Testing the Validity of a Verdict

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“A hearing permits counsel to probe the juror’s memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror’s demeanor under cross‑examination and to evaluate his answers in light of the particular circumstances of the case.”

Tanner v. United States, 483 U.S. 107, 135 (1987) (Marshall, J., concurring) (quoting Smith v. Phillips, 455 U.S. 209, 222 (1982) (O’Connor, J., concurring)).

In McDonough Power Equipment, Inc. v. Greenwood, the Supreme Court reaffirmed that a litigant is entitled to a fair trial but not a perfect one, because there is no such thing as a perfect trial.[[2]](#footnote-2) When allegations of juror misconduct arise, prompting claims of an unfair trial, courts are reluctant to pierce the secrecy of the jury deliberation process. The language of the rule governing juror impeachment allows testimony from jurors in three discrete circumstances. This Article examines two recent cases, each from a different federal circuit court of appeals. The petitioners sought review by the Supreme Court to determine whether an evidentiary hearing was required following allegations of juror misconduct.

Because the results of these cases were not consistent with one another, this Article argues that the Supreme Court should have granted certiorari to address this circuit split. Further, it argues that a clearly worded and uniform standard—one that is applied by all federal courts (and that allows for circumstantial evidence)—will alleviate any distinctions in how the standard is applied.Finally, it argues that the denial of a posttrial evidentiary hearing seeking to address claims of juror misconduct invokes constitutional rights.

Juror misconduct is a serious allegation that deserves a meaningful remedy. Despite fears that posttrial investigation will uproot the jury system, juror impeachment is necessary to ensure that the minimum requirements established by due process and the Sixth Amendment are met to provide a fair trial.

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Introduction

In 2022, the Supreme Court had two opportunities to clarify the standard necessary for a federal district court to grant a *Remmer* hearing, an evidentiary posttrial hearing originating from the case *Remmer v. United States.*[[3]](#footnote-3)A *Remmer* hearing is requested when juror misconduct or juror bias is suspected.[[4]](#footnote-4) The Court’s first opportunity was in *Loughry v. United States*, a Fourth Circuit Court of Appeals case in which the defendant was denied a *Remmer* hearing because he could not offer any concrete proof of juror misconduct.[[5]](#footnote-5) The second opportunity presented itself in *Shoop v. Cunningham*, a case in which the Sixth Circuit Court of Appeals granted the defendant a hearing on the grounds that juror misconduct might have affected the outcome of the trial.[[6]](#footnote-6)

Because the Fourth and Sixth Circuits applied different standards and reached different results, the Supreme Court might have been expected to grant certiorari in *Loughry*, *Cunningham*, or both. It declined, however, to hear either case. Writing in a dissent from the Court’s decision to deny certiorari in *Cunningham*,[[7]](#footnote-7) Justice Thomas (who was joined by Justices Alito and Gorsuch) asserted that he would have granted certiorari and issued a summary reversal.[[8]](#footnote-8) While this Article does not agree with the dissenters that the case should have been summarily reversed, they were correct in concluding that something is seriously awry with post‑conviction practice when one circuit grants a hearing that could result in a new trial, on the mere *possibility* that evidence of juror misconduct may turn up,[[9]](#footnote-9) while another jurisdiction requires more concrete and direct evidence to grant the same hearing.[[10]](#footnote-10) As a result, the Supreme Court should have taken up both the *Cunningham* and *Loughry* cases to resolve the circuit split.

This Article addresses the inconsistency with which federal courts apply the standard for *Remmer* hearings. The inconsistency will be analyzed through the lens of Federal Rule of Evidence 606 (“Rule 606”), which allows *inquiry* into the validity of a jury verdict when there has been an allegation of juror misconduct.[[11]](#footnote-11)

Part I provides an overview of pre‑1975 approaches to juror impeachment; the creation of Rule 606 itself; and commonly referenced terms, including “juror competency,” “juror misconduct,” and “juror bias,” in addition to the words “extraneous” and “outside,” which are found within the rule. Additionally, Part I discusses two significant Supreme Court cases, each of which involved a criminal conviction and addressed the issue of whether the defendant should have been granted an evidentiary hearing in light of allegations of jury tampering, misconduct, or bias. Finally, Part I addresses a third case, which focuses on juror bias in a civil matter.[[12]](#footnote-12)

Part II addresses the circuit split. First, it details the different standards being utilized in a number of federal circuit courts of appeals. Next, it turns to *Loughry* and *Cunningham* and discusses the facts, procedural postures of the cases, and, ultimately, the denials of certiorari.

This leads to Part III, which takes a view contrary to that of Justice Thomas and argues that both due process and Sixth Amendment rights are at stake when a federal trial court decides to either grant or deny a *Remmer* hearing.

Finally, Part IV recommends the adoption of a uniform standard in granting a *Remmer* hearing. The language of the proposed standard is close to the one currently in use by the Sixth Circuit, but also has significant and important changes. It abandons the circuit‑specific language that has led to inconsistent decisions and instead uses standardized vocabulary. Moreover, Part IV argues that circumstantial, and not direct evidence, is all that is needed for a threshold inquiry into whether there has been a claim of juror bias or misconduct.

The goal of this Article is twofold: first, to stress that a circuit split does in fact exist where the standard for *Remmer* hearings is concerned and, second, to show that the Supreme Court’s hesitance in addressing this split leaves defendants to confront confusing and unfair procedural standards whenever they seek post‑conviction relief as a result of juror misconduct. Only when the procedure for *Remmer* hearings becomes standardized across the federal circuits will defendants harmed by juror misconduct be able to meaningfully exercise their constitutional right to a fair—though imperfect—trial.

I. The Origins of Federal Rule of Evidence 606 and Defendants’ Access to Post‑Conviction Relief

A. Early Approaches to Juror Impeachment

The secrecy of the jury deliberation process extends back to a decision from the English justice Lord Mansfield in the late eighteenth century case of *Vaise v. Delaval*, a case that centered on the admissibility of one juror’s pre‑trial affidavit.[[13]](#footnote-13) Within that affidavit, the juror attested that when he and other jurors were unable to agree on the verdict, they flipped a coin to determine the defendant’s guilt or innocence.[[14]](#footnote-14) In 1785, Lord Mansfield wrote the following: “The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor: but in every such case the Court must derive their knowledge from some other source: such as a person having seen the transaction . . . .”[[15]](#footnote-15)

In the centuries following the *Vaise* decision, American courts closely adhered to its holding. The Supreme Court has decided a number of cases centering on juror impeachment in both civil and criminal cases. In one of its early decisions on juror impeachment, the 1915 case *McDonald v. Pless*,[[16]](#footnote-16) the Court emphasized the importance of the no‑impeachment rule:

For while by statute in a few jurisdictions, and by decisions in others, the affidavit of a juror may be received to prove the misconduct of himself and his fellows, the weight of authority is that a juror cannot impeach his own verdict. The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial, the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.[[17]](#footnote-17)

The Court’s analysis reflects the fact that there were already distinct approaches within the American court system regarding the no‑impeachment rule during the nineteenth and early twentieth centuries.[[18]](#footnote-18) The “Iowa approach” to juror impeachment excluded only evidence that touched upon the “subjective intentions and thought processes” of the juror in reaching a verdict.[[19]](#footnote-19) In contrast, the “federal approach” allowed evidence of what occurred during jury deliberations only if the evidence showed that there was an “extraneous” or outside influence on the jury.[[20]](#footnote-20) The decision in *Pless* signaled a rejection of the Iowa approach.

Over seventy years after the decision in *Pless*,the Supreme Court reaffirmed the importance of the no‑impeachment rule in *Tanner v. United States*.[[21]](#footnote-21)Justice O’Connor, writing for the majority, noted that “full and frank discussion in the jury room, jurors’ willingness to return an unpopular verdict, and the community’s trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct” occurring sometimes weeks or months after a verdict.[[22]](#footnote-22)

B. The Creation of Rule 606

The Federal Rules of Evidence became effective in 1975, and with that adoption came the creation of Rule 606 on juror impeachment. At the time of the adoption, Rule 606 was titled “Competency of Juror as Witness” and consisted of two parts.[[23]](#footnote-23) Although the rule was restyled in 2011, its content remains substantially the same.[[24]](#footnote-24)

The rule’s first part, Rule 606(a), prohibits a juror from testifying in front of other jurors at trial; but in the event that a juror is called to testify outside of the remaining jurors’ presence, the rule allows litigants the opportunity to object to the testimony.[[25]](#footnote-25)

The rule’s second part, Rule 606(b), consists of two subparts and indicates what kind of juror testimony is prohibited.[[26]](#footnote-26) This subdivision addresses the prohibited testimony of a juror when there is an “inquiry into the validity of a verdict.”[[27]](#footnote-27) Specifically, Rule 606(b) restricts testimony (as well as the introduction of an affidavit or other evidence) about statements made during the deliberations, incidents that occurred during the deliberations, the effect of anything on the juror or the juror’s vote, or any mental processes concerning a verdict.[[28]](#footnote-28)

Coming to a consensus on the wording of Rule 606 was not an easy task.[[29]](#footnote-29) During the early stages of the drafting process, the House of Representatives (“House”) and Senate had different ideas about the restrictions that should be imposed under the rule. The version proposed by the House was broader than that proposed by the Senate and would have prevented inquiries into jurors’ mental processes while still allowing juror testimony about “objective matters occurring during juror deliberations.”[[30]](#footnote-30)

The Senate took exception with the House’s version for three reasons: first, it might lead to the harassment of jurors by aggrieved parties seeking posttrial relief; second, it was susceptible to exploitation by former jurors who were “disgruntled or otherwise badly‑motivated”; and third, it permitted a jury’s internal deliberations to be used as a basis for challenging verdicts.[[31]](#footnote-31) This last point was perhaps the most crucial for the Senate. Finality was viewed as an extremely important goal of the judicial process.[[32]](#footnote-32) Thus, the notes of Rule 606 from the Senate Judiciary Committee underscore the concern Senate members had for undoing verdicts, which was considered “unwarranted and ill‑advised.”[[33]](#footnote-33) In the notes, Senate leaders wrote:

Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post‑trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit *any* inquiry into the internal deliberation of the jurors.[[34]](#footnote-34)

As the use of the word “any” makes clear, the Senate version was far more rigid than the House version. However, there are exceptions to subpart (b)(1) that are enumerated under Rule 606(b)(2).[[35]](#footnote-35) These exceptions allow a juror to testify about what occurred in the jury deliberation room *only* when (1) extraneous prejudicial information has been improperly brought to the attention of the jury, (2) when there has been an improper outside influence, or (3) when a mistake has been made in entering a verdict on the jury form.[[36]](#footnote-36)

1. Words Have Meaning

The insulation of the jury from inquiry, for reasons not listed in Rule 606, means that an attorney (often the attorney for the defendant) is left with the herculean task of trying to surmount a viable challenge when there is an allegation of juror misconduct or bias. This challenge is made yet more difficult by the very language of Rule 606.

For example, defining what “extraneous” prejudicial information is and what improper “outside” influences are has proven difficult when applied to particular fact scenarios and cases.[[37]](#footnote-37) In *Warger v. Shauers*, Justice Sotomayor opted to interpret the words according to their “plain meaning” and explained that information “derive[d] from a source ‘external’ to the jury” is extraneous.[[38]](#footnote-38) Justice Sotomayor went on to add, that “‘[e]xternal’ matters include publicity and information related specifically to the case the jurors are meant to decide, while ‘internal’ matters include the general body of experiences that jurors are understood to bring with them to the jury room.”[[39]](#footnote-39) The Supreme Court’s decision in *Mattox v. United States* emphasized that a juror cannot testify about the effect that an extraneous influence had on the deliberation process—only that the extraneous influence existed.[[40]](#footnote-40)

Clarifying what a court will consider as an outside influence has also been difficult, as the use of the words “extraneous” and “outside” are not synonymous in the Court’s view.[[41]](#footnote-41) In *Tanner v. United States*, discussed *infra*, the Supreme Courtfamously rejected the petitioners’ argument that the use of alcohol and illicit drugs by jurors during deliberations resulted in an outside influence on the jury after both defendants were convicted.[[42]](#footnote-42) Instead, the Court opined that alcohol and drugs are “no more an ‘outside influence’ than a virus, poorly prepared food, or a lack of sleep.”[[43]](#footnote-43) Expressed differently, because the alcohol and drugs had been *internalized*, these substances were outside of the scope of what would be considered an “outside” influence. As a result, juror testimony about bribery or a juror’s reading of the newspaper would be permitted, but juror testimony about alcohol and drug use would be barred.[[44]](#footnote-44)

Just as the words “extraneous” and “outside” have confused courts,[[45]](#footnote-45) the very title of the rule itself is confusing. Currently, Rule 606 is titled “Juror’s Competency as a Witness,” but, in many ways, the word “competency” is a misnomer. Generally, jurors are found to be competent unless they fail to meet the qualifications necessary to sit on a jury.[[46]](#footnote-46) Under 28 U.S.C. § 1865, a juror will not be seated on a federal grand or petit jury if the person (1) is not a citizen of the United States who is eighteen or older and has not resided within a judicial district for at least one year; (2) is unable to read, write, or understand English with a degree of proficiency; (3) is unable to speak English; (4) is incapable of rendering satisfactory jury service due to a mental or physical infirmity; or (5) has a pending charge or has been convicted in either a state or federal court and has been disenfranchised.[[47]](#footnote-47)

During oral arguments in *Tanner*, Justice O’Connor inquired if what occurred in the district court trial was an instance of juror incompetence or one of alleged juror misconduct—and whether any distinction made a difference.[[48]](#footnote-48) Counsel for the petitioners responded that, while both incompetence and misconduct were at issue, the petitioners had specifically framed the issue as one of incompetence because it mattered if the juror was “physically or mentally competent to qualify as a juror initially, under [section] 1865.”[[49]](#footnote-49) In that sense, competence has been defined as the qualification necessary to sit on a jury.[[50]](#footnote-50) In contrast, misconduct involves the actions of the jurors or the extraneous or outside influences that impaired the juror deliberation process.[[51]](#footnote-51)

When the Court’s decision came down in *Tanner*, Justice O’Connor revisited the distinction between juror incompetence and juror misconduct. Justice O’Connor found that the petitioners had alleged both minor and “more dramatic” instances of juror misconduct.[[52]](#footnote-52) Nonetheless, any allegations of incompetence were meager and had traditionally been treated as “internal” by federal courts.[[53]](#footnote-53) Accordingly, with the adoption of Rule 606, it was unclear if juror incompetence should still be treated as internal, but petitioners had failed to allege sufficiently substantial allegations of incompetence.[[54]](#footnote-54)

Lastly, juror bias is also often conflated with juror misconduct. Juror misconduct occurs when jurors who have been seated on the jury violate their oath by engaging in conduct that affects their ability to remain impartial.[[55]](#footnote-55) Juror misconduct can take many forms, including researching non‑evidentiary material, conducting experiments, or tampering with the jury by contacting third parties.[[56]](#footnote-56) While juror misconduct addresses what happens once a person has been seated on a jury, juror bias can occur either during the voir dire process in jury selection or it can take the form of an accusation that a juror’s personal prejudices have affected the overall deliberation process.[[57]](#footnote-57) “Apart from showing that a juror gave dishonest or misleading answers during voir dire, a party may still be entitled to relief by demonstrating . . . an actual bias or that a bias may be imputed to the juror based on the juror’s conduct . . . .”[[58]](#footnote-58)

The Supreme Court allowed one exception regarding the issue of juror bias and the no‑impeachment rule. The *Pena‑Rodriguez v. Colorado* case exemplifies an instance where the Supreme Court’s strict adherence to Rule 606 was ceded to important and key principles, including the recognition that racial bias is a “familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.”[[59]](#footnote-59) Yet even in reaching this decision, the Court emphasized that constitutional exceptions to the no‑impeachment rule should be permitted only when “juror bias [is] so extreme that, almost by definition, the jury trial right has been abridged.”[[60]](#footnote-60)

While recommendations and suggestions for a change to the *language* of Rule 606 are beyond the scope of this Article, plenty of suggestions have been made regarding ways to address what has become a morass of case law surrounding the above referenced terms. For instance, in his article, *Extraneous Prejudicial Information: Remedying Prejudicial Juror Statements Made During Deliberations*, Nicholas S. Bauman cites changes that states have undertaken to broaden the scope of their evidentiary rules on juror impeachment without undermining the finality of judgments or foreclosing a free deliberative process for jurors.[[61]](#footnote-61) Further, Bauman states, “Rule 606(b) should be amended to clarify that prejudicial statements based on a juror’s personal experience are always extraneous, enable jurors to testify regarding these statements when they are made during deliberations, and preclude testimony regarding the statements’ subjective effect.”[[62]](#footnote-62)

This is a more expansive reading of the language within Rule 606 that would help to define the contours of what courts can deem “extraneous” or “outside.” But these are simply suggestions. The jurisprudence in this area is complicated by policy considerations, judicial interpretations, and even technological advancements that have created more opportunities to influence juries.

