviewing it and that there were no discussions about the transcript. (*Id.* at PageID# 6131). When shown Carey Ex. 4, Juror No. 2 testified as follows:

> Court: Okay. You mentioned earlier a transcript. Do you know whether the transcript – the portion of the transcript that's in front of you, do you know whether that's the specific one you recall reviewing?

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13. Juror No. 7 initially stated that she recalled seeing a transcript in the jury room, but it became apparent during her testimony that she misunderstood what a transcript was and thought it referred to the recording itself. (Hearing Trans. (May 15, 2024), Doc. No. 542 at PageID# 6188-89). After the Court explained that a transcript was written as opposed to a recording, she said she could not recall if there were transcripts in the jury room. (*Id.* at PageID# 6190).

Juror No. 10 also at first stated that she recalled seeing a transcript in the jury room, but then said that she could not recall and that she was having trouble distinguishing between the trial and deliberations. (*Id.* at PageID# 6206-07).

Juror No. 13 also at first stated that she recalled seeing transcripts, but then corrected herself, explaining that she did not think they had transcripts in the jury room. (*Id.* at PageID# 6229). Later in her testimony she was more confident in her memory and stated, "Now I'm recollecting, we didn't have anything to read, so we kind of had to replay them to hear certain parts." (*Id.* at PageID# 6236-37).

> Witness: I do not know if this is the specific one, but I do remember the conversation was between those two people.
>
> Court: Which two people?
>
> Witness: Conway and Brockway.
>
> Court: Again, you recall seeing a transcript of this as opposed to just listening to the conversation?
>
> Witness: Both, yes.
>
> Court: Because transcripts were [ ] provided during the trial. And do you specifically remember looking at a transcript during your deliberations as opposed to seeing it in trial?
>
> Witness: I'll say I don't recall because I feel like we did because we couldn't understand parts of the recording.
>
> Court: Okay. So during deliberations you have a memory of looking at a transcript?
>
> Witness: I feel like I do, yes.

(*Id.* at PageID# 6133-34).

Juror No. 5 was included in the Court's count of jurors who testified that they did not see transcripts

during deliberations because she testified that she did not personally see a transcript in the deliberation room. (*Id.* at PageID# 6170). But Juror No. 5 did say that she was "sure it was in there and one person opened it." (*Id.*). Juror No. 5, for whom English was not a first language, was sure that the person who was playing the recordings was also reading from something. "[W]e had one person who was putting all the CDs and everything in and sometimes reading some of the stuff to us." (*Id.* at PageID# 6181). But she did not see the transcript herself and agreed the juror could have been reading from something else such as another exhibit, notes, or even the jury instructions. (*Id.* at PageID# 6184).

Juror No. 5 was specifically asked whether one of the jurors was reading from something to clarify what was being said during the recordings and answered, "No, it was just when we stopped—I mean literally we went through a lot of, like—listened to some of them over and over and over again . . . if somebody didn't understand, then . . . she was, like, reading some of the stuff and then listen to it again and again." (*Id.* at PageID# 6181-82; *see also id.* at PageID# 6179 (stating that the jury listened to some of the recordings "over and over again just to make sure that we hear[d] what we really heard").

The jurors who were called to testify later in the hearing did not share Juror No. 5's recollection of someone reading from the transcript. (*See id.*, PageID# 6199, 6225, 6236). To the extent Juror No. 5 believed the juror who was "reading some of the stuff" was reading from a transcript of the recordings, the Court finds she was likely mistaken.

It bears noting that some of the contradictions in her testimony may have been due to difficulty understanding the nuance in the questions asked. While Juror No. 5 spoke fluent English, it is not her first language. Even some of the native English speakers had trouble discerning the recordings from the written transcripts of those recordings.

c. The USB

The jurors were asked whether they listened to conversations on a USB drive and all answered in the affirmative, though one juror—Juror No. 4—clarified that she did not recall what medium the recordings were on. (*Id.* throughout and at PageID# 6111). The Court views this testimony of limited value in determining whether the recordings were on a USB drive or some other medium. Except as discussed below, the jurors appeared focused on the fact that they listened to recordings, not the specific medium those recordings were on.