C. Defendant Challenges to the No‑Impeachment Rule

Criminal defendants may seek post‑conviction relief in the form of an evidentiaryhearing to investigate claims of juror bias and juror misconduct. As noted, these hearings are commonly referred to as *Remmer* hearings, following the Supreme Court’s 1954 decision in *Remmer v. United States*.[[63]](#footnote-63) The decision predated the adoption of Rule 606 by over twenty years, but the holding continues to guide federal judges as they consider the circumstances under which they should grant a hearing. This Section provides an overview of *Remmer* and *Tanner*,[[64]](#footnote-64) to lay the groundwork for the later analysis of both *Loughry v. United States*[[65]](#footnote-65) and *Shoop v. Cunningham*.[[66]](#footnote-66) It also presents the civil case *Warger v. Shauers*, to provide a more recent example of the Supreme Court’s reluctance to inquire about bias in jury selection and to clarify that these issues are not limited to criminal cases.[[67]](#footnote-67)

1. *Remmer v. United States*

In 1953, Elmer F. Remmer stood trial for federal tax evasion and was convicted on four counts.[[68]](#footnote-68) After the verdict, he became aware that one of the jurors in the trial, who later became the foreperson, had been offered a bribe in exchange for making a deal with Remmer.[[69]](#footnote-69) The foreperson, Irwin J. Smith, was approached by the briber, James H. Satterly, at Smith’s home.[[70]](#footnote-70) Smith was an insurance agent, and Satterly came, purportedly, to discuss an insurance policy.[[71]](#footnote-71) The conversation then turned to Remmer’s trial, as Satterly knew the defendant. Satterly allegedly said, “I know Bones Remmer very well. He sold Cal‑Neva for $850,000 and really got about $300,000 under the table which he daresn’t [sic] touch. Why don’t you make a deal with him?”[[72]](#footnote-72)

Smith reported the incident to the trial judge.[[73]](#footnote-73) According to newspaper articles, Smith believed Satterly had approached him in “jest,” but he alerted the court because of the judge’s warning that jurors should not discuss the case.[[74]](#footnote-74) The trial judge discussed the matter ex parte with federal prosecutors but did not inform trial counsel about the alleged bribe.[[75]](#footnote-75) The trial judge also notified the Federal Bureau of Investigation (FBI), and the agency investigated the bribery allegation.[[76]](#footnote-76)

Remmer and his counsel did not become aware of the bribe and the resulting investigation until after he was convicted.[[77]](#footnote-77) Remmer moved for a new trial, based on a number of errors, including the bribe.[[78]](#footnote-78) In an affidavit accompanyingthe motion for a new trial, Remmer argued that if trial counsel had been made aware of the incident, the defendant would have moved for a mistrial and requested that Smith be replaced with an alternate juror.[[79]](#footnote-79)

Unconvinced that the defendant had suffered any harm, the federal district court denied the motion for a new trial, without a hearing.[[80]](#footnote-80) Subsequently, Remmer appealed his convictions to the Ninth Circuit. The Ninth Circuit affirmed the district court ruling, noting that “if in fact an attempt had been made by persons associated with the defense to bribe a juror disclosure of the planned [FBI] investigation would have greatly decreased the likelihood that such investigation would be successful.”[[81]](#footnote-81) The Ninth Circuit also found that Remmer had failed to demonstrate sufficient prejudice to warrant a new trial.[[82]](#footnote-82)

Aggrieved, Remmer petitioned the Supreme Court on a writ of certiorari for the first time.[[83]](#footnote-83) The Supreme Court vacated the Ninth Circuit decision and remanded the case back to the federal district court. The Supreme Court directed the federal district court “to hold a hearing to determine whether the incident complained of [by Smith] was harmful to the petitioner and, if after [the] hearing” the incident was determined to be harmful, this warranted a grant of a new trial.[[84]](#footnote-84) The Supreme Court found that it is the trial court’s duty to “determine the circumstances, the impact thereof upon the juror, and whether or not [that impact] was prejudicial, in a hearing with all interested parties permitted to participate.”[[85]](#footnote-85) The Court further explained:

In a criminal case, any private communication, contact or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . . The 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.[[86]](#footnote-86)

When the case was remanded back to the district court following the Supreme Court’s decision, the evidentiary hearing was conducted, and the district court judge found that the incident involving Smith was “entirely harmless” to Remmer.[[87]](#footnote-87) Thus, Remmer had no relief. His convictions were affirmed.

While that might have ended the matter, a series of tax‑related Supreme Court cases prompted the Supreme Court to order[[88]](#footnote-88) the Ninth Circuit to rehear Remmer’s case, in order to identify any errors in light of those decisions.[[89]](#footnote-89) The appeals court reviewed the entire record again, including the district court’s findings regarding the alleged bribe.[[90]](#footnote-90) However, the Ninth Circuit affirmed Remmer’s convictions a second time, in light of the tax decisions.[[91]](#footnote-91)

Remmer’s case then reached the Supreme Court for the third and final time. At this point, the only question before the Court was whether there had been an “extraneous communication” between Smith, the foreperson, and Satterly, that interfered with Remmer’s right to a fair trial.[[92]](#footnote-92) Unfortunately, there had been a misunderstanding on the decision in *Remmer II* as to how the district court was to proceed with the case.

When the Supreme Court remanded the case back to the federal district court the first time, the Court had directed the district court to investigate “the incident complained of.”[[93]](#footnote-93) The federal district court judge incorrectly interpreted the Supreme Court directive to mean that it should investigate whether the alleged briber, Satterly, had committed any criminal offense.[[94]](#footnote-94) This mistaken interpretation led the district court to downplay the effect of the alleged bribe on Smith, the foreperson.[[95]](#footnote-95) In retrospect, the Supreme Court noted that its directive could have been more explicit and clarified that it had intended for the district court hearing to explore “Satterly’s communication with the juror *and* the impact thereof upon [Smith] then, immediately thereafter, and during the trial, taken together with the fact that the F.B.I. was investigating a circumstance involving the juror . . . .”[[96]](#footnote-96)

The first time the case came before the Supreme Court on a writ of certiorari, the Court found that the record was devoid of many important facts.[[97]](#footnote-97) In its third and final review of the case, the Supreme Court held that Remmer had been denied a new trial, because the district court failed to consider whether Smith had been affected by the “extraneous influences” during jury service.[[98]](#footnote-98) Writing for the Court, Chief Justice Warren stated, “We think [the] evidence, covering the total picture, reveals such a state of facts that neither Mr. Smith nor anyone else could say that he was not affected in his freedom of action as a juror.”[[99]](#footnote-99) Chief Justice Warren further elaborated that Smith “had been subjected to extraneous influences to which no juror should be subjected, for it is the law’s objective to guard jealously the sanctity of the jury’s right to operate as freely as possible from outside unauthorized intrusions . . . .”[[100]](#footnote-100) As a result, the Supreme Court vacated the Ninth Circuit’s decision and remanded the case to the federal district court again, but this time for a new trial.

The *Remmer* decision continues to inform cases involving the juror deliberation process, even after the passage of Rule 606. The case is also important for its repeated use of the phrase “extraneous influences,” which previously formed the basis for the “federal approach” to the no‑impeachment rule and would later make its way into the evidentiary rule.

2. *Tanner v. United States*

*Tanner,* a 1987 case, is important for its distinction between the words “extraneous” and “outside” found in Rule 606, as well, and for its interpretation of “juror incompetence” and “misconduct.”[[101]](#footnote-101) The case also serves as an example of a court’s denial of a *Remmer* hearing—even when presented with the most disturbing facts.

William M. Conover and Anthony R. Tanner (who were also associates) were tried jointly in the U.S. District Court for the Northern District of Florida for mail fraud and conspiring to defraud the United States.[[102]](#footnote-102) In September 1979, Conover’s employer, Seminole Electric, began construction on a power plant.[[103]](#footnote-103) After the previous construction company’s contract was terminated, Conover, who oversaw procurement on the project, called Tanner.[[104]](#footnote-104) Tanner owned a limerock mine, and it was determined that material from Tanner’s mine would be suitable to complete the project.[[105]](#footnote-105) The government alleged that in securing the loan for the project, Conover and Tanner had neglected to inform Seminole Electric about their friendship, which posed a conflict of interest.[[106]](#footnote-106) The first trial resulted in a hung jury and the two were retried and then convicted.[[107]](#footnote-107)

Shortly after the verdict in the second trial, Tanner’s trial counsel received unsolicited contact from individual jurors on two separate occasions.[[108]](#footnote-108) The first juror, Vera Asbul, contacted the attorney and claimed that jurors drank alcohol during the lunch breaks throughout the trial and that some of the jurors slept during the afternoon trial sessions.[[109]](#footnote-109) Given this information, the defendants moved for a new trial, among other requests, one day before they were to be sentenced.[[110]](#footnote-110)

The district court determined that the language of Rule 606(b) prohibited the *jurors* from being interviewed about intoxication during the lunch recesses.[[111]](#footnote-111) However, the district court could (and did) hear testimony from *non‑juror* witnesses in support of a motion for a new trial.[[112]](#footnote-112) Tanner’s trial counsel took the stand and testified that he had observed one of the jurors in a “giggly mood” but did not bring this to the attention of anyone in court.[[113]](#footnote-113) The trial judge also noted that no one had alerted the court to any sleeping jurors.[[114]](#footnote-114) As a result, the district court denied the defendants’ motion to interview jurors as well as their motion for a new trial.[[115]](#footnote-115)

In light of the district court’s decision, Tanner and Conover appealed their convictions to the Eleventh Circuit.[[116]](#footnote-116) While the appeal was pending, however, trial counsel was visited at his home by a second juror, Daniel Hardy.[[117]](#footnote-117) Hardy’s description of the conduct of the jurors during the trial proceedings was much more colorful and outrageous than the first juror’s had been. Hardy described his jury service as “one big party,” and stated that jurors ingested both illicit substances and alcohol.[[118]](#footnote-118) Hardy recounted that seven jurors drank alcohol during the noon recess: four jurors drank one to three pitchers of beer during other recesses, at least two jurors consumed mixed drinks, and on three occasions the foreperson drank a liter of wine.[[119]](#footnote-119) Hardy also observed or otherwise was aware of substance abuse among the jurors.[[120]](#footnote-120) One juror sold another marijuana.[[121]](#footnote-121) Jurors brought marijuana, cocaine, and drug paraphernalia into the courthouse.[[122]](#footnote-122) Hardy, himself, smoked marijuana on a regular basis during the trial proceedings.[[123]](#footnote-123) And he saw “one juror ingest cocaine five times and another juror ingest cocaine two or three times.”[[124]](#footnote-124) One juror described himself as “flying” during the trial.[[125]](#footnote-125) Finally, Hardy told trial counsel that jurors were in fact sleeping during the trial.[[126]](#footnote-126)

The jurors’ behavior during the trial had been weighing on Hardy’s conscience, so he came forward to speak directly to trial counsel.[[127]](#footnote-127) Hardy explained to trial counsel that no one had contacted him before he came to the attorney’s home, nor had he been offered anything in exchange for detailing what happened during the course of the trial.[[128]](#footnote-128) Hardy simply “felt . . . that Mr. Tanner should have a better opportunity to get somebody [on the jury] that would review the facts right.”[[129]](#footnote-129)

As a result of Hardy’s account to trial counsel, two private investigators interviewed Hardy, and the transcript of the interview was attached to a second motion for a new trial.[[130]](#footnote-130) The court denied this subsequent motion.[[131]](#footnote-131) The pair did not fare any better in the Eleventh Circuit, which affirmed the convictions.[[132]](#footnote-132)On the matter of whether the district court should have granted the defendants an evidentiary hearing on the allegations of juror misconduct, the Eleventh Circuit court of appeals wrote the following:

The decision to investigate allegations of jury misconduct rests within the sound discretion of the district court. . . . [Under Rule 606(b),] [w]hen an evidentiary hearing is conducted, the inquiry is limited to determining “whether extraneous prejudicial information was improperly brought to the jury’s attention or whether an outside influence was improperly brought to bear upon any juror.” The affidavit supporting appellants’ motion for new trial does not allege that prejudicial information was brought to the jury’s attention. Similarly, it does not allege that any outside influence was brought to bear upon any juror. Even if the allegations of substance abuse were true, there is no “adequate showing of extrinsic influence to overcome the presumption of jury impartiality.” Thus, the district court was under no duty to investigate the allegations, and did not abuse its discretion in refusing to conduct an evidentiary hearing.[[133]](#footnote-133)

The defendants then petitioned for and were granted a writ of certiorari in the Supreme Court. The issue before the Court was whether a second evidentiaryhearing should have been granted so that the jurors could have testified about the alcohol and drug use.[[134]](#footnote-134) Solicitor General Richard J. Lazarus began oral argument stating that ensuring the protection of jury privacy, preventing juror harassment, and preserving the finality of a verdict, meant that trials “traditionally demanded a hard, uncompromising, and rigid rule that bars at the outset postverdict testimony by a juror for the purpose of impeaching the jury’s verdict.”[[135]](#footnote-135) Solicitor General Lazarus acknowledged that testimony from a court bailiff or marshal could have been admitted as independent evidence in support of Tanner and Conover’s motion for a new trial; however, anything that went beyond the language of the rule would “invite the grossest abuse” of the secrecy of the jury deliberation process.[[136]](#footnote-136) Solicitor General Lazarus continued, “The choice, we admit, is between the lesser of two evils in this case: the exclusion of potentially relevant evidence versus undermining the jury system. Congress however, we think carefully considered this issue and opted for adherence to the general principle in order to preserve the sanctity of the jury system.”[[137]](#footnote-137)

In an amusing exchange, Justice Thurgood Marshall asked Solicitor General Lazarus if the government could conceive of cocaine as an outside influence.[[138]](#footnote-138) In response, Solicitor General Lazarus stated, “No, we would not, any more than we would believe that anything that a juror voluntarily ate for breakfast, lunch or dinner would be an outside influence.”[[139]](#footnote-139) To this Justice Marshall quipped, “Bacon and eggs and cocaine.”[[140]](#footnote-140)

The five to four decision in favor of the government on this issue meant that despite the outrageous and outlandish behavior of the jury in the petitioners’ trial, they would not receive any relief on this issue. In a separate dissenting opinion, Justice Marshall issued a stinging rebuke.[[141]](#footnote-141)First, Justice Marshall did not believe that Rule 606 was implicated by the facts in the case.[[142]](#footnote-142) To him, the rule did not prohibit the jurors from testifying about the consumption of alcohol and drugs during trial recesses.[[143]](#footnote-143) Justice Marshall asserted that the rule only contemplated testimony related to events that took place *during* jury deliberations—not those *unrelated* to what occurred in the jury deliberation room.[[144]](#footnote-144) Second, Justice Marshall believed alcohol and drugs should always be considered outside influences that have an effect on the jury.[[145]](#footnote-145) He reasoned that because the use of alcohol and drugs occurred “outside” of and prior to the deliberation process, a second hearing was necessary.[[146]](#footnote-146) He asserted that the no‑impeachment rule would not prohibit testimony on this topic.[[147]](#footnote-147) Finally, Justice Marshall took issue with the majority’s suggestion that the jury system would not survive posttrial investigations into juror misconduct.[[148]](#footnote-148) As he observed, Tanner and Conover were not seeking a perfect jury trial, but instead were “seeking to determine whether the jury that [had] heard their case behaved in a manner consonant with the minimum requirements of the Sixth Amendment.”[[149]](#footnote-149) Justice Marshall disagreed with the majority’s assertion that other aspects of the trial process had adequately provided protections of the defendants’ Sixth Amendment rights. To the contrary, he wrote:

If, as is charged, members of petitioners’ jury were intoxicated as a result of their use of drugs and alcohol to the point of sleeping through material portions of the trial, the verdict in this case must be set aside. In directing district courts to ignore sworn allegations that jurors engaged in gross and debilitating misconduct, this Court denigrates the precious right to a competent jury.[[150]](#footnote-150)

By denying the petitioners and others like them an opportunity to explore these issues through the evidentiary hearing, Justice Marshall believed the Court might be preserving the jury system, but it was running the risk that a constitutional guarantee would become meaningless.[[151]](#footnote-151)

3. *Warger v. Shauers*

After *Tanner*, nearly thirty years passed before the Court took up the issue of juror impeachment in a civil case, in the 2014 case *Warger v. Shauers*.[[152]](#footnote-152) A Supreme Court with a much different composition again addressed the secrecy of the jury deliberation process.

In August 2006, Gregory P. Warger and Randy D. Shauers were involved in an accident.[[153]](#footnote-153) Warger was riding a motorcycle and Shauers was driving a pickup truck, which was also towing a twenty‑eight foot camper trailer.[[154]](#footnote-154) Warger sustained serious injuries in the collision, including loss of his left leg.[[155]](#footnote-155)

In his subsequent lawsuit, filed in December of 2008, Warger alleged that Shauers was negligent and was liable for “property damage, present and future lost wages, present and future pain and suffering, loss of enjoyment of life, permanent disability, present and future medical expenses, and prejudgment interest.”[[156]](#footnote-156) The first trial, which began in July 2010, ended in a mistrial when one of the defendant’s attorneys violated a court order regarding a motion in limine.[[157]](#footnote-157) The second jury trial began in September 2010, and the defendant was found not liable.[[158]](#footnote-158)

In October 2010, Warger filed a motion for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50, and a motion for a new trial, pursuant to Fed. R. Civ. P. 59.[[159]](#footnote-159) One of the three arguments Warger set forth was that the verdict was the product of juror misconduct.[[160]](#footnote-160) The claim of juror misconduct was based on the fact that Warger’s counsel was contacted by a juror, Stacey Titus, after the verdict.[[161]](#footnote-161) In a signed affidavit, Titus explained that during the deliberations, foreperson Regina Whipple mentioned that her daughter had been involved in a car accident where a man died.[[162]](#footnote-162) According to Titus, Whipple had remarked that if her daughter had been sued, the resulting lawsuit would have ruined her life.[[163]](#footnote-163) Titus expressed concern that as a result of this and other similar comments made during the deliberations, Whipple was not only biased but she had also influenced other jurors to find in favor of the defendant.[[164]](#footnote-164) Titus stated that some jurors had also “expressed their concern about ruining the Shauers’ [lives], as they were a young couple.”[[165]](#footnote-165)

Ruling on the motion for a new trial, the federal district court determined that a new trial could only be granted in connection with the claim of juror misconduct if there was “*admissible* evidence of juror bias” based on the language of Rule 606and the decision in *McDonough Power Equipment*.[[166]](#footnote-166) The district court found no such admissible evidence.[[167]](#footnote-167) Relying on the holdings of three other federal cases,[[168]](#footnote-168) the court reasoned that Rule 606(b) has always prohibited testimony about the “subjective prejudices or improper motives” of jurors.[[169]](#footnote-169) The district court found that jurors bring with them a myriad of life experiences, come from different backgrounds, and, as a result, will perceive trial evidence differently.[[170]](#footnote-170) The court concluded that, nonetheless, this type of information brought into the jury deliberation room is not extraneous nor is it an outside influence.[[171]](#footnote-171) The court explained that Whipple’s statements about her daughter were the product of “prior life experiences”—experiences that could not simply be put aside whenever a juror entered the jury room.[[172]](#footnote-172) Citing *Lopez v. Aramark Uniform and Career Apparel, Inc.*, the *Warger* Court noted that if the jurors had considered evidence that was not admitted in court or were contacted by a third party, then it would have been appropriate to invoke Rule 606(b).[[173]](#footnote-173) The Court specified, however, that where no such allegation was made, life experiences do not constitute extraneous prejudicial information and may be brought into the jury room.[[174]](#footnote-174)

In addition to the allegation that Whipple’s statements may have influenced other jurors, Warger also claimed that Whipple had *lied* about her impartiality when she was questioned during the voir dire process.[[175]](#footnote-175) The federal district court also rejected this argument based on a then recently decided case out of the Tenth Circuit.[[176]](#footnote-176) In *United States v. Benally*,the court of appeals had faced a similar issue and held that a juror could be found in contempt for their dishonesty during the voir dire process.[[177]](#footnote-177) However, the court cautioned that Rule 606 would not permit testimony about the same juror’s dishonesty, even during voir dire, to overturn a jury verdict.[[178]](#footnote-178) Because the “immediate purpose of introducing the testimony” was to vacate the verdict and have a new trial, Rule 606 prohibited this.[[179]](#footnote-179)

Having no success in the federal district court, Warger appealed to the Eighth Circuit.[[180]](#footnote-180) That court, like the federal district court before it, held that Titus’s affidavit was barred by Rule 606(b) regardless of whether the affidavit would be used to prove either that (1) Whipple had lied during voir dire or (2) that the bias had influenced other jurors.[[181]](#footnote-181) The Eighth Circuit also cited the *Benally* decision and emphasized the policy reasons behind the no‑impeachment rule.[[182]](#footnote-182) The opinion stated that to avoid endless second‑guessing, which disturbs the finality of cases, “occasional inappropriate jury deliberations must be allowed to go unremedied.”[[183]](#footnote-183)

Warger then petitioned the Supreme Court for a writ of certiorari.[[184]](#footnote-184) Affirming the Eighth Circuit’s opinion, the Court ruled against Warger in a unanimous decision. The Court found that “[a] postverdict motion for a new trial on the ground of voir dire dishonesty plainly entails ‘an inquiry into the validity of [the] verdict’: If a juror was dishonest during voir dire and an honest response would have provided a valid basis to challenge that juror for cause, the verdict must be invalidated.”[[185]](#footnote-185) The Court rejected Warger’s argument that examining the questioning of Whipple during voir dire would leave the jury verdict untouched and, as a result, the examination did not involve any inquiry into the verdict.[[186]](#footnote-186) Warger asserted that his inquiry was like any number of other errors during a trial that result in vacatur of a verdict but have nothing to do with the way the jury reached its determination.[[187]](#footnote-187) In deciding to the contrary, Justice Sotomayor, writing for the majority, stated that the language of the rule made clear that it applied to any judicial “*proceeding* in which the verdict may be rendered invalid.”[[188]](#footnote-188) Because Warger’s motion for a new trial would necessarily require a court to assess whether the earlier verdict against him should stand, Rule 606(b) prevented Warger from relying on Titus’s affidavit even if the reliance was solely to prove that Whipple lied during voir dire.[[189]](#footnote-189)

Additionally, Justice Sotomayor dismissed Warger’s claim that a litigant’s constitutional right to an impartial jury would be threatened if they were unable to use evidence of juror deliberations to prove that a juror lied during voir dire.[[190]](#footnote-190) As in past decisions, the Court stated that a party’s constitutional rights were already protected by (1) the voir dire process itself; (2) the vigilance of judges, courtroom personnel, and attorneys during trial; (3) a party’s ability to alert the court to any bias prior to reaching a verdict; and (4) the ability to use “nonjuror evidence” after the return of a verdict.[[191]](#footnote-191)

The Court further rebuffed Warger’s suggestion that Whipple’s remarks about her daughter were “extraneous prejudicial information” under Rule 606(b).[[192]](#footnote-192) Warger argued that anything a juror said during deliberations could be labeled “extraneous” if it ultimately resulted in a juror being struck for cause.[[193]](#footnote-193) In rejecting this argument, Justice Sotomayor wrote: “Whether a juror would have been struck from the jury for incompetence or bias, the mere fact that a juror would have been struck does not make admissible evidence regarding that juror’s conduct and statements during deliberations.”[[194]](#footnote-194)

The question raised in *Warger* narrowly focused on whether a “lying” juror can be impeached based on their responses during the voir dire process, but the Supreme Court’s heavy reliance on the plain meaning and language of Rule 606(b) affirmed that any proceeding that questions the validity of a verdict is prohibited.

II. The Supreme Court Declines to Resolve the Circuit Split.[[195]](#footnote-195)

 This Section details the two most recent cases seeking certiorari to the Supreme Court on issues of juror misconduct and an evidentiary Remmer hearing.

A. The Scope of the Split

Under Supreme Court Rule 10(a), the Court will grant certiorari if, among other things, “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.”[[196]](#footnote-196)A circuit split certainly exists in connection with granting a *Remmer* hearing. Not only do federal circuits use different standards, but those standards also often make use of complex language and require multistep analyses to determine if a defendant is entitled to a post‑conviction evidentiary hearing.[[197]](#footnote-197) Also, the different standards may result in a shifting of the burden of proof.[[198]](#footnote-198) The Supreme Court’s reluctance to resolve this split has resulted in a process that is far from uniform or standardized.

1. The Third Circuit

When a defendant alleges that extraneous information or an outside influence affected a juror, the Third Circuit Court of Appeals may presume prejudice, as the Supreme Court did in *Remmer*.[[199]](#footnote-199) However, going beyond what *Remmer* seems to require, the Third Circuit mandates a showing of “substantial” prejudice to the defendant.[[200]](#footnote-200) Like other circuit courts of appeals, a hypothetical juror’s impartiality is taken into consideration.[[201]](#footnote-201) This hypothetical juror test helps to create an objective basis for determining the likely effect of information or influence on a juror.[[202]](#footnote-202)

In the Third Circuit, if the court determines that the hypothetical juror would not have been compromised by extraneous information or outside influence, then the *Remmer* hearing is denied.[[203]](#footnote-203) Further, the Third Circuit assumes that the voir direselection process already accounted for any possible juror bias if the hypothetical juror’s impartiality would not have been compromised by extraneous information or outside influences.[[204]](#footnote-204) In contrast, if the court determines that the hypothetical juror would have been affected by extraneous information or an outside influence, then the hearing will be granted.[[205]](#footnote-205) An aggrieved defendant may still not have any recourse in the Third Circuit, however, “even if a foundation has been established for the claim” of juror misconduct, where the party alleging the misconduct “would not be entitled to relief.”[[206]](#footnote-206)

2. The Fourth Circuit

Like the Third Circuit, the Fourth Circuit presumes prejudice when an allegation of juror misconduct arises.[[207]](#footnote-207) Specifically, the juror must have made or been subject to “an unauthorized contact.”[[208]](#footnote-208) The Fourth Circuit will not grant a *Remmer* hearing unless the defendant’s allegation is a credible one and unless the contact in question was “of such character as to reasonably draw into question the integrity of the trial proceedings.”[[209]](#footnote-209) As a result, the allegation must be based on more than pure speculation. The Fourth Circuit’s standard will be further examined in the discussion of *Loughry v. United States*.[[210]](#footnote-210)

3. The Sixth Circuit

Following the Supreme Court’s 1982 decision in *Smith v. Phillips*, the Sixth Circuit abandoned the presumption of prejudice from *Remmer*.[[211]](#footnote-211) As a result, those bringing a challenge in this circuit must show that the juror’s alleged contact caused actual bias.[[212]](#footnote-212) An evidentiary hearing will be granted where there is a “colorable claim of extraneous influence.”[[213]](#footnote-213) The Sixth Circuit’s standard will be examined in more detail in the discussion of *Shoop v. Cunningham*.[[214]](#footnote-214)

4. The Seventh Circuit

Jurors’ outside contacts are presumed to be prejudicial in a case brought within the Seventh Circuit.[[215]](#footnote-215) A court will grant the *Remmer* hearing only when there is “reasonable suspicion” that further inquiry is necessary to determine whether a juror’s communications deprived the defendant of their Sixth Amendment right to an impartial jury.[[216]](#footnote-216) The extraneous communications must be considered “in context” and courts within the circuit will deny a hearing when the communications are deemed “ambiguous” or “innocuous.”[[217]](#footnote-217)

5. The Eighth Circuit

The Eighth Circuit maintains that there is a presumption of prejudice when an allegation is raised, but only in certain circumstances.[[218]](#footnote-218) In the Eighth Circuit, there must be an “extrinsic contact” that does not concern factual evidence developed at trial or questions of law.[[219]](#footnote-219) If the extrinsic contact is either a question of law or related to factual evidence at trial, then the courts will employ an objective test to determine if the “typical juror” would have been affected by the contact.[[220]](#footnote-220) Courts can consider (1) the manner in which the juror received the extraneous information, (2) the length of time the information was available to the jury, (3) whether the information was received before or after deliberations, and (4) the reasonable likelihood that information influenced the verdict.[[221]](#footnote-221)

6. The Tenth Circuit

The Tenth Circuit also maintains that there is a presumption of prejudice when there are “genuine concerns of improper jury contact.”[[222]](#footnote-222) In response to an allegation of juror tampering in *Stouffer v. Trammel*, the Tenth Circuit stated that where there is credible evidence of tampering, a court has a duty to investigate.[[223]](#footnote-223) The court asserted that the proper inquiry for this type of misconduct “is whether the unauthorized conduct or contact is potentially prejudicial, not whether the parties alleged to have tampered with the jury did so intentionally.”[[224]](#footnote-224) Further, other decisions from the Tenth Circuit reveal that prior to granting a *Remmer* hearing, the circuit also requires that any alleged contact about a case must be more than incidental—there must be “communication or contact ‘about the matter pending before the jury.’”[[225]](#footnote-225) According to the Tenth Circuit, should courts be required to hold evidentiary hearings in connection with non‑pending matters, courts would become bogged down in addressing “each of the multiple ordinary incidental contacts between non‑sequestered jurors and virtually any other person during the course of the trial.”[[226]](#footnote-226)

These selected examples demonstrate the wide range of standards that the federal district courts currently utilize to determine if a *Remmer* hearing will be granted.

B. United States v. Loughry: The Fourth Circuit’s Standard for Remmer Hearings

The following Part discusses *United States v. Loughry* to illustrate the Fourth Circuit’s standard for granting a *Remmer* hearing. Tracing the case’s movement through the federal courts, this Part concludes with the Supreme Court’s eventual decision to deny certiorari.

1. Factual Background

In June 2018, Allen Loughry was indicted by a grand jury on over twenty criminal charges, including mail fraud, wire fraud, making false statements, and tampering with a witness.[[227]](#footnote-227) The indictment stemmed from accusations that Loughry, who became a West Virginia Supreme Court judge in 2012 and chief justice of the court in 2017, had improperly used government credit cards and cars for his personal use, billed the state for charges related to moving an antique desk from his office to his home, and entered false mileage for trips he took in a court‑issued car.[[228]](#footnote-228) Loughry was not the only justice to face scrutiny.[[229]](#footnote-229) Ironically, in 2006 Loughry had written a book on corruption in West Virginia politics, titled *Don’t Buy Another Vote, I Won’t Pay for a Landslide: The Sordid and Continuing History of Political Corruption in West Virginia*.[[230]](#footnote-230)

2. *Loughry* in the Federal District Court

In October 2018, Loughry’s federal trial quickly followed the indictment. Ultimately, Loughry was convicted on eleven of the indictments: one count of mail fraud, one count of witness tampering, seven counts of wire fraud related to gasoline purchases, and two counts of making false statements related to the investigation.[[231]](#footnote-231)

Soon after Loughry was convicted, a stranger approached his trial attorney on the street outside of the courthouse and recommended that the attorney look into the social media activity of a specific juror.[[232]](#footnote-232) Juror A was a regular user of Twitter (now known as “X”).[[233]](#footnote-233) Four months before the trial began, in June of 2018, Juror A liked and retweeted a tweet by West Virginia state legislator Mike Pushkin that stated: “When the soundness of the judiciary is questioned, coupled with the corrupt activities of other branches of government, how is the public ever to have any faith in State government?”[[234]](#footnote-234)Approximately two weeks later, Juror A liked a tweet by state legislator Rodney Miller that referred to the possible impeachment of the state supreme court justices.[[235]](#footnote-235) That same day, Juror A liked another tweet by Pushkin stating: “Justice Loughry should resign. The people of WV already paid for his couch, he should spare them the cost of his impeachment.”[[236]](#footnote-236) Finally, on August 7, 2018, Juror A liked a tweet by another individual, which stated: “Yes, it’s a sad day in WV to think these individuals who are supposed to be the pillars of what is right, just and truthful would be overcome with such an attitude of self importance that they thought the lavish spending was appropriate!”[[237]](#footnote-237) These were four out of eleven total tweets that Juror A liked or retweeted in the months prior to the trial.[[238]](#footnote-238)

When Juror A was summoned for jury service, she was subjected to questioning about her knowledge of the case during voir dire.[[239]](#footnote-239) Juror A stated that she had knowledge of the *impeachment* proceedings.[[240]](#footnote-240) Juror A was also asked the following questions duringvoir direand responded no to all of them:

Question 1: Do any of you have any personal knowledge of the facts of this case?

Question 2: Have you heard this case discussed at any time by anyone in your presence?

Question 3: Have any of you read or heard anything about this case in the news media or television or radio?

Question 4: Is there anything further that any of you would want to relate to the Court about your knowledge of this case that goes beyond what we’ve already covered?

Question 5: Do any of you now have an opinion or have you at any time expressed an opinion as to the guilt or innocence of the defendant of the charge or charges contained in this indictment in this case?

Question 6: Have you heard anything at all from any source about the facts of this case from social networking websites, such as Twitter, Facebook, Instagram, any of you?

Question 7: Are you sensible to any bias or prejudice in this matter or can you think of anything that may prevent you from rendering a fair and impartial verdict based solely upon the evidence and my instructions to you as to the law applicable to that evidence?

Question 8: Whether reflecting on all the questions that I’ve asked you so far, are there any of them to which you would wish to change or supplement your answer that you’ve already given me? Have you thought of anything later that you believe you should have told me? Do any of you have anything further to add? [[241]](#footnote-241)

After the first day of trial, the district court judge gave the jurors in Loughry’s case lengthy instructions about what they could and could not access.[[242]](#footnote-242) While it is undisputed that the judge did not require jurors to refrain from accessing social media completely, the judge did instruct them, “You must not consult dictionaries or reference materials; you must not search the Internet, websites, blogs, or use any other tools, electronic or otherwise, to obtain information about this case or to help you decide the case.”[[243]](#footnote-243) Further, after the first day of trial, the judge told the jurors: “You may not communicate with anyone about the case, on your cell phone, your iPhone, through e‑mail, text messaging, *Twitter*, through any blog or website, including Facebook, Google, Myspace, LinkedIn, YouTube, anything imaginable. It’s all out. You must not use it in any sense.”[[244]](#footnote-244)

Yet, during the trial proceedings, Juror A continued her use of Twitter.[[245]](#footnote-245) During the trial, Juror A followed the Twitter accounts of two journalists who were reporting on Loughry’s trial.[[246]](#footnote-246) The two journalists tweeted a combined seventy‑three times during the course of the trial.[[247]](#footnote-247) While there was no evidence that Juror A took affirmative steps to like or retweet any of the tweets the journalists produced during the course of the trial, her Twitter history indicated that she was in fact active on the social media site on both October 3 and October 6—dates she was serving on the jury.[[248]](#footnote-248)

On October 13, 2018, the day after the verdict was announced, Juror A tweeted: “Grateful to have had a chance to serve as a juror for a Criminal trial this week. It was emotionally draining & I’m glad it’s Over. #Juror. #ThisisAmerica #Justiceserved #Loughry.”[[249]](#footnote-249)

Based on this information about Juror A’s behavior, Loughry moved for a new trial.[[250]](#footnote-250) The federal district court denied Loughry’s request for a new trial, which would have also allowed for a *Remmer* hearing.[[251]](#footnote-251) First, the questions posed by the court to prospective jurors, during voir dire, referred to “this case” or “the facts of this case.”[[252]](#footnote-252) Because the tweets Juror A had liked had not referenced Loughry’s federal trial but instead focused on the impeachment proceedings, the district court concluded that Juror A had not been untruthful during voir dire.[[253]](#footnote-253) Second, the court found that Juror A had not been deceitful in failing to volunteer anything that might prevent her from rendering a fair and impartial verdict.[[254]](#footnote-254) That question, the court explained, had been an open‑ended one, and because trial counsel did not follow up on it with a more specific inquiry, Juror A’s silence was “a simple innocent failure to disclose information that could [otherwise] have been elicited.”[[255]](#footnote-255) Finally, the district court noted that the instructions it had given jurors about avoiding social media only concerned social media related to Loughry’s trial.[[256]](#footnote-256) Jurors had not been prohibited from the use of social media altogether. Thus, the court concluded that Juror A had committed no misconduct in continuing to use Twitter during the trial.[[257]](#footnote-257)