Two jurors, however, stated that they recognized the USB drive that was Carey Ex. 3. Juror No. 9 testified that he recognized it from the black color and red writing and stated that it was used on the tv to listen to the recording. (*Id.* at PageID# 6145-46). Juror No. 7 also testified that she remembered seeing the USB drive during deliberations. (*Id.* at PageID# 6197). She said it was used to play some of the recordings. (*Id.*).

d. Spreadsheet

The jurors were shown the spreadsheet that was Government Exhibit 359. All but two of the twelve jurors testified that they did not look at it or did not recall looking at it during deliberations. (*Id.* at PageID# 6106, 6112-13, 6124-25, 6136, 6148, 6156, 6175, 6196, 6214, 6224, 6234). Juror No. 7 said she looked at something similar, but did not think it was Government Exhibit 359. (*Id.* at PageID# 6196). Juror No. 3 was less certain. (*Id.* at PageID# 6165). She recalled a spreadsheet, but was not sure if it was Government exhibit 359. (*Id.*).

e. Red Binder

As explained above, during the hearing, the Court and the parties were operating under the misunderstanding that the defense exhibits were consolidated into the red binder before the exhibits were delivered to the jury for deliberations. As a result, the jurors were asked questions about whether they specifically looked at exhibits in the red binder. Most of the jurors responded that they generally recalled that the exhibits were in binders, but they were less confident about the color of the binders that they reviewed. (*See e.g., id.* at PageID# 6106-07, 6113, 6125, 6137, 6166, 6213). Based on this testimony, the misunderstanding regarding the consolidation of exhibits did not materially affect the hearing.

From the testimony at the hearing, the Court concludes that at least one of the jurors reviewed the unredacted transcript of the excerpt of the recording of the October

25, 2021 meeting between Brockway and Conaway, which was Carey Exhibit 4. It is also likely that jurors listened to the unredacted recording. Two jurors recognized the appearance of the USB drive that was Carey Exhibit 3 and one juror said that it was used to play a recording. If that juror's recollection is accurate, it would have exposed all of the jurors to the unredacted recording.

III. APPLICABLE LAW

Rule 33 of the Federal Rules of Criminal Procedure permits a district court to "vacate any judgment and grant a new trial if the interest of justice so requires." The decision whether to grant a new trial is left to the sound discretion of the district court. *United States v. Pierce*, 62 F.3d 818, 823 (6th Cir. 1995). Although Rule 33 does not define the "interests of justice," it is "widely agreed" that the standard "allows the grant of a new trial where substantial legal error has occurred." *United States v. Munoz*, 605 F.3d 359, 373 (6th Cir. 2010) (citing cases).

The Fifth and Sixth Amendments to the United States Constitution guarantee a criminal defendant a fair trial, which includes a trial by an impartial jury and the right to confront witnesses against him. U.S. Const. Amend. V and VI. Indeed, "the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial." *Parker v. Gladden*, 385 U.S. 363, 364 (1966). And "[t]he presence of even a single biased juror deprives a defendant of [their] right to an impartial jury." *Lanier*, 988 F.3d at 294 (citing *Williams v. Bagley*, 380 F.3d 932, 944 (6th Cir. 2004)).

The Court acknowledges that "a constitutional error does not automatically require reversal of a conviction." *See Weaver v. Massachusetts*, 582 U.S. 286, 294 (2017) (citing *Arizona v. Fulminante*, 488 U.S. 279, 306 (1991) (quoting *Chapman v. California*, 386 U.S. 18 (1967)). Usually, "if the government can show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict,'" the error is deemed harmless, and the defendant is not entitled to a new trial. *Id.*

This harmless-error standard usually applies to circumstances in which extrinsic evidence has reached the jury. In the Sixth Circuit, however, the defendant has the burden to prove that "the improper contact caused actual prejudice to the verdict."[14] *In re Sittenfeld*, 49 F.4th 1061, 1066 (6th Cir. 2022). The Sixth Circuit is "the only circuit that places on the defendant the burden of proving bias . . . rather than requiring the Government to show 'that

14. The Court notes that the Sixth Circuit is unique in placing the burden of proof on the defendant. *See Cunningham v. Shoop*, 23 F.4th 636, 648-49 (6th Cir. 2022) (explaining that, contrary to other circuits, the Sixth Circuit has concluded that *Smith v. Phillips*, 455 U.S. 209 (1982), "shifted [*Remmer*'s] burden of showing bias at *Remmer* hearings to defendants and stripped defendants of the presumption of prejudice"); *United States v. Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988) ("This court has consistently held that *Smith v. Phillips* reinterpreted *Remmer* to shift the burden of showing bias to the defendant rather than placing a heavy burden on the government to show that an unauthorized contact was harmless."). Given the limits imposed on jury questioning by Federal Rule of Evidence 606(b), this Circuit's placement of the burden on the defendant creates a substantial challenge for the defendant to carry that burden.

an unauthorized contact was harmless.'" *Lanier*, 988 F.3d at 295 (citing *United States v. Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988)).