Although Loughry could provide no evidence that Juror A read, liked, or retweeted any of the journalists’ tweets, Loughry argued that Juror A’s exposure to the tweets, coupled with her pre‑trial Twitter likes and retweets, provided a sufficient basis for the evidentiary hearing.[[258]](#footnote-258) Additionally, given Juror A’s negative responses to the voir dire questions, Loughry’s post‑conviction relief hinged on whether Juror A’s misconduct could be characterized as lying about her actual knowledge of the case during jury selection.[[259]](#footnote-259)

Regarding the grant of the *Remmer* hearing, the district court opined that the Fourth Circuit had made it clear that such a hearing was not obligatory, especially as it related to issues of voir dire.[[260]](#footnote-260) Further, the court emphasized that the decision to grant the evidentiary hearing is discretionary.[[261]](#footnote-261) After having carefully considered Loughry’s arguments on the merits, the district court determined that the consequences of holding the hearing “far outweigh[ed]” the merits, because Loughry had not presented any “clear, strong, substantial and incontrovertible evidence . . . that a specific non‑speculative impropriety” occurred.[[262]](#footnote-262) As Loughry had not met the threshold showing of juror misconduct or juror bias, the court determined that it would not allow Loughry to venture into a fishing expedition.[[263]](#footnote-263)

3. *Loughry* in the Fourth Circuit

Dissatisfied with the district court’s ruling, Loughry took his case to the Fourth Circuit. In the first appeal hearing, the Fourth Circuit affirmed the federal district court’s order.[[264]](#footnote-264) The Fourth Circuit laid out its standard for the *Remmer* hearing, that there must be “a credible allegation that an unauthorized contact was made, and that contact was of such a character as to reasonably draw into question the integrity of the trial proceedings, constituting more than an innocuous intervention.”[[265]](#footnote-265) In assessing the evidence before it, the Fourth Circuit reaffirmed the district court’s opinion that Juror A’s activity on Twitter during the trial and her pre‑trial knowledge of the case through Twitter were not “of the character as to reasonably draw into question the integrity of the verdict.”[[266]](#footnote-266)

The majority found that while Juror A may have engaged in liking and retweeting prior to being impaneled on the jury, her conduct during the trial did not rise to the level of prohibited contacts or communications.[[267]](#footnote-267) Moreover, as far as the majority was concerned, there had been no deceit, and Juror A’s prior knowledge of the case was insufficient to support a finding that she had actual prejudice against Loughry.[[268]](#footnote-268) That a juror probably or possibly had access to extraneous information or was influenced by an outside force was not enough. The Court of Appeals for the Fourth Circuit held that the district court had not abused its discretion in denying Loughry the evidentiary hearing.[[269]](#footnote-269)

Judge Diaz[[270]](#footnote-270) penned a partial dissent after the first hearing. Judge Diaz noted that *Loughry* presented a case of first impression to the Fourth Circuit, but other courts had already found that social media use could be the basis for a *Remmer* hearing.[[271]](#footnote-271) In fact, Judge Diaz drew attention to the 2016 Supreme Court decision in *Dietz v. Bouldin*, involving the recall of a dismissed civil jury.[[272]](#footnote-272) In *Dietz*, the Court held that a federal district court judge had the authority to recall a jury for further deliberations, but, in doing so, the judge could consider that jurors may have used their smartphones or the internet to discover information about the verdict after being discharged.[[273]](#footnote-273) Writing for the majority, Justice Sotomayor wrote:

It is a now‑ingrained instinct to check our phones whenever possible. Immediately after discharge, a juror could text something about the case to a spouse, research an aspect of the evidence on Google, or read reactions to a verdict on Twitter. Prejudice can come through a whisper or a byte.[[274]](#footnote-274)

In *Loughry II*,Judge Diaz asserted that Loughry made a credible allegation that Juror A’s Twitter use had compromised her impartiality.[[275]](#footnote-275) Recognizing that the evidence of Juror A’s misconduct was circumstantial, Judge Diaz opined that without a hearing Loughry could not produce any direct evidence because he had not had the opportunity to conduct discovery or question Juror A on the stand.[[276]](#footnote-276) As he explained, “It’s impossible to obtain direct evidence of which tweets Juror A saw without a hearing.”[[277]](#footnote-277) Judge Diaz stated that there was little speculation, here, that the journalists’ tweets appeared on Juror A’s homepage because she followed them and likely saw the tweets during trial.[[278]](#footnote-278) In the digital age, jurors’ access to information is quicker, easier, and more private, given the overwhelming advances in technology since 1954 when *Remmer* was decided.[[279]](#footnote-279) As Judge Diaz further explained,

The mere fact that Juror A used Twitter during the trial isn’t what warrants a hearing here. Rather, Loughry is entitled to hearing because of Juror A’s past Twitter activity, coupled with who she follows (reporters) and the fact that those reporters used Twitter . . . to report and comment on Loughry’s trial.[[280]](#footnote-280)

Judge Diaz also criticized the majority’s position that the judiciary would be inundated by a flood of litigation if courts held *Remmer* hearings any time there was an allegation of social media use.[[281]](#footnote-281) In Judge Diaz’s opinion, a confluence of factors required the Fourth Circuit to, at a minimum, grant Loughry an opportunity to investigate—not fish—for any information on what Juror A actually viewed during the trial.[[282]](#footnote-282) In fact, Judge Diaz wrote that although Loughry claimed that his allegations were circumstantial, they were still better supported than those in *United States v. Harris*,[[283]](#footnote-283) a Sixth Circuit case in which the defendant was granted a *Remmer* hearing on the “mere possibility” that juror’s live‑in girlfriend had spoken to the juror about the defendant’s LinkedIn profile.[[284]](#footnote-284)

Following the Fourth Circuit opinion affirming his conviction, Loughry petitioned for a rehearing en banc.[[285]](#footnote-285) On May 3, 2021, twelve judges from the Fourth Circuit participated in a remote oral argument.[[286]](#footnote-286) Loughry’s counsel argued that the only issue before the Court of Appeals for the Fourth Circuit was whether a grant of a *Remmer* hearing required direct evidence.[[287]](#footnote-287) Ultimately, the Fourth Circuit issued a per curiam opinion stating that the judgment was affirmed by an “equally divided court.”[[288]](#footnote-288)

During oral argument, there were judges who were skeptical of granting Loughry a *Remmer* hearing, because they did not believe that the necessary “contact” delineated in the Fourth Circuit standard was demonstrated simply because Juror A had followed the journalists’ Twitter accounts during the trial.[[289]](#footnote-289) There were also fears that granting a *Remmer* hearing would result in counsel improperly developing the necessary evidence of misconduct while the juror was on the stand.[[290]](#footnote-290) Finally, some judges opined that Rule 606(b), regarding “outside influences,” was not implicated in *Loughry*, because there had been no testimony that Juror A had somehow taken the information she may have learned on Twitter back to the jury deliberations to discuss it with the other jurors.[[291]](#footnote-291) Without this “purposeful activity,” as Judge Richardson described it, Loughry’s case was different than other cases involving the grant of a *Remmer* hearing.[[292]](#footnote-292)

On the other hand, there were judges who found that balancing the rights of the defendant and the oath of the juror tipped in favor of investigating a credible allegation of juror misconduct. During oral argument, Judge Diaz stated:

I think we would be doing a disservice by not [pursuing] that simply because the nature of the technology doesn’t lend itself to the kind of direct proof that has historically and conventionally been part of the analysis.

. . . It’s a confluence of facts in this case that, in my view, warrant, at least, further probing and questioning.[[293]](#footnote-293)

Similarly, Judge Wynn believed a “simple hearing” would assuage any concerns about overthrowing jury verdicts.[[294]](#footnote-294) Finally, when the government argued its position, Judge Harris was critical of the government’s willingness to excise the pre‑trial Twitter engagement of Juror A in terms of any potential bias when it appeared that Juror A was actively involved and interested in what was happening with the federal case from its outset.[[295]](#footnote-295)

4. *Loughry* (Not) at the Supreme Court

 With his direct appeal having failed in the Fourth Circuit, Loughry petitioned the Supreme Court.[[296]](#footnote-296) He argued that the Court should review his case for three reasons. First, the petition highlighted that the circuit split on the necessary showings for a *Remmer* hearing created inconsistencies as to what type of relief a defendant might expect to receive.[[297]](#footnote-297) Specifically, Loughry asserted that the circumstances under which the Fourth Circuit grants a hearing run counter to the Sixth Circuit’s decision in *Harris*. Loughry pointed out that the Sixth Circuit not only held that Harris was entitled to a *Remmer* hearing but that the court was “required” to grant him one when the “colorable claim of extraneous influence” had been made out.[[298]](#footnote-298)

Second, Loughry argued that social media poses a unique threat to the jury system, because the pervasiveness of social media has increased the risk that jurors will be exposed to extraneous information and that this exposure could go undetected.[[299]](#footnote-299) Though Loughry conceded that the evidence of Juror A’s social media activity may have been circumstantial, he characterized it as “compelling.”[[300]](#footnote-300) Loughry argued that the Fourth Circuit had not grasped that “[a]bsent extremely unusual circumstances, the best a defendant can hope for these days is circumstantial evidence that a juror *might* have been prejudiced by extrajudicial contact.”[[301]](#footnote-301) The petition asserted that by requiring direct evidence, the Fourth Circuit was setting up an “impossible” evidentiary bar for juror misconduct.[[302]](#footnote-302)

Third, Loughry argued that his case presented the ideal vehicle for the Court to clarify its position on this issue, because the case was coming before the Court after a direct appeal and not in connection with any habeas corpusproceeding.[[303]](#footnote-303) As a result, the Supreme Court would not have to navigate the stringent and often cumbersome issues related to habeasreview.[[304]](#footnote-304) According to Loughry, the opportunity was “unlikely to arise again for some time,” and the Court had the ability to intervene.[[305]](#footnote-305) Despite Loughry’s arguments, the Supreme Court denied certiorari without any written explanation.[[306]](#footnote-306)

C. Shoop v. Cunningham: The Sixth Circuit’s Standard for Remmer Hearings

This Part provides a detailed overview of *Shoop v. Cunningham*, a case that originated in Ohio state court and eventually made its way into the federal system.[[307]](#footnote-307) Like *Loughry*, *Cunningham* involved allegations of juror misconduct and illustrates the obstacles faced by a defendant seeking a *Remmer* hearing, given the inflexibility of the no‑impeachment rule and, in this case, the confines of habeas corpus practice, which makes its history through the court system particularly meandering.

1. Factual Background[[308]](#footnote-308)

On January 3, 2002, Jeronique Cunningham and his half‑brother, Cleveland Jackson, bought crack cocaine from Lashane Liles, at Liles’s apartment in Lima, Ohio.[[309]](#footnote-309) The two returned to Liles’s apartment later that evening intending to rob Liles.[[310]](#footnote-310) When they arrived, Liles was not at home, but his family members and several friends were.[[311]](#footnote-311) Once Liles returned home, Jackson and Cunningham’s robbery plans began to unfold.[[312]](#footnote-312) Liles and Jackson were in a different part of the apartment when Cunningham drew a gun and ordered Liles’s family and friends into the kitchen.[[313]](#footnote-313) Jackson took Liles upstairs and robbed him of drugs and money, at gunpoint.[[314]](#footnote-314) The individuals in the kitchen were ordered to place their money and valuables on the kitchen table.[[315]](#footnote-315) Jackson then entered the kitchen with Liles and demanded more money from him.[[316]](#footnote-316) When Liles responded that he did not have any, Jackson shot him in the back.[[317]](#footnote-317) Cunningham and Jackson then began shooting everyone else in the kitchen.[[318]](#footnote-318) Six of the shooting victims survived, but seventeen‑year‑old Leneshia Williams and three‑year‑old Jala Grant, were shot in the head and died.[[319]](#footnote-319)

1. *Cunningham* in the State Courts and Habeas Corpus[[320]](#footnote-320)

Cunningham was convicted of two counts of aggravated murder, one count of aggravated robbery, and six counts of attempted murder, and he was sentenced to death.[[321]](#footnote-321) Since his sentencing, Cunningham has advanced a number of direct and collateral attacks on his convictions. One of Cunningham’s earliest efforts began in August 2003 when he filed a post‑conviction petition in Ohio state court arguing that his right to an impartial jury had been violated because of the bias of a juror named Nichole Mikesell.[[322]](#footnote-322)

Cunningham became aware that Mikesell, who later became the foreperson, had obtained information through her job at a social services agency that cast Cunningham in a negative light.[[323]](#footnote-323) (This will be described throughout the remaining sections of this Article as the first claim of juror bias.) To support these allegations, Cunningham supplied an affidavit from Gary Ericson, an investigator who was hired by Cunningham’s co‑defendant and who interviewed Mikesell in the aftermath of Cunningham’s trial.[[324]](#footnote-324)

In the summary of his interview with Mikesell, Ericson reported that Mikesell described Cunningham as “an evil person” who had “no redeeming qualities.”[[325]](#footnote-325) Ericson also wrote that Mikesell told him that “some social workers [who had] worked with [Cunningham] in the past [] were afraid of him.”[[326]](#footnote-326) Finally, Ericson stated that Mikesell told him that, “if you observe one of the veins starting to bulge in his head, watch out and stay away because he might try to kill you.”[[327]](#footnote-327) Although Mikesell’s comments about Cunningham were properly presented to the state court, the court denied Cunningham discovery and an evidentiary hearing.[[328]](#footnote-328)

Without any relief in the state courts, Cunningham filed his first petition for habeas corpus relief in the Federal District Court for the Northern District of Ohio in 2006 and was granted leave to depose Mikesell, other jurors and alternate jurors, Mikesell’s co‑workers at Allen County Children’s Services, and Ericson.[[329]](#footnote-329) In the fall of 2008, Cunningham had managed to secure affidavits from two jurors, Staci Freeman and Roberta Wobler.[[330]](#footnote-330)

Neither Freeman nor Wobler could recall Mikesell mentioning the negative information about Cunningham that was raised in the first state post‑conviction motion, however, both recalled Mikesell mentioning that she knew the families of the victims in the case.[[331]](#footnote-331) Freeman stated:

At one point during the jury deliberations, I had problems with the apparent fact that all the ballistic evidence pointed to a 9mm automatic pistol and not the revolver [allegedly belonging to Cunningham]. I expressed my opinion and Nichole Mikesell responded that, [“]You don’t understand. I know the families of the people that were shot in the kitchen. The families know me and I am going to have to go back and see them. These families are my clients.[”] I interpreted Mikesell’s comments as pressure to vote guilty.[[332]](#footnote-332)

Like Freeman, Wobler attested that when another woman on the jury stated that she believed Cunningham was not guilty, “Mikesell told the young woman and the jury that the young woman did not have to work in the local community.”[[333]](#footnote-333)

During her January 2009 deposition, Mikesell admitted to reviewing Cunningham’s social services file after the trial, but she denied ever speaking to other colleagues at the social work office about Cunningham.[[334]](#footnote-334) During the deposition, when Mikesell was asked whether she had known the victims, the attorney for the government raised an objection and she was stopped from answering the question.[[335]](#footnote-335) Based on the juror interviews and deposition of Mikesell, Cunningham was allowed to amend his motion for habeas post‑conviction relief to add the second claim of juror bias that Mikesell was familiar with the parties.[[336]](#footnote-336) The district court judge also permitted Cunningham to depose Freeman and Wobler on the same issue of whether Mikesell knew the families, but Cunningham was ultimately denied a *Remmer* hearing.[[337]](#footnote-337)

While the federal district court rulings had generally been favorable to Cunningham, his case was reassigned to a different federal judge in December 2010.[[338]](#footnote-338) This newly assigned federal district court judge denied Cunningham’s federal habeas petition, because the second juror bias claim was unexhausted in the state court.[[339]](#footnote-339) Cunningham appealed to the Court of Appeals for the Sixth Circuit.[[340]](#footnote-340)

Charting a lengthy course through the Sixth Circuit, the Court of Appeals first granted a certificate of appealability (COA) on several of Cunningham’s claims.[[341]](#footnote-341) In contrast to the federal district court, the Sixth Circuit determined that the second claim of juror bias was “not plainly meritless.”[[342]](#footnote-342) Nonetheless, the Sixth Circuit remanded the case back to the federal district court, over Cunningham’s objection, to determine if the lower court would stay the current habeaspetition while the Ohio state courts fully exhausted the second bias claim through any successive post‑conviction motions for relief.[[343]](#footnote-343)

In September 2015, the state court denied both Cunningham’s subsequent state post‑conviction motion and his motion for funds to hire an investigator, and the court granted the State’s motion to dismiss.[[344]](#footnote-344) After subsequent appeals, the Ohio Supreme Court declined discretionary appellate review in July 2017, ending Cunningham’s post‑conviction relief hopes in Ohio state court.[[345]](#footnote-345)

With no further avenues to pursue in state court, Cunningham went back to federal court in November 2017. First, he amended his federal habeas petition expanding upon his second claim of juror bias related to foreperson Mikesell’s relationship with the victims’ families.[[346]](#footnote-346) The government argued that Cunningham had procedurally defaulted on his second claim of juror bias by not presenting it to the *state* courts in a timely manner.[[347]](#footnote-347) Cunningham argued that he was excused due to cause and prejudice. He asserted that by previously denying him hearings on the issue and an opportunity for discovery, the Ohio state courts had not adequately provided him a fair and full opportunity to address the second claim of juror bias.[[348]](#footnote-348)

The federal district court adopted the state court rationale and determined that Cunningham had in fact procedurally defaulted.[[349]](#footnote-349) The federal district court went on further to find that even if Cunningham had presented a valid claim on this second claim of juror bias by Mikesell, the evidence of the affidavits of Freeman and Wobler would have been precluded by the federal no‑impeachment rule or an Ohio rule similar to Rule 606.[[350]](#footnote-350) The affidavits of Freeman and Wobler went directly to what occurred during the deliberations of the jury, and the internal matters of the jury could not be examined to reveal any potential bias on the part of Mikesell. As the court viewed it, no extraneous matters or outside influences had entered the jury room.[[351]](#footnote-351) Cunningham could not let light into the black box of jury secrecy in his attempt to prove Mikesell’s bias.[[352]](#footnote-352) If, as the court hypothesized, one of the family members of the victims had attempted to contact or influence Mikesell, that would have been a different claim, which would have merited testimony because it would be considered extraneous to the deliberation process.[[353]](#footnote-353)

Furthermore, Cunningham had not persuaded the federal district court of his position that Mikesell could not put her impressions or opinions aside and render a verdict based on the evidence.[[354]](#footnote-354) Reviewing the second juror claim de novo, the court determined that the central issue on the second claim was not so much whether Mikesell knew the victims’ families; rather, the question was whether she would have been able to set aside any preexisting opinions, even if she did know them, and decide the case based solely on the evidence.[[355]](#footnote-355)

1. *Cunningham* in the Sixth Circuit

Before proceeding any further, there are two points worth making. First, prior to the decision in *Cunningham V* from the Sixth Circuit, Cunningham had essentially requested that both claims of juror bias be consolidated for purposes of the federal court’s review.[[356]](#footnote-356) Recall, the first claim of juror bias concerning negative information about him was raised in the state courts. However, the second claim was amended and added to his claims for federal post-conviction relief. Second, because of the second claim arising out of the federal post-conviction relief, Cunningham’s case invoked the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[[357]](#footnote-357) Both Cunningham and the government have, at various stages, argued that the case’s procedural posture differs significantly from other cases that have reached either a court of appeals or the Supreme Court seeking an evidentiary hearing based on juror misconduct under AEDPA.[[358]](#footnote-358) As a result, Cunningham’s arguments that he should obtain post-conviction relief became entangled because, on the one hand, he argued for relief under AEDPA (for habeas relief) while also seeking an evidentiary *Remmer* hearing.[[359]](#footnote-359) The uniqueness of Cunningham’s case has played a significant role in the Sixth Circuit Court of Appeals proceedings and, ultimately, the government’s petition for a writ of certiorari in the Supreme Court in 2022.

Under 28 U.S.C. § 2253(c)(2), the federal district court’s denial of post-conviction relief allowed Cunningham another COA to the Sixth Circuit so that he could appeal the most recent federal district court order.[[360]](#footnote-360) On a renewed appeal in January 2022, the Sixth Circuit Court of Appeals reversed and determined that Cunningham had not only satisfied the AEDPA predicates necessary to receive an evidentiary hearing, but he had also successfully made out the standard under *Remmer*.[[361]](#footnote-361)

The Sixth Circuit drew a parallel between Cunningham’s claims and those in the 2000 Supreme Court case *Williams v. Taylor*, another habeas corpus case involving an allegation of juror misconduct.[[362]](#footnote-362) In *Williams*, the defendant was convicted of a capital crime in Virginia.[[363]](#footnote-363) When Williams petitioned for federal habeas relief, the petition contained a previously unraised claim that one of the jurors had formerly been married to a state witness and that the prosecutor had represented this same juror in divorce proceedings.[[364]](#footnote-364) During voir dire, neither the prosecutor nor the juror had disclosed that they knew each other, and the juror did not disclose that she was related to any state witness.[[365]](#footnote-365)

Because Williams’s case was subject to AEDPA, one of the central issues was whether Williams could receive a federal evidentiary hearing on this previously unraised claim.[[366]](#footnote-366)The government argued that Williams was not entitled to a hearing.[[367]](#footnote-367) Williams argued he was entitled to the hearing, because he had demonstrated the appropriate diligence necessary to litigate this claim in the state courts but this effort had been denied by the Virginia Supreme Court.[[368]](#footnote-368) The United States Supreme Court held that when state courts have not adjudicated a habeas claim on the merits but the petitioner “diligent[ly]” attempted to develop the claim in state court, 28 U.S.C. § 2254(e)(2) allows the federal district court to hold an evidentiary hearing on the claim.[[369]](#footnote-369)

Given the decision in *Williams*,the Sixth Circuit determined that Cunningham had diligently pursued both claims of juror bias and was entitled to relief. The court stated, “Cunningham’s diligence excuses any procedural default. . . . Because, as we have explained, the facts of this case are on all fours with [*Williams*], Cunningham’s diligence likewise demonstrated cause.”[[370]](#footnote-370) The Sixth Circuit held that Cunningham would be entitled to relief under 28 U.S.C. § 2254(e)(2) if he could show that Mikesell was either “actually or impliedly biased” because of her relationship to the victims’ families.[[371]](#footnote-371)

Furthermore, the Sixth Circuit determined that the allegations in *Williams* were vague compared to Cunningham’s second claim of juror bias. The court stated, “Cunningham may not be able to rely on juror testimony at the evidentiary hearing, but he does not need to do so to be offered an *opportunity* to prove actual bias.”[[372]](#footnote-372) The Sixth Circuit went on to address the testimony of jurors Freeman and Wobler, who had previously been deposed and interviewed about the case: “Whether or not Rule 606(b) bars the testimony of jurors Freeman and Wobler, Cunningham does not need to rely on that testimony to be granted an evidentiary hearing under §2254(e)(2).”[[373]](#footnote-373)

Regarding the evidentiary hearing under *Remmer*, the Sixth Circuit laid out its circuit‑specific standard for granting a hearing:

When a trial court is presented with evidence that an extrinsic influence has reached the jury which has a reasonable potential for tainting the jury, due process requires that the trial court take steps to determine what the effect of such extraneous information actually was on that jury. In other words, where 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.[[374]](#footnote-374)

The *Cunningham V* majority was further critical of the dissent’s position that the term “colorable claim” had only been used in instances of a federal direct appeal.[[375]](#footnote-375) The majority determined that the only sensible reading of the *Remmer* instruction that a federal district court must inquire if there are credible allegations of juror misconduct, must also deem the evidentiary hearing appropriate and applicable in the habeas corpus context.[[376]](#footnote-376)

The Sixth Circuit determined that the state courts had unreasonably applied *Remmer* when analyzing Cunningham’s first claim of juror bias.“By attaching evidence to his state post-conviction petition that raised the question whether Mikesell had spoken to her colleagues about him, Cunningham credibly alleged that a ‘private communication [occurred]’ . . . . This colorable claim of extraneous influence entitled Cunningham to a *Remmer* hearing.”[[377]](#footnote-377)

The *Cunningham V* majority was critical of the dissent’s argument that the factual situation was not similar enough to other cases to warrant the grant of an evidentiary hearing.[[378]](#footnote-378) The court asserted:

Whether the defendant alleges that a third party offered a juror a bribe, as in *Remmer*, or that a third party provided a juror with outside information she otherwise would not have known, the principle is the same: a defendant must be afforded a chance to prove the juror’s bias in a *Remmer* hearing.[[379]](#footnote-379)

The prima facie showing by Cunningham that there was potentially extrajudicial and extraneous information while Mikesell was a member of the jury supported the grant of the hearing to determine “what actually transpired.”[[380]](#footnote-380) Further, because it was unclear if Mikesell had developed her opinions about Cunningham because of the information she learned from her job posttrial or because of her jury service, the Sixth Circuit opined that the *Remmer* hearing was the appropriate forum to determine the answer.[[381]](#footnote-381)

According to the Sixth Circuit, Cunningham’s second juror bias claim did not invoke Rule 606(b) at all, so the *Remmer* hearing could proceed without allegations of an extraneous influence.[[382]](#footnote-382) The court stated, “It would therefore be possible for Cunningham to prove that Mikesell was actually biased without relying on juror testimony in violation of Federal Rule of Evidence 606(b).”[[383]](#footnote-383) “For example, Cunningham could rely on Mikesell’s testimony or the testimony of a victim’s family member to show that Mikesell answered untruthfully ‘a material question on voir dire’ that ‘would have provided a valid basis for a challenge for cause.’”[[384]](#footnote-384)

The majority again drew a parallel to *Williams* to justify granting Cunningham relief. The court asserted that, in *Williams*, the juror bias and misconduct did not stem from extraneous influences, which would be prohibited by Rule 606; instead, the claims resulted from the juror *omitting* information during the voir dire process.[[385]](#footnote-385) Likewise, the Sixth Circuit found that Cunningham’s claims focused on juror omissions instead of extraneous information—Mikesell’s presence on the jury was an issue, because she failed to disclose any potential bias and that bias potentially prejudiced Cunningham.[[386]](#footnote-386) As a result, the court found that the interviews of Freeman and Wobler, which the dissent believed disclosed the internal deliberations of the jury, were not crucial to Cunningham’s request for an evidentiary hearing.[[387]](#footnote-387)

Because Cunningham was a habeas corpus case and relief had been granted on both claims, the Sixth Circuit needed to clarify the remedy. The court explained:

Cunningham is entitled to habeas relief for both of his juror‑bias claims. When we determine in a habeas case that a *Remmer* hearing is in order, we often grant habeas relief unless the State takes steps to conduct a proper evidentiary hearing on juror misconduct within a reasonable time. Our customary remedy makes sense for Cunningham’s first juror‑bias claim. But Cunningham receives relief for his second juror bias‑claim under §2254(e)(2), which governs the federal courts—not the state courts. And conducting parallel hearings about the same juror in the state and federal courts with the same witnesses makes no sense, depletes judicial resources, and wastes everyone’s time.

 We therefore order the federal district court to conduct a *Remmer* hearing to investigate both juror‑bias claims. Cunningham is entitled to a “‘meaningful opportunity’ to demonstrate jury bias at the *Remmer* hearings.” Under Sixth Circuit precedent, Cunningham bears the burden of proving actual or implied bias at that hearing.[[388]](#footnote-388)

Dissenting in part, Judge Kethledge argued that the “colorable claim” standard came from circuit court precedent alone, and therefore did not constitute “clearly established Federal law as determined by the Supreme Court” required by AEDPA.[[389]](#footnote-389) Even if it did, Judge Kethledge did not believe that Cunningham had raised the requisite colorable claim: the introduction of the interviews from Freeman and Wobler and the deposition from Mikesell would clearly violate the no‑impeachment rule, because it would include information about what occurred during the jury deliberation process.[[390]](#footnote-390) Moreover, Judge Kethledge believed Cunningham was merely alleging that some outside contact had occurred and had presented little proof.[[391]](#footnote-391)

3. *Cunningham* (Not) at the Supreme Court

The Sixth Circuit handed Cunningham a victory on both of his juror claims, remanding the case back to the federal district court for the evidentiary hearing.[[392]](#footnote-392) The government appealed and petitioned the Supreme Court for either summary reversal or a writ of certiorari, to fully brief and argue the merits of the case.[[393]](#footnote-393) Tim Shoop, the warden at Chilico, the Correctional Institution, advanced three arguments in his petition arguing that Cunningham should have been denied the right to an evidentiary hearing.

The first was an AEDPA‑based argument that the Sixth Circuit incorrectly applied and relied on its own circuit precedent and not Supreme Court precedent to conclude that the state courts had unreasonably denied Cunningham a *Remmer* hearing.[[394]](#footnote-394) Shoop argued that there was no concrete Supreme Court precedent specifying when a *Remmer* hearing is necessary, and so the state court could not have unreasonably applied the law when denying Cunningham relief on his state post‑conviction motions.[[395]](#footnote-395) Shoop further argued thatthe Sixth Circuit therefore relied on its own case law in the absence of a Supreme Court decision to determine that Cunningham was now entitled to post-conviction relief.[[396]](#footnote-396) Moreover, Shoop argued that this was not the first time that the Sixth Circuit had erred and applied its own circuit precedent, asserting that in nearly two dozen other instances, the Supreme Court has reversed the Sixth Circuit for this same transgression.[[397]](#footnote-397)

Shoop’s second argument was that the Sixth Circuit did not accurately apply the language of Rule 606 when addressing the juror misconduct and bias claims.[[398]](#footnote-398) He argued that, had the court correctly applied the language, the rule would have prohibited consideration of the Freeman and Wobler interviews on the first claim of juror bias, because they each concerned “internal matters” during the jury deliberations and did not fall within one of the exceptions of Rule 606(b)(2).[[399]](#footnote-399)

Third, Shoop argued that there were in fact two circuit splits at issue in the case: (1) as to whether or not an evidentiary hearing was mandated under the AEDPA statute and (2) regarding the standard necessary for the *Remmer* evidentiary hearing.[[400]](#footnote-400) Regardless, Shoop asserted that in each instance where the circuit split might apply, Cunningham was seeking to prove his entitlement to the hearings through the use of evidence prohibited under Rule 606(b).[[401]](#footnote-401)

Cunningham, in opposing Shoop’s writ of certiorari, claimed that there was no circuit split on the application of Rule 606(b). In his brief in opposition, Cunningham argued that “[p]etitioner’s asserted ‘split’ is nothing more than the lower courts properly reviewing each case on its own unique facts and legal posture. Courts reaching different decisions in different cases based on different facts do not create a ‘split.’”[[402]](#footnote-402) Cunningham also asserted that an evidentiary hearing was necessary because the allegations of juror misconduct and bias were disputed.[[403]](#footnote-403) He reasoned that if the allegations of juror misconduct and bias involving Mikesell were undisputed and clear on the record, an evidentiary hearing would never be necessary.[[404]](#footnote-404) Ultimately, it was Cunningham’s position that the Sixth Circuit granted him relief to determine and flesh out any inconsistencies within the record about what information Mikesell knew, when she knew it, and if it in fact played a part in the jury deliberations.[[405]](#footnote-405) Cunningham asserted that “[t]he *Remmer* standard, when applied to Mikesell’s improper and external contacts, mandated a hearing, and the Circuit correctly found that the state post‑conviction court’s failure to hold one constituted an unreasonable application of *Remmer*.”[[406]](#footnote-406)

Faced with these competing arguments, the Supreme Court ultimately decided to deny certiorari in *Cunningham.*[[407]](#footnote-407) Unlike in *Loughry*, however, three Justices—Justice Thomas, Justice Alito, and Justice Gorsuch—joined in dissent.[[408]](#footnote-408) Declaring that they would have summarily reversed the Sixth Circuit, the Justices rebuked the Sixth Circuit Court of Appeals for “manifest abuses of [its] habeas jurisdiction.”[[409]](#footnote-409) Writing for the dissent, Justice Thomas explained that by mandating an evidentiary hearing under AEDPA’s § 2254(e)(2), the Sixth Circuit had usurped the discretion of the federal district court.[[410]](#footnote-410) Agreeing with the petitioner, the dissenters argued that this was not the first time that the Sixth Circuit had erred and overstepped.[[411]](#footnote-411) They further asserted that by failing to grant certiorari in *Cunningham*, the Supreme Court was displaying a “newfound tolerance for recidivism” where it concerned the Sixth Circuit’s continued AEDPA violations.[[412]](#footnote-412)

Justice Thomas also contended that the Sixth Circuit completely misunderstood the holding in *Remmer*. Where the contact in *Cunningham* was “merely *alleged*,” the Sixth Circuit had “stretched [*Remmer*] far beyond its four corners” by injecting the circuit precedent of a “colorable claim” into its analysis and reasoning.[[413]](#footnote-413) According to the dissent, granting Cunningham a *Remmer* hearing “on the mere possibility” that evidence might turn up to support his juror bias claim was “an injustice.”[[414]](#footnote-414)

Justice Thomas’s dissent was issued in November 2022. In April 2023, as a direct result of the Sixth Circuit’s decision during the previous year, Cunningham received court approval for his motion to compel documentary discovery and to hire an investigator in connection with his two juror bias claims.[[415]](#footnote-415)

*Cunningham VI* presented the Supreme Court with its second opportunity to address the standard necessary for a *Remmer* hearing. The case’s sinuous route through both the state and federal courts sits in stark contrast to the *Loughry* case, as does the ultimate result. Yet, the Supreme Court decided that the circuit court of appeals rulings from either circuit would not be disturbed. There are thus unanswered questions as to how defendants in either defendants’ position can successfully mount a challenge to a claim of juror misconduct. One of those questions is whether a defendant can frame the issue as a constitutional or procedural challenge. The next Part will address this issue.