But the Supreme Court has also recognized that some errors are not amenable to harmless-error analysis. *See e.g., Vasquez v. Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of member of a grand jury based on race); *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n.8 (1984) (right to self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 49, n.9 (1984) (right to a public hearing); *White v. Maryland*, 373 U.S. 59 (1963) (right to counsel at preliminary hearing during which defendant entered a plea of guilty); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (judge with financial interest in the outcome). When a constitutional error is not amenable to harmless-error analysis, the defendant is entitled to a new trial without a showing that the error affected the verdict. "[T]he term 'structural error' carries with it no talismanic significance as a doctrinal matter. It means only that the government is not entitled to deprive the defendant of a new trial by showing that the error was 'harmless beyond a reasonable doubt.'" *Weaver v. Massachusetts*, 582 U.S. 286, 299 (2017).

Defendants argue that the error resulted in fundamental unfairness to all parties which, due to the nature of the exhibits and the Court's evidentiary rulings, is not amenable to harmless-error review. Defendants contend the error is, therefore, structural and that they are entitled to new trials without regard to prejudice. The Government disagrees that the errors with the exhibits constitute structural error, noting that the Supreme Court

has rarely held that an error is structural and never in circumstances like those here. The Government argues that the error is subject to harmless-error review and that the Court must apply the Sixth Circuit standard, which, as stated above, places the burden on the defendant to prove that "the improper contact caused actual prejudice to the verdict." *In re Sittenfeld*, 49 F.4th at 1066.

IV. ANALYSIS

In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Supreme Court surveyed its previous rulings and divided trial errors into two categories: (1) those that constitute "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards;" and (2) "trial errors" which "occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 307-09.

Eight years after *Fulminante*, the Court again addressed "structural error" in *Neder v. United States*, 527 U.S. 1 (1999), a case involving an erroneous jury instruction. Before concluding that the "harmless-error standard" applied, Chief Justice Rehnquist, writing for a unanimous court, drew distinctions between "trial errors" and "structural errors" and observed that the Court's previous cases viewed structural errors as those that "'infect the entire trial process' and 'necessarily render a trial fundamentally unfair.'" *Id.* at 8 (quoting

Brecht v. Abrahamson, 507 U.S. 619, 630 (1993), and *Rose v Clark*, 478 U.S. 570, 579 (1986)). "Put another way, these [structural] errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Id.* at 8-9 (quoting *Rose*, 478 U.S. at 577-78).

The Supreme Court again considered the structural error doctrine in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006). That case involved a convicted defendant who claimed that his right to choose which attorney represented him during trial had been violated. *Id.* After reiterating that the Sixth Amendment right to counsel includes the right to counsel of one's own choosing, Justice Scalia went on to hold that the right to a "fair trial" was violated by the violation of the right to counsel, thus "[n]o additional showing of prejudice is required to make the violation 'complete.'" *Id.* at 146. Noting the distinctions between a defendant's right to counsel of his choice and the right to effective counsel, the Court had "little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.'" *Id.* at 150 (citation omitted). Justice Scalia explained this conclusion by pointing out the numerous differences in the trial process that can result from having different counsel and succinctly observed: "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *Id.*

Appendix B

In 2017, the Supreme Court returned to the structural error doctrine. *See Weaver v Massachusetts*, 582 U.S. 286 (2017). After surveying previous cases, Justice Kennedy observed that "the precise reason why a particular error is not amenable to [harmless-error] analysis—and thus the precise reason why the Court has deemed it structural—varies in a significant way from error to error." *Id.* at 295. The Court then summarized three rationales for why a particular error may be deemed structural: (1) "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest"; (2) "if the effects of the error are simply too hard to measure"; and (3) "if the error always results in a fundamental unfairness."[15] *Id.* at 295-96. More than one of these rationales may be part of the reason an error is deemed to be structural, but Justice Kennedy emphasized that "an error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id.* at 296 (citing *Gonzalez-Lopez*, 548 U.S. at 149, n.4 (rejecting the idea that structural errors "always or necessarily render a trial fundamentally unfair and unreliable")).

In determining whether this error is structural, which automatically requires a new trial, or is a trial error subject to harmless-error inquiry, the Court is mindful that the Supreme Court has cautioned trial courts about the danger of "import[ing] into the initial structural-

15. In identifying "at least three broad rationales," Justice Kennedy left open the possibility that there are other reasons a particular error is not amenable to harmless-error review. *Weaver*, 582 U.S. at 295.

error determination (*i.e.* whether an error is structural) a case-by-case approach that is more consistent with our traditional harmless-error inquiry (*i.e.*, whether an error is harmless)." *Neder*, 527 U.S. at 14.