III. Constitutional Concern or Procedural Quibble?

Justice Thomas’s dissent in *Cunningham* raises a question as to whether the decision in *Remmer* “established *any* constitutional rule.”[[416]](#footnote-416) In the dissent, Justice Thomas appears to reach a fairly radical conclusion that the decision in *Remmer* may have only concerned procedural matters and not constitutional ones.[[417]](#footnote-417) As he remarked:

[I]t is not even clear that *Remmer* established *any* constitutional rule. Words like “constitutional” and “due process” are nowhere to be found in the Court’s laconic opinion. One could just as naturally—perhaps more naturally—read *Remmer* as a case about new‑trial motion practice under the Federal Rules of Criminal Procedure than as one about the requirements of constitutional due process.[[418]](#footnote-418)

Justice Thomas’ willingness to cast doubt as to whether *Remmer* was meant to protect a constitutional right or to serve as a mere procedural prophylactic can be best understood in relation to his larger approaches to constitutional interpretation, specifically as a textualist and originalist.[[419]](#footnote-419) His approach is especially visible in the *Pena‑Rodriguez v. Colorado* decision in which the majority of the Supreme Court carved out an exception to the no‑impeachment rule where racial bias has been clearly alleged.[[420]](#footnote-420) In *Pena‑Rodriguez*, Justice Thomas also wrote a dissenting opinion that advanced an originalist argument in connection with the purpose of the no‑impeachment rule.[[421]](#footnote-421) He also joined Justice Alito’s dissent, which objected to the majority’s decision on textual and public‑policy grounds.[[422]](#footnote-422)

In his independent dissent in *Pena‑Rodriguez*, Justice Thomas stressed that the decision “[could not] be squared with the original understanding of the Sixth or Fourteenth Amendments.”[[423]](#footnote-423) In particular, he argued that the Sixth Amendment’s protection of the right to trial by an impartial jury is “limited to the protections that existed at common law when the Amendment was ratified.”[[424]](#footnote-424) According to Justice Thomas, English common law in 1791 placed a firm bar on juror impeachment, and to support this he cited the *Vaise* opinion.[[425]](#footnote-425)

Justice Thomas emphasized that at the time of the nation’s founding and through the passage of the Fourteenth Amendment, states took different approaches to the no‑impeachment rule.[[426]](#footnote-426) Justice Thomas looked to these points in history to affirm his originalist view.

Our common‑law history does not establish that—in either 1791 (when the Sixth Amendment was ratified) or 1868 (when the Fourteenth Amendment was ratified)—a defendant had the right to impeach a verdict with juror testimony of juror misconduct. In fact, it strongly suggests that such evidence was prohibited. In the absence of a definitive common‑law tradition permitting impeachment by juror testimony, we have no basis to invoke a constitutional provision that . . . overturn[s] Colorado’s decision to preserve the no‑impeachment rule.[[427]](#footnote-427)

A similar textualist view is also evident in Justice Alito’s dissent in *Pena‑Rodriguez*, which Justices Thomas and Roberts joined.[[428]](#footnote-428) Justice Alito underscored his opposition to the majority’s rationale by highlighting the history of the no‑impeachment rule and the public‑policy reasons for its implementation.[[429]](#footnote-429) Justice Alito wrote that, “[n]othing in the text or history of the [Sixth] Amendment or in the inherent nature of the jury trial right suggests that the extent of the protection provided by the Amendment depends on the *nature* of a jury’s partiality or bias.”[[430]](#footnote-430)

Although Justice Alito admitted that “racial bias implicates unique historical, constitutional and institutional concerns,” he found the majority’s opinion misguided.[[431]](#footnote-431)To drive this point home, he provided the following analogy:

Imagine two cellmates serving lengthy prison terms. Both were convicted for homicides committed in unrelated barroom fights. At the trial of the first prisoner, a juror, during deliberations, expressed animosity toward the defendant because of his race. At the trial of the second prisoner, a juror, during deliberations, expressed animosity toward the defendant because he was wearing the jersey of a hated football team. In both cases, jurors come forward after the trial and reveal what the biased juror said in the jury room. The Court would say to the first prisoner: “You are entitled to introduce the jurors’ [sic] testimony, because racial bias is damaging to our society.” To the second, the Court would say: “Even if you did not have an impartial jury, you must stay in prison because sports rivalries are not a major societal issue.”[[432]](#footnote-432)

This analogy falls flat. First, there is a great distinction between sports fanaticism and racial bias, which the majority in *Pena‑Rodriguez* deemed “antithetical to the functioning of the jury system and must be confronted in egregious cases . . . despite the general bar of [ ] no‑impeachment.”[[433]](#footnote-433) Second, the Supreme Court’s precedent appears to have established a connection between the guarantees of a Sixth Amendment right to an impartial jury and fair trial and the grant of a *Remmer* hearing, when there has been an allegation of juror bias or misconduct. Writing for the dissent in *Tanner*, and joined by three other justices, Justice Marshall declared that “[e]very criminal defendant has a constitutional right to be tried by competent jurors” and that “due process implies a tribunal both impartial and mentally competent to afford a hearing.”[[434]](#footnote-434) Justice Marshall still recognized the importance of policy considerations like freedom of deliberation, finality of verdicts, and protecting jurors from harassment in the creation of Rule 606.[[435]](#footnote-435) However, he asserted that when a *convicted* defendant’s constitutional rights are seriously threatened, then these considerations “must give way.”[[436]](#footnote-436)

In his petition for writ of certiorari, Loughry emphasized that “[a] *Remmer* hearing is often the only way for a defendant to determine ‘what actually transpired [during deliberations], or whether the incidents that may have occurred were harmful or harmless,’ . . . thereby ensur[ing] he has not been deprived of his Sixth Amendment right to a fair trial.”[[437]](#footnote-437) As a result, the grant of an evidentiary *Remmer* hearing is the *minimum* requirement under the Sixth Amendment to ensure that a defendant’s right has been protected.[[438]](#footnote-438) As Justice Marshall stated, “[i]f we deny them this opportunity, the jury system may survive, but the constitutional guarantee on which it is based will become meaningless.”[[439]](#footnote-439) Despite Justice Thomas’s view, *Remmer* is more than a procedural rule regarding the grant of a new trial.

Lastly, in *Smith v. Phillips*, the Supreme Court decided an issue of juror bias in the context of constitutional due process.[[440]](#footnote-440) The Court found that “due process does not require a new trial every time a juror has been placed in a potentially compromising situation.”[[441]](#footnote-441) The majority indicated that if a new trial were mandated in every instance, there would be few constitutionally sound trials.[[442]](#footnote-442) However, the Court went on to state that:

Due 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 effects of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* . . . .[[443]](#footnote-443)

For example, if the current jury system cannot address issues regarding bias at the outset of a trial, before a biased juror is seated, *Remmer* hearings are a necessary safeguard to ensure that defendants have some type of redress.[[444]](#footnote-444) While the Supreme Court has emphasized that voir dire and other jury and trial practices are built into the system to reduce arbitrary harms, these are not foolproof safeguards.[[445]](#footnote-445) The next Section will demonstrate that the best method of ensuring that defendants are not treated disparately is to create a uniform standard for the circuit courts, which regularly confront these scenarios of jury bias and misconduct.

IV. A Uniform Standard for *Remmer* Hearings

In his dissent in *Cunningham V*, Judge Kethledge stated that the decision in *Remmer* makes no attempt to “describe qualitatively or quantitatively the showing necessary to mandate the evidentiary hearing.”[[446]](#footnote-446) Shoop, in his petition for writ of certiorari, stated that *Remmer* has created questions that the Supreme Court has not revisited since the 1954 decision.[[447]](#footnote-447) The only clear directive in *Remmer* is that there is presumption of prejudice given to extrajudicial contact with jurors.[[448]](#footnote-448) Without clearer guidance and direction, federal courts employ a variety of standards to determine whether a defendant is entitled to the hearing.[[449]](#footnote-449) Had the Supreme Court taken up either *Cunningham* or *Loughry*, or both, it could have addressed conflicting judgments in the lower federal courts. Because the Supreme Court declined the opportunity to resolve the matter, the most one can do at this time is to recommend a uniform standard that the Court might adopt in the future.

This Articleproposes a standard that seeks to address the current difficulties faced by federal courts in reducing the significant discrepancies among circuits, while simultaneously ensuring the protection of defendants’ constitutional rights to an impartial jury, a fair trial, and due process. The language of the standard is as follows:

A court has a duty to hold an evidentiary hearing when (1) a party makes a colorable allegation that a juror has been exposed to, (2) a biased outside communication or contact or, (3) an extraneous influence, (4) that has either a direct or close relationship to the case and, (5) shows through direct or circumstantial evidence, (6) a prejudicial effect on the jury’s verdict.

The multi‑pronged proposed standard draws on various circuit courts’ existing standards while supplementing them in important ways. Foremost, the standard preserves the presumption of prejudice from the *Remmer* decision.[[450]](#footnote-450) Second, this standard maintains the use of the word “colorable” from the Sixth Circuit, to describe the qualitative nature of the allegation of juror misconduct or bias.[[451]](#footnote-451) In contrast to the Fourth Circuit’s use of the word “credible,” which lends itself to subjective interpretations, the word “colorable” suggests that a defendant’s allegation of juror misconduct must be well‑grounded, justifiable, or logically supported. In other words, a colorable claim, as opposed to a credible one, is not just a claim that someone *could* believe; rather it is a claim that has a basis in fact.

Moreover, the use of the phrase “colorable allegation” gives federal judges discretion in determining whether an evidentiary hearing is required.This standard takes into consideration that every allegation raised may not in fact be a viable claim and will not warrant a hearing. Further, under this standard, none of the circuits would automatically mandate a hearing solely on the basis of a defendant bringing forth a claim. As a result, the trial court’s duty to hold an evidentiary hearing would only be triggered if the allegation raised more than a mere speculative claim. Thus, district court judges would have the ability to reject weaker claims of juror misconduct or bias. This is consonant with the abuse of discretion standard used to determine if the trial court judge’s decision should be reviewed for error.

To further clarify the qualitative nature of the evidence presented at the hearing, it should be understood that the evidence can be either direct or circumstantial. While this may seem counterintuitive, the basis of a criminal conviction itself can be proven through either direct or circumstantial evidence. The fact that, before granting a *Remmer* hearing, some circuits require a showing of what is essentially direct evidence is onerous to defendants.[[452]](#footnote-452)

Additionally, this standard clarifies that communication or contact must be biased in some way. And of primary importance, the proposed standard echoes Rule 606 by including the words “outside” and “extraneous” in describing the nature of communications, contacts, or influence that serve as the basis of the allegation.[[453]](#footnote-453) Thus, the proposed standard conveys that outside communications, contacts, or influences that ultimately taint the jury deliberation process in a way that prejudices the defendant will result in an evidentiary hearing.

The colorable allegation must relate directly to or have a close relationship to the case. This is an important point, because, for example, while the Eighth Circuit will deny a defendant a *Remmer* hearing when outside information acquired by the juror relates to a question of law or factual evidence developed at trial,[[454]](#footnote-454)the Tenth Circuit will grant a *Remmer* hearing only when the outside information directly relates to a matter pending before the jury.[[455]](#footnote-455) To avoid this inconsistency, the proposed standard emphasizes that the defendant will need to make a showing that the communication, contact, or influence either directly relates to the pending matter or has a close relationship to the pending matter. In *Loughry*, Juror A’s pretrial Twitter activity concerning the impeachment proceedings would then be relevant in making out a claim of juror bias, because that proceeding was closely related to the trial and involved the defendant.

The point of the *Remmer* hearing is not to develop the colorable claim while the witness is on the stand, but to determine the viability of the claim after it is brought to a party’s attention. This proposed standard attempts to strike a balance between constitutional rights and criticism—criticism that potentially allowing hearings under these circumstances will, one, result in fishing expeditions by trial counsel and, two, open the flood gates of post‑conviction litigation, thus, disturbing the valued policy goals of finality. But the proposed standard also protects constitutional rights and, at a minimum, should result in the grant of a hearing to those who meet each element of the standard.

Under the proposed standard, for example, Elmore Remmer would have been granted an evidentiary hearing in connection with his allegation of juror tampering and bribery. Jeronique Cunningham would also have been granted a hearing in connection with his allegation that Nichole Mikesell was biased against him. And finally, Allen Loughry would have been granted a *Remmer* hearing in connection with his allegation that Juror A’s Twitter activity amounted to juror misconduct.

That Loughry would have received an evidentiary hearing under the proposed standard is worth emphasizing again. As the facts of this case point out, juror misconduct is likely to increase in the future.[[456]](#footnote-456) When the Supreme Court reached its decision in *Remmer* in 1954, there was no way it could have foreseen the development of cellular phones, laptops, tablets and other digital devices, which are now ubiquitous. Yet, if anything is clear from *Remmer*, it is that the Court wished to ensure that criminal defendants were not harmed by “*any* private communication, contact, or tampering, directly or indirectly.”[[457]](#footnote-457) The use of the word “any” takes into consideration today’s world and all of its new forms of communication and contact.

Moreover, in *Loughry*, Judge Diaz asserted that given the claim about Juror A’s actions, there may never be direct evidence that a juror was exposed to information on their cell phone or another digital device.[[458]](#footnote-458) Nevertheless, this is exactly the purpose of the *Remmer* hearing—to clarify what Juror A may or may not have seen, by questioning the juror on the stand.

A number of the Fourth Circuit judges in *Loughry* were wary of allowing the *Remmer* hearing simply because Juror A *may* have been exposed to tweets from the two journalists during the trial. But again, given today’s world, exposure matters. The *Remmer* Court probably never envisioned a world where information would literally be at someone’s fingertips. “Scrolling through Twitter, reading email, checking the latest scores, and reading a weather forecast look identical to the passerby.”[[459]](#footnote-459) But imagine a scenario where, instead of heeding a trial judge’s warning to refrain from researching the background of a witness or a piece of evidence, a juror googles that information—and, worse, takes the information back to the jury room. “The rise of the digital age presents increased opportunities for juries to misbehave or to become the targets of outside influence.”[[460]](#footnote-460)

Conclusion

Litigants are not guaranteed a perfect trial, and the proposed language for a uniform standard for a *Remmer* hearing may be far from perfect. However, given the figurative minefield that this area of law currently presents, perfect cannot be the enemy of good. In attempting to create a uniform standard, the goal of this Article is to alleviate the inconsistent application that complex standards have produced, as well as the incongruent results that occur when claims of juror bias and misconduct are raised.

The defendants in both *Cunningham* and *Loughry* were convicted of their crimes. Both defendants sought post-conviction relief. Yet, the conflicting results are evidence that the current procedures surrounding the grant of *Remmer* hearings are in need of a transformation. While the Supreme Court declined to rectify the circuit split on the issue in its most recent terms, it should do so sooner rather than later to ensure that defendants are treated *equally* in their request for a hearing and that neither due process nor Sixth Amendment constitutional rights are trampled.

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2. . 464 U.S. 548, 553 (1984). [↑](#footnote-ref-2)
3. . Remmer v. United States (*Remmer II*), 347 U.S. 227 (1954). [↑](#footnote-ref-3)
4. *. Id.* at 229–30. [↑](#footnote-ref-4)
5. . United States v. Loughry (*Loughry II*), 983 F.3d 698 (4th Cir. 2020), *aff’d en banc*, 996 F.3d 729 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022). [↑](#footnote-ref-5)
6. . Cunningham v. Shoop (*Cunningham V*), 23 F.4th 636 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 37 (2022). [↑](#footnote-ref-6)
7. . This is known as an “opinion related to orders.”“Opinions may be written . . . if a justice wants to dissent from the denial of certiorari or concur in that denial.” *Opinions Relating to Orders*, U.S. Sup. Ct., https://www.supremecourt.gov/opinions/relatingtoorders/22 [https://perma.cc/EQ92‑FU4F] (last updated Sept. 22, 2023); *see also* Barry P. McDonald, *SCOTUS’s Shadiest Shadow Docket*, 56 Wake Forest L. Rev. 1021, 1028–29 (2021) (highlighting the emergence of the use of opinions related to orders by justices to shed light on their thinking and criticizing the practice as a prohibited advisory opinion in addition to violating the “norms” of judicial impartiality). [↑](#footnote-ref-7)
8. *. See* Shoop v. Cunningham (*Cunningham VI*), 143 S. Ct. 37, 37–45 (2022) (Thomas, J., dissenting). A summary reversal would overturn the decision below without any written briefs or oral arguments on the merits of the case. Erin Miller, *Glossary of Supreme Court Terms*, SCOTUSBLOG (Dec. 31, 2009, 8:04 PM), https://www.scotusblog.com/2009/12/glossary‑of‑legal‑terms/ [https://perma.cc/7HFX‑422D]. [↑](#footnote-ref-8)
9. *. Cunningham VI*, 143 S. Ct. at 44 (Thomas, J., dissenting). [↑](#footnote-ref-9)
10. . The Fourth Circuit requires a showing of actual bias. Porter v. Zook, 898 F.3d 408, 414 (4th Cir. 2018). Interestingly, neither the majority nor the dissent in the Court of Appeals decision believed the defendant had proven actual bias. *Id.* at 430; *id.* at 439 (Shedd, J., dissenting). However, Judge Diaz would have granted the evidentiary *Remmer* hearing to flesh this very issue out, as discussed in his dissenting opinion in another Fourth Circuit case. *Loughry II*, 983 F.3d at 712–13 (Diaz, J., dissenting). “To demonstrate actual bias, a defendant ‘must prove that a juror, because of his or her partiality or bias, was not capable and willing to decide the case solely on the evidence before it.’” *Id.* at 711 (internal quotation marks omitted) (quoting *Porter*,898 F.3d at 423). [↑](#footnote-ref-10)
11. . Fed. R. Evid. 606. “Juror’s Competency as a Witness” includes:

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury’s presence.

(b) During an Inquiry Into the Validity of a Verdict or Indictment.

(1) *Prohibited* *Testimony or Other Evidence*. During an inquiry into the validity of a verdict or indictment, 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 or indictment. The court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters.

(2) *Exceptions*. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury’s attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

*Id.* [↑](#footnote-ref-11)
12. . This Article largely focuses on criminal proceedings; thus the discourse will center on criminal defendants and the language used will lean towards the use of the word convicted or conviction when discussing the outcome of a case. However, Fed. R. Evid. 606 is also applicable in a civil proceeding where there is a finding of liability. [↑](#footnote-ref-12)
13. . Vaise v. Delaval (1785) 99 Eng. Rep. 944, 944 (KB). [↑](#footnote-ref-13)
14. . John L. Rosshirt, Note, *Evidence—Assembly of Jurors’ Affidavits To Impeach Jury Verdict*, 31 Notre Dame Law. 484, 484 (1956). [↑](#footnote-ref-14)
15. *. Id.* (quoting *Vaise*, 99 Eng. Rep. at 944). [↑](#footnote-ref-15)
16. . 238 U.S. 264 (1915). [↑](#footnote-ref-16)
17. *. Id.* at 267. [↑](#footnote-ref-17)
18. *. See* Pena‑Rodriguez v. Colorado, 580 U.S. 206, 215–17 (2017) (recounting the history of the no‑impeachment rule in the American judicial system and the emergence of the two approaches—the “Iowa approach” and the “federal approach”). [↑](#footnote-ref-18)
19. . Warger v. Shauers (*Warger III*), 574 U.S. 40, 45 (2014) (first citing 3 C. Mueller & L. Kirkpatrick, Federal Evidence § 6.16, at 70 (4th ed. 2013); and then citing 8 John Henry Wigmore, A Treatise on the Anglo‑American System of Evidence in Trials at Common Law §§ 2253, 2254, at 699–702 (J. McNaughton rev. 1961)). [↑](#footnote-ref-19)
20. *. Id.* at 46 (first citing Mueller, *supra* note 18, at 70; and then citing Wigmore, *supra* note 18, at 699–702). [↑](#footnote-ref-20)
21. . 483 U.S. 107, 120–21 (1987). [↑](#footnote-ref-21)
22. *. Id.* [↑](#footnote-ref-22)
23. . Fed. R. Evid. 606 (1975) (amended 2011). The original rule read as follows:

Rule 606. Competency of Juror as Witness

(a) At the trial.— A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment.— Upon an inquiry

into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon his or any other juror’s mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying be received for these purposes.