With this background in mind, the Court finds that the errors in presenting certain exhibits to the jury constitute structural error. Before explaining this conclusion, the Court finds it important to first address fairness, which is the basis for the third category of structural error described in *Weaver*. 582 U.S. at 296. Justice Kennedy stated that one rationale for finding an error structural is when the error *always* results in fundamental unfairness. *Id.* The errors here do not fall into this *Weaver* category—there is no question that circumstances in which extraneous information reaches the jury do not result in fundamental unfairness in every case.[16] But it bears mentioning that the errors in this case *did* result in fundamental unfairness. Here, due to an administrative mistake, the court provided the jury exhibits that had not been admitted into evidence. And, unlike cases in which the extraneous information is obviously not part of the evidence presented during the trial, this extraneous evidence was delivered to the jury in evidence binders, in some cases marked with evidence stickers. Likely in part because of the apparent imprimatur of the Court, the error went unnoticed until well after the jury reached a verdict. Defendants are not entitled to a perfect trial, but they are entitled to a fair trial. *Lutwak v United States*, 344 U.S.

16. The Court does not consider whether there is a threshold above which the quantity of extraneous evidence provided to the jury would result in fundamental unfairness in every case.

604, 619 (1953). The error here resulted in fundamental unfairness to these defendants.

The error here implicates the second rationale articulated by Justice Kennedy in *Weaver* – the effects of the error are simply too hard to measure. *Weaver*, 582 U.S. at 295. This is largely because of the Court's conditional ruling that admission of Carey Exhibits 3 and 4 would lead to additional admissible evidence. Brockway and Maund both expressed intentions of introducing statements made during the July 2020 meeting if Carey Exhibit 3 was admitted and they were denied the opportunity to do so based on the mistaken understanding that the jury would not receive Carey Exhibit 3.

This is not the first case where trial jurors have received documents or other extraneous information not admitted in court, nor will it be the last. Typically, such error is amenable to harmless-error inquiry.[17] The structural error here is distinguishable because the Court had ruled that the erroneously provided documents would open the door to the presentation of additional evidence.

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17. Although circumstances in which extraneous information reaches the jury are usually amenable to harmless-error analysis, other courts have found structural error when the Court provided the jury incriminating evidence that had not been presented at trial. *See e.g., United States v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir. 1996) (finding that sending tapes to the jury room "violate[d] the basic framework of the trial system" and that "where the error is so fundamental and defies meaningful review . . . harmless or plain error analysis may not be applied"), amended by *United States v. Noushfar*, 78 F.3d 1442 (9th Cir. 1996).

Thus, any inquiry into prejudice would necessitate consideration not only of the effects of the evidence erroneously presented to the jury, but also the effects of evidence ***not*** presented, not to mention speculation about the potential arguments of counsel had the various exhibits been properly admitted. Neither the parties nor the Court can know what impact, if any, the evidence Brockway and Maund would have introduced would have on the jury because they were not given that opportunity, nor was Carey or the Government given the opportunity to test that evidence through cross-examination or rebuttal evidence.

Had the same circumstances occurred without Brockway or Maund stating what they would do if Carey sought to admit his Exhibit 3, then giving Exhibit 3 to the jury may have fallen under the "harmless-error" standard like numerous cases involving jury access to extraneous information. *See e.g., United States v. Lanier*, 988 F.3d 284 (6th Cir. 2021); *Ewing v. Horton*, 914 F.3d 1027 (6th Cir. 2019); *United States v. Gonzalez*, 227 F.3d 520 (6th Cir. 2000); *United States v. Walker*, 1 F.3d 423 (6th Cir. 1993); *United States v. Zelinka*, 862 F.2d 92 (6th Cir. 1988); *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984). But nobody can measure, with any degree of certainty, the effects of something that did not happen. *Weaver*, 582 U.S. at 295. Under the circumstances here, "[h]armless-error analysis . . . would be a speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. 150.

The jury was exposed to extraneous evidence upon which the Court conditioned potential submission of other

evidence, the effects of which are too hard to measure. The Court thus finds the error in this case is not amenable to harmless-error analysis and the defendants are entitled to a new trial without a showing of prejudice. *See Weaver*, 582 U.S. at 295-96. Indeed, it would be fundamentally unfair to expect the defense to meet such a burden under these circumstances when the uncertainties of the effects of the additional evidence make such a showing virtually impossible.

V. CONCLUSION

For the reasons stated, defendants' motions for a new trial (Doc. Nos. 491, 496, 493) are **GRANTED**. The new trial will be on only the counts on which the jury found the defendants guilty, as double jeopardy bars retrial of acquitted counts. *See Benton v. Maryland*, 395 U.S. 784, 796 (1969) (holding that the Double Jeopardy Clause barred retrial on acquitted count after the jury returned a split guilty/not guilty verdict); *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial.").

It is so **ORDERED**.

/s/ William L. Campbell, Jr.
William L. Campbell, Jr.
Chief United States District Judge