*Id.* [↑](#footnote-ref-23)
24. . Fed. R. Evid. 606 advisory committee’s note to 2011 amendments (“The language of Rule 606 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.”). [↑](#footnote-ref-24)
25. *. Id.* 606(a). [↑](#footnote-ref-25)
26. *. Id.* 606(b). [↑](#footnote-ref-26)
27. *. Id.* 606(b)(1). [↑](#footnote-ref-27)
28. *. Id.* [↑](#footnote-ref-28)
29. *. See generally* *id.* 606 advisory committee’s notes to 1974 enactment. [↑](#footnote-ref-29)
30. *. Id.* [↑](#footnote-ref-30)
31. *. Id.* As the no‑impeachment rule has developed over time, one way of understanding the Senate’s version of Fed. R. Evid. 606 is to analogize it to the popular tourist slogan “what happens in Vegas stays in Vegas.” *See* Amanda R. Wolin, *What Happens in the Jury Room Stays in the Jury Room . . . but Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. Rev. 262, 264 (2012) (advocating for more transparency in the juror deliberation process where there are claims of juror bias by allowing testimony that is generally prohibited by the rule and also addressing the circuit split on this issue); *see* *also* Robert P. MacKenzie III & C. Clayton Bromberg Jr., *Jury Misconduct: What Happens Behind Closed Doors,* 62 Ala. L. Rev. 623, 626 (2011) (comparing the Alabama state evidence rule on juror impeachment, which allows testimony on extraneous information, with the federal rule and examining different scenarios where Alabama courts have considered the admissibility of juror testimony). [↑](#footnote-ref-31)
32. . Fed. R. Evid. 606 advisory committee’s note to 1974 enactment. [↑](#footnote-ref-32)
33. *. Id.* [↑](#footnote-ref-33)
34. *. Id.* (emphasis added) (citing S. Rep. No. 93‑1277, at 13–14 (1974)). [↑](#footnote-ref-34)
35. . Fed. R. Evid. 606(b)(2). [↑](#footnote-ref-35)
36. . The third exception will not be addressed in the Article. [↑](#footnote-ref-36)
37. *. See* Smith v. Brewer, 444 F. Supp. 482, 489 (S.D. Iowa 1978) (“The problem is whether such wholly intra‑jury statements can be viewed as ‘extraneous . . . information’ or an ‘outside influence’ and, if so, whether the proof of such statements can be separated from proof of the effect of the statements on the mental processes of the jurors.” (omission in original)), *aff’d*, 577 F.2d 466, (8th Cir. 1978). [↑](#footnote-ref-37)
38. *. Warger III*, 574 U.S. 40, 44, 51 (2014). [↑](#footnote-ref-38)
39. *. Id.* at 51. [↑](#footnote-ref-39)
40. . 146 U.S. 140, 149 (1892), *superseded by rule*, Fed. R. Evid. 606. [↑](#footnote-ref-40)
41. *. See generally* Benjamin T. Huebner, Note, *Beyond* Tanner*: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469, 1480–81 (2006). [↑](#footnote-ref-41)
42. . 483 U.S. 107, 127 (1987). [↑](#footnote-ref-42)
43. *. Id.* at 122. [↑](#footnote-ref-43)
44. *. See* Caden A. Grant, Note, *Holding Juries Accountable: Assessing the Right to a Competent and Unimpaired Jury in Light of* Tanner *and Federal Rule of Evidence 606(b)*, 35 Geo. J. Legal Ethics 773, 776 (2022) (opining that “Rule 606(b) has left open for courts to interpret what constitutes an ‘outside influence’”). [↑](#footnote-ref-44)
45. . At least one court has recognized that juror bias “does not fit neatly on one side or the other of the dichotomy” between what is extraneous and what is outside as drawn in the language of Fed. R. Evid. 606. Smith v. Brewer, 444 F. Supp. 482, 489 (S.D. Iowa 1978). [↑](#footnote-ref-45)
46. . *See* 28 U.S.C. § 1865. [↑](#footnote-ref-46)
47. . *Id.* [↑](#footnote-ref-47)
48. . Oral Argument at 26:53, Tanner v. United States, 483 U.S. 107 (1987) (No. 86‑177), https://www.oyez.‌org/‌cases/1986/86‑177 [https://perma.cc/H2B4‑EDYA]. [↑](#footnote-ref-48)
49. *. Id.* at 27:15. [↑](#footnote-ref-49)
50. . § 1865. [↑](#footnote-ref-50)
51. *. Remmer II*, 347 U.S. 227, 229 (1954). [↑](#footnote-ref-51)
52. *. Tanner*, 483 U.S. at 126. [↑](#footnote-ref-52)
53. *. Id.* at 118. [↑](#footnote-ref-53)
54. *. Id.* at 125–26. [↑](#footnote-ref-54)
55. *. See* Leslie Y. Garfield Tenzer, *The Gen Z Juror*, 88 Tenn. L. Rev. 173, 175 (2020). [↑](#footnote-ref-55)
56. . Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. Rev. 322, 323 (2005). [↑](#footnote-ref-56)
57. . Beltran v. Cate, No. LACV 13‑1624, 2017 U.S. Dist. LEXIS 219075, at \*35 (C.D. Cal. Aug. 22, 2017) (“One important mechanism for ensuring impartiality is voir dire, which enables the parties to probe potential jurors for prejudice. For voir dire to function, jurors must answer questions truthfully. A juror demonstrates bias by failing to answer honestly a material question on voir dire that answered honestly, would have provided a valid basis for a challenge for cause.” (footnotes omitted) (internal quotation marks omitted) (first quoting Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998); and then quoting McDonough Power Equip. v. Greenwood, 464 U.S. 548, 556 (1984))). [↑](#footnote-ref-57)
58. . Gershman, *supra* note 53, at 336. [↑](#footnote-ref-58)
59. . 580 U.S. 206, 224 (2017). [↑](#footnote-ref-59)
60. *. Id.* at 221 (quoting *Warger III*, 574 U.S. 40, 51 n.3 (2014)). [↑](#footnote-ref-60)
61. . Nicholas S. Bauman,Note, *Extraneous Prejudicial Information: Remedying Prejudicial Juror Statements Made During Deliberations*, 55 Ariz. L. Rev. 775, 800 (2013) (discussing changes in California, Connecticut, and Hawaii as to what evidence is allowed to address allegations of juror misconduct beyond what Rule 606(b) allows). [↑](#footnote-ref-61)
62. *. Id.* at 803. [↑](#footnote-ref-62)
63. *. Remmer II*, 347 U.S. 227 (1954). [↑](#footnote-ref-63)
64. . Tanner v. United States, 483 U.S. 107 (1987). [↑](#footnote-ref-64)
65. . Loughry v. United States (*Loughry IV*), 142 S. Ct. 897 (2022). [↑](#footnote-ref-65)
66. *. Cunningham VI*, 143 S. Ct. 37 (2022). [↑](#footnote-ref-66)
67. *. Warger III*, 574 U.S. 40 (2014). [↑](#footnote-ref-67)
68. . Remmer v. United States (*Remmer I*), 205 F.2d 277, 281 (9th Cir. 1953), *vacated*, 347 U.S. 227 (1954). [↑](#footnote-ref-68)
69. . United States v. Remmer (*Remmer III*), 122 F. Supp. 673, 674 (D. Nev. 1954), *aff’d*, 222 F.2d 720 (9th Cir. 1955), *vacated*, 350 U.S. 377 (1956). [↑](#footnote-ref-69)
70. *. Id.* [↑](#footnote-ref-70)
71. *. Id.* [↑](#footnote-ref-71)
72. . Remmer v. United States (*Remmer V*), 350 U.S. 377, 380 (1956). [↑](#footnote-ref-72)
73. *. Remmer III*, 122 F. Supp. at 674. [↑](#footnote-ref-73)
74. *. Remmer I*, 205 F.2d 277, 291 (9th Cir. 1953), *vacated*, 347 U.S. 227 (1954). [↑](#footnote-ref-74)
75. *. Remmer II*, 347 U.S. 227, 228 (1954). [↑](#footnote-ref-75)
76. *. Id.* [↑](#footnote-ref-76)
77. *. Id.* [↑](#footnote-ref-77)
78. *. Id.* [↑](#footnote-ref-78)
79. *. Id.* at 228–29. [↑](#footnote-ref-79)
80. *. Remmer I*, 205 F.2d 277, 291 (9th Cir. 1953), *vacated*, 347 U.S. 227 (1954). [↑](#footnote-ref-80)
81. *. Id.* [↑](#footnote-ref-81)
82. *. Id.* at 291–92 (“These circumstances do not indicate prejudice to appellant. . . . Appellant relied solely upon the affidavit of defense counsel stating what counsel had learned [about Satterly’s remark] through the newspapers. If any jurors had received communications from the trial court or the Federal Bureau of Investigation of a nature which would tend to prejudice them against appellant, or had been subjected to other extraneous influences, such fact could have been appropriately presented by submitting affidavits of the jurors themselves.”). [↑](#footnote-ref-82)
83. *. Remmer II*, 347 U.S. at 228. [↑](#footnote-ref-83)
84. *. Id.* at 230. [↑](#footnote-ref-84)
85. *. Id.* at 229–30. [↑](#footnote-ref-85)
86. *. Id.* at 229. [↑](#footnote-ref-86)
87. *. Remmer III*, 122 F. Supp. 673, 675 (D. Nev. 1954), *aff’d*, 222 F.2d 720 (9th Cir. 1955), *vacated*, 350 U.S. 377 (1956). [↑](#footnote-ref-87)
88. *. Remmer v. United States*, 348 U.S. 904, 904 (1955) (per curiam) (“This case is restored to the docket, and the whole record, including the findings and order of Judge Goodman, is remanded to the Court of Appeals . . . in order that the Court on the whole record may reconsider the case in the light of our recent decisions . . . .”). [↑](#footnote-ref-88)
89. . Remmer v. United States (*Remmer IV*), 222 F.2d 720, 720 (9th Cir. 1955), *vacated*, 350 U.S. 377 (1956) (per curiam); *see also, e.g.*,Holland v. United States, 348 U.S. 121 (1954); Friedberg v. United States, 348 U.S. 142 (1954); Smith v. United States, 348 U.S. 147 (1954); United States v. Calderon, 348 U.S. 160 (1954). [↑](#footnote-ref-89)
90. *. See Remmer IV*, 222 F.2d at 720. [↑](#footnote-ref-90)
91. *. Id.* [↑](#footnote-ref-91)
92. *. Remmer V*, 350 U.S. 377, 378 (1956). [↑](#footnote-ref-92)
93. *. Id.* [↑](#footnote-ref-93)
94. *. Id.* at 378–79. [↑](#footnote-ref-94)
95. *. Id.* at 382. [↑](#footnote-ref-95)
96. *. Id.* at379 (emphasis added). [↑](#footnote-ref-96)
97. *. Id.* at 379–80 (“We also pointed out that the record we had before us did not reflect what in fact transpired, ‘or whether the incidents that may have occurred were harmful or harmless.’ It was the paucity of information relating to the entire situation coupled with the presumption which attaches to the kind of facts alleged by petitioner which, in our view, made manifest the need for a full hearing.” (citation omitted) (quoting *Remmer II*, 347 U.S. 227, 229 (1954))). [↑](#footnote-ref-97)
98. *. Id.* at 382. [↑](#footnote-ref-98)
99. *. Id.* at381–82. [↑](#footnote-ref-99)
100. *. Id.* at 382. [↑](#footnote-ref-100)
101. *. See supra* Part I.B.1. [↑](#footnote-ref-101)
102. . Tanner v. United States,483 U.S. 107, 112 (1987). [↑](#footnote-ref-102)
103. . United States v. Conover, 772 F.2d 765, 767 (11th Cir. 1985). [↑](#footnote-ref-103)
104. *. Id.* at 768. [↑](#footnote-ref-104)
105. *. Id.* [↑](#footnote-ref-105)
106. *. Id.* at 769. [↑](#footnote-ref-106)
107. *. Id.* [↑](#footnote-ref-107)
108. . Tanner v. United States, 483 U.S. 107, 135 n.3 (Marshall, J., dissenting). The jury foreperson also contacted the trial judge and informed the judge that she wanted to testify and wanted to know when a hearing would be scheduled. *Id.* [↑](#footnote-ref-108)
109. *. Id.* at 113 (majority opinion). The juror’s name is spelled “Asbul” in the majority opinion, but “Asbel” in the dissent. *See id.* at 135 (Marshall, J., dissenting). [↑](#footnote-ref-109)
110. *. Id.* The defendants also sought a continuance for the sentencing, permission to interview the jurors, and a *Remmer* hearing. The sentencing date was continued, and a hearing was held only on the issue of whether the jurors should be interviewed. *Id.* [↑](#footnote-ref-110)
111. *. Id.* [↑](#footnote-ref-111)
112. *. Id.* [↑](#footnote-ref-112)
113. *. Id.* [↑](#footnote-ref-113)
114. *. Id.* at 114–15. [↑](#footnote-ref-114)
115. *. Id.* at 115. [↑](#footnote-ref-115)
116. *. Id.* [↑](#footnote-ref-116)
117. *. Id.* [↑](#footnote-ref-117)
118. *. Id.* at 115–16. [↑](#footnote-ref-118)
119. *. Id.*at 115. [↑](#footnote-ref-119)
120. *. Id.* at 115–16. [↑](#footnote-ref-120)
121. *. Id.*at 116. [↑](#footnote-ref-121)
122. *. Id.* [↑](#footnote-ref-122)
123. *. Id*. at 115. [↑](#footnote-ref-123)
124. *. Id.* at 115–16. [↑](#footnote-ref-124)
125. *. Id.* at 116. [↑](#footnote-ref-125)
126. *. Id.* [↑](#footnote-ref-126)
127. *. Id.* [↑](#footnote-ref-127)
128. *. Id.* [↑](#footnote-ref-128)
129. *. Id.*(omission in original). [↑](#footnote-ref-129)
130. *. Id.* at 115. [↑](#footnote-ref-130)
131. *. Id.* at 116. [↑](#footnote-ref-131)
132. . United States v. Conover, 772 F.2d 765, 765–66 (11th Cir. 1985) (citations omitted), *rev’d on other grounds sub nom.* Tanner v. United States, 483 U.S. 107 (1987). [↑](#footnote-ref-132)
133. *. Id.* at 770. [↑](#footnote-ref-133)
134. *. Tanner*, 483 U.S. at 110, 116. [↑](#footnote-ref-134)
135. . Oral Argument, *supra* note 46, at 40:29. [↑](#footnote-ref-135)
136. *. Id.* at 42:36. [↑](#footnote-ref-136)
137. *. Id.* at 46:29. [↑](#footnote-ref-137)
138. *. Id.* at 41.21. [↑](#footnote-ref-138)
139. *. Id.* at 41:24. [↑](#footnote-ref-139)
140. *. Id.* at 41:33. [↑](#footnote-ref-140)
141. . Tanner v. United States, 483 U.S. 107, 137–38 (1987) (Marshall, J., concurring in part and dissenting in part). [↑](#footnote-ref-141)
142. *. Id.* at 138–39. [↑](#footnote-ref-142)
143. *. Id.* [↑](#footnote-ref-143)
144. *. Id.* at 138. [↑](#footnote-ref-144)
145. *. Id.* at 142. [↑](#footnote-ref-145)
146. *. Id.* at 140. [↑](#footnote-ref-146)
147. *. Id.* at 141. [↑](#footnote-ref-147)
148. *. Id.* at 142. [↑](#footnote-ref-148)
149. *. Id.* [↑](#footnote-ref-149)
150. *. Id.* at 134. [↑](#footnote-ref-150)
151. *. Id.* at 142. [↑](#footnote-ref-151)
152. *. Warger III*, 574 U.S. 40 (2014). [↑](#footnote-ref-152)
153. . Warger v. Shauers (*Warger I*), No. CIV. 08‑5092, 2012 U.S. Dist. LEXIS 43032, at \*1–2 (D.S.D. Mar. 28, 2012), *aff’d*, 721 F.3d 606 (8th Cir. 2013), *aff’d*, 574 U.S. 40 (2014). [↑](#footnote-ref-153)
154. . *Id.* at \*2. [↑](#footnote-ref-154)
155. *. Id.* at \*3. [↑](#footnote-ref-155)
156. *. Id.* at \*2. [↑](#footnote-ref-156)
157. *. Id.* at \*3. [↑](#footnote-ref-157)
158. *. Id.* [↑](#footnote-ref-158)
159. *. Id.* [↑](#footnote-ref-159)
160. *. Id.* [↑](#footnote-ref-160)
161. *. Id.* at \*24. [↑](#footnote-ref-161)
162. *. Id.* [↑](#footnote-ref-162)
163. *. Id.* at \*25. [↑](#footnote-ref-163)
164. *. Id.* at \*24–25. [↑](#footnote-ref-164)
165. *. Id.*at \*25. [↑](#footnote-ref-165)
166. *. Id.* at \*25–26 (citing McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984)). [↑](#footnote-ref-166)
167. *. Id.* at \*37–38. [↑](#footnote-ref-167)
168. *. Id.* at \*29–31. (first citing Lopez v. Aramark Uniform & Career Apparel, Inc., 417 F. Supp. 2d 1062 (N.D. Iowa 2006); then citing United States v. Duzac, 622 F.2d 911 (5th Cir. 1980); and then citing Marcavage v. Bd. of Trustees of Temple Univ., 400 F. Supp. 2d 801 (E.D. Pa. 2005)). [↑](#footnote-ref-168)
169. *. Id.* [↑](#footnote-ref-169)
170. *. Id.* at \*29–30. [↑](#footnote-ref-170)
171. *. Id.* at \*32–33. [↑](#footnote-ref-171)
172. *. Id.* at \*29. [↑](#footnote-ref-172)
173. *. Id.* at \*31. [↑](#footnote-ref-173)
174. *. Id.* [↑](#footnote-ref-174)
175. *. Id.* at \*23–24. During voir dire, Whipple, like other prospective jurors, had been asked (1) whether she “would be unable to award damages for pain and suffering or for future medical expenses,” and (2) whether she thought she could not be “a fair and impartial juror on this kind of case.” *Warger III*, 574 U.S. 40, 43 (2014). In response to both questions, Whipple answered in the negative. *Id.* [↑](#footnote-ref-175)
176. *. Warger I*, 2012 U.S. Dist. LEXIS 43032, at \*32–33. [↑](#footnote-ref-176)
177. . United States v. Benally, 546 F.3d 1230, 1235–36 (10th Cir. 2008). [↑](#footnote-ref-177)
178. *. Id.* [↑](#footnote-ref-178)
179. *. Id.* at 1235. [↑](#footnote-ref-179)
180. . Warger v. Shauers (*Warger II*), 721 F.3d 606 (8th Cir. 2013), *aff’d*, 574 U.S. 40 (2014). [↑](#footnote-ref-180)
181. *. Id.* at 612. Unlike the district court, however, the Eighth Circuit did note that a circuit split existed on this front. *Id.* at 611–12. The Tenth Circuit’s decision in *Benally* was in line with the Third Circuit’s position. *See**id.*; *Benally*, 546 F.3d at 1236. However, the Ninth Circuit had previously held that “statements by jurors regarding dishonesty during voir dire [could] be admitted into evidence for the purpose of challenging a verdict.” *Id.* at 611 (citing United States v. Henley, 238 F.3d 1111, 1121 (9th Cir. 2001)). [↑](#footnote-ref-181)
182. *. Id.* at 612. [↑](#footnote-ref-182)
183. *. Id.* [↑](#footnote-ref-183)
184. *. Warger III*, 574 U.S. 40, 44 (2014). [↑](#footnote-ref-184)
185. *. Id.* at 44–45 (second alteration in original) (first quoting Fed. R. Evid. 606(b); and thenciting McDonough Power Equip. Inc. v. Greenwood, 464 U.S. 548, 556 (1984)). [↑](#footnote-ref-185)
186. *. Id.* at 49. [↑](#footnote-ref-186)
187. *. Id.* at 48. [↑](#footnote-ref-187)
188. *. Id.* at 49. [↑](#footnote-ref-188)
189. *. Id.* [↑](#footnote-ref-189)
190. *. Id.* at 50. [↑](#footnote-ref-190)
191. *. Id.* at 51 (quoting Tanner v. United States, 483 U.S. 107, 127 (1987)). [↑](#footnote-ref-191)
192. *. Id.* at 51–52. [↑](#footnote-ref-192)
193. *. Id.* at 52. [↑](#footnote-ref-193)
194. *. Id.* at 53. [↑](#footnote-ref-194)
195. . Not all of the federal circuit courts of appeals are addressed in this Section. [↑](#footnote-ref-195)
196. . S. Ct. R. 10. The rule is titled “Considerations Governing Review on Writ of Certiorari.” [↑](#footnote-ref-196)
197. *. See* B. Samantha Helgason, Note, *Opening Pandora’s Jury Box*, 89 Fordham L. Rev. 231, 242–53 (2020). [↑](#footnote-ref-197)
198. *. See* *Id.* at 242 (“Ultimately, the sporadic handful of Supreme Court cases on this matter have confused circuits about what contact to presume prejudicial and by which standard to evaluate alleged taint. Circuits have therefore diverged in their interpretations of *Remmer*’s presumption. While they agree that a prima facie showing entitles a defendant to a hearing, *Remmer* left unanswered whether that showing presumes prejudice and reallocates the burden of proof to the government. The perceived ambiguity of, first, whether *Remmer* created a burden‑shifting framework and, second, whether subsequent cases dissolved its standard has challenged courts for years.” (footnote omitted)). [↑](#footnote-ref-198)
199. *. See Remmer II*, 347 U.S. 227, 228–30 (1954); *see also* Bey v. Rozum, No. 13‑325, 2015 U.S. Dist. LEXIS 181623, at \*43 (E.D. Pa. Aug. 21, 2015) (“In some instances where the allegations of juror misconduct are readily supported and of sufficient magnitude, the trial court may infer prejudice and be required to hold a hearing to determine the extent and existence of such prejudice . . . .” (citing *Remmer II*, 347 U.S. at 228)). [↑](#footnote-ref-199)
200. . United States v. Lloyd*,* 269 F.3d 228, 238 (3d Cir. 2001) (quoting United States v. Gilsenan, 949 F.2d 90, 95 (9th Cir. 1991)). [↑](#footnote-ref-200)
201. *. Id.* An analysis involving a hypothetical juror is also used in the Second Circuit. *See* United States v. Greer, 285 F.3d 158, 174 (2d Cir. 2002). [↑](#footnote-ref-201)
202. . United States v. Fumo, 655 F.3d 288, 304 (3d Cir. 2011). [↑](#footnote-ref-202)
203. *. See, e.g.*, *id.* at 304–08 (finding the defendant was not substantially prejudiced by the actions of two jurors—one who was exposed to evidence that had been excluded from the trial and another who used social media during the trial and commented on Facebook and Twitter). [↑](#footnote-ref-203)
204. . Helgason, *supra* note 196, at 244. [↑](#footnote-ref-204)
205. *. Id.* [↑](#footnote-ref-205)
206. *. Fumo*, 655 F.3d at 304 (quoting United States v. Gilsenan, 949 F.2d 90, 97 (3d Cir. 1991)). [↑](#footnote-ref-206)
207. *. See* United States v. Johnson, 954 F.3d 174, 179 (4th Cir. 2020) (“[A defendant] is entitled under *Remmer* . . . to a rebuttable presumption that the external influence prejudiced the jury's ability to remain impartial . . . .”). [↑](#footnote-ref-207)
208. *. Loughry II*, 983 F.3d 698, 705 (4th Cir. 2020) (quoting *Johnson*, 954 F.3d at 179), *aff’d en banc*, 996 F.3d 729 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022). [↑](#footnote-ref-208)
209. *. Id.* [↑](#footnote-ref-209)
210. *. Id.*; *see also infra* Part II.B. [↑](#footnote-ref-210)
211. . 455 U.S. 209 (1982); Helgason, *supra* note 196, at 250. [↑](#footnote-ref-211)
212. *. Smith*, 455 U.S. at 216. [↑](#footnote-ref-212)
213. *. Cunningham V*, 23 F.4th 636, 651 (6th Cir. 2022) (quoting Smith v. Phillips, 455 U.S. 209 (1982)), *cert. denied*, 143 S. Ct. 37 (2022). [↑](#footnote-ref-213)
214. *. Id.*; *see also infra* Part II.C. [↑](#footnote-ref-214)
215. . Helgason, *supra* note 196, at 245. [↑](#footnote-ref-215)
216. . United States v. Gallardo, 497 F.3d 727, 736 (7th Cir. 2007) (citing United States v. Spano, 421 F.3d 599, 605 (7th Cir. 2005)). [↑](#footnote-ref-216)
217. . Brown v. Finnan, 598 F.3d 416, 423 (7th Cir. 2010). [↑](#footnote-ref-217)
218. . Helgason, *supra* note 196, at 247. [↑](#footnote-ref-218)
219. . United States v. Blumeyer, 62 F.3d 1013, 1016 (8th Cir. 1995) (citing United States v. Cheyenne*,* 855 F.2d 566, 568 (8th Cir. 1988)). In *Blumeyer*, Juror 9 reached out to one of the defendants post‑conviction because the foreperson of the jury had asked a lawyer friend of theirs a “question of law.” *Id.* at 1014. Most of the jurors interviewed could not recall what the exact response was to the foreperson’s inquiry. *Id.* at 1016. The Eighth Circuit found that neither the likely hypothetical question focused on a point of law nor that the defendants in the case were prejudiced by the foreperson’s question. *Id.* Even if the defendants had demonstrated prejudice, given the language in *Remmer*, the government would have been able to rebut that presumption of prejudice by proving the jury foreperson’s contact was harmless beyond a reasonable doubt. *Id.* at 1017. [↑](#footnote-ref-219)
220. *. Id.* [↑](#footnote-ref-220)
221. *. Id.* at 1017. [↑](#footnote-ref-221)
222. . Stouffer v. Trammell,738 F.3d 1205, 1214 (10th Cir. 2013). [↑](#footnote-ref-222)
223. *. Id.* at 1213. [↑](#footnote-ref-223)
224. *. Id.* at 1214 (quoting United States v. Rutherford, 371 F.3d 634, 641–42 (9th Cir. 2004)). [↑](#footnote-ref-224)
225. . United States v. Brooks, 161 F.3d 1240, 1246 (10th Cir. 1998) (quoting *Remmer II*, 347 U.S. 227, 229 (1954)). [↑](#footnote-ref-225)
226. *. Id.* [↑](#footnote-ref-226)
227. *. Loughry II*, 983 F.3d 698, 701 (4th Cir. 2020), *aff’d en banc*, 996 F.3d 729 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022). [↑](#footnote-ref-227)
228. *. See* Yawana Wolfe, *W. Va. Supreme Court Justice Arrested on 22 Criminal Counts*, Courthouse News Serv. (June 21, 2018), https://www.courthousenews.com/w‑va‑supreme‑court‑justice‑arrested‑on‑22‑‌criminal‑counts/ [https://perma.cc/5QCJ‑UU9A]. [↑](#footnote-ref-228)
229. . A reported $3.7 million dollars was spent to renovate and decorate the judges’ offices. Elliot Hannon, *West Virginia House Votes To Impeach Three State Supreme Court Judges for Spending Millions on Office Renovations,* Slate (Aug. 13, 2018, 8:59 PM), https://slate.com/news‑and‑politics/2018/08/west‑‌virginia‑house‑votes‑to‑impeach‑three‑state‑supreme‑court‑judges‑for‑spending‑millions‑on‑office‑renovations.html [https://perma.cc/HH6C‑SQCQ]. A subsequent impeachment of the entire bench resulted from the investigation into government spending. Justice Loughry was eventually impeached by the House of Delegates, as were Justices Davis, Walker, and Workman. *Id.* The court’s fifth justice, Justice Ketchum, escaped impeachment only by resigning prior to the commencement of the impeachment proceedings. *Id.* JusticeKetchum resigned several days before he was formally charged with federal wire fraud. *Id.* [↑](#footnote-ref-229)
230. *. See generally* Allen H. Loughry, Don’t Buy Another Vote, I Won’t Pay for a Landslide (2006). *See* Hannon, *supra* note 221. [↑](#footnote-ref-230)
231. . United States v. Loughry (*Loughry I*), No. 2:18‑CR‑00134, 2019 U.S. Dist. LEXIS 7111, \*1 (S.D. W. Va. Jan. 11, 2019), *aff’d*, 983 F.3d 698 (4th Cir. 2020), *aff’d en banc*, 996 F.3d 729 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022). [↑](#footnote-ref-231)
232. *. Loughry II*, 983 F.3d at 702. [↑](#footnote-ref-232)
233. *. Id.* [↑](#footnote-ref-233)
234. *. Id.* [↑](#footnote-ref-234)
235. *. Id.* [↑](#footnote-ref-235)
236. *. Id.* at 702–03. [↑](#footnote-ref-236)
237. *. Id.* at 703. [↑](#footnote-ref-237)
238. *. Id.* at 702. [↑](#footnote-ref-238)
239. *. Id.* at 701. [↑](#footnote-ref-239)
240. *. Id.* at 702. [↑](#footnote-ref-240)
241. . Petition for Writ of Certiorari at App. 49–50, *Loughry IV*, 142 S. Ct. 897 (2022) (No. 21‑581) [hereinafter Petition for Writ of Certiorari, *Loughry*] ; Transcript of Voir Dire at 144–85, *Loughry II*, 983 F.3d 698 (4th Cir. 2020) (No. 19‑4137). [↑](#footnote-ref-241)
242. . Petition for Writ of Certiorari, *Loughry*, *supra* note 233, App. at 60. [↑](#footnote-ref-242)
243. *. Id.* [↑](#footnote-ref-243)
244. *. Id.*at 21(emphasis added). [↑](#footnote-ref-244)
245. *. Id.* at 11. [↑](#footnote-ref-245)
246. *. Id.* [↑](#footnote-ref-246)
247. . Brief for Appellant at 4–5, *Loughry II*, 983 F.3d 698 (No. 19‑4137). [↑](#footnote-ref-247)
248. *. Id.* at 16. [↑](#footnote-ref-248)
249. *. Id.* at 15; Petition for Writ of Certiorari, *Loughry*, *supra* note 233, at App. 47. [↑](#footnote-ref-249)
250. *. Loughry I*, No. 18‑CR‑00134, 2019 U.S. Dist. LEXIS 7111, at \*1 (S.D. W. Va. Jan. 11, 2019). [↑](#footnote-ref-250)
251. . Petition for Writ of Certiorari, *Loughry*, *supra* note 233, at App. 69. [↑](#footnote-ref-251)
252. *. Id.* at App. 53–54. [↑](#footnote-ref-252)
253. *. Id.* at App. 53. [↑](#footnote-ref-253)
254. *. Id.*at App.54. [↑](#footnote-ref-254)
255. *. Id*. [↑](#footnote-ref-255)
256. *. Id.* at 59. [↑](#footnote-ref-256)
257. *. Id.* at 64. [↑](#footnote-ref-257)
258. . Brief for Appellant, *supra* note 238, at 28–31. [↑](#footnote-ref-258)
259. . It is the author’s opinion that Juror A should have responded in the affirmative to questions 1, 3, and 6. It is arguable whether her likes and retweets in the prior months leading up to the trial amounted to an opinion on the guilt or innocence of Loughry (question 7). However, a hearing would resolve any doubt as to her true feelings. Further, her knowledge about the case, due to her Twitter activity, beyond what the district court judge and the attorneys had already covered during voir dire, was also at issue (question 4). [↑](#footnote-ref-259)
260. . Petition for Writ of Certiorari, *Loughry*, *supra* note 233, at App. 65–69. [↑](#footnote-ref-260)
261. *. Id.* [↑](#footnote-ref-261)
262. *. Id.* [↑](#footnote-ref-262)
263. *. Id.* at App. 69 (“Without a threshold showing of juror misconduct, the court declines to expend its resources to allow the defendant to pry into a juror’s pretrial conduct and fish for evidence of bias.”). [↑](#footnote-ref-263)
264. *. Loughry II*, 983 F.3d 698 (4th Cir. 2020), *aff’d en banc*, 996 F.3d. 729 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022). [↑](#footnote-ref-264)
265. *. Id.* at 705 (quoting United States v. Johnson, 954 F.3d 174, 179 (4th Cir. 2020))*.* [↑](#footnote-ref-265)
266. *. Id.* at 704*.* [↑](#footnote-ref-266)
267. *. Id.* at 712*.* [↑](#footnote-ref-267)
268. *. Id.* [↑](#footnote-ref-268)
269. *. Id.* [↑](#footnote-ref-269)
270. . Currently, Diaz is chief justice of the Fourth Circuit. U.S. 4th Cir. App. Ct., https://www.ca4.‌uscourts.gov/judges/judges‑of‑the‑court/judge‑albert‑diaz [https://perma.cc/43NY‑QU6U] (last visited Oct. 28, 2023). [↑](#footnote-ref-270)
271. *. Loughry II*, 983 F.3d at 714 (Diaz, J., dissenting in part)*.* [↑](#footnote-ref-271)
272. . 579 U.S. 40, 51 (2016). The Court did not address if it would be appropriate to recall a criminal jury after being discharged. *Id.* [↑](#footnote-ref-272)
273. *. Id.* [↑](#footnote-ref-273)
274. *. Id.*; *see also Loughry II*, 983 F.3d at 714 (Diaz, J., dissenting in part) (emphasis omitted) (quoting *Dietz,* 579 U.S. at 51)*.* [↑](#footnote-ref-274)
275. *. Loughry II*, 983 F.3d at 714 (Diaz, J., dissenting in part). [↑](#footnote-ref-275)
276. *. Id.* [↑](#footnote-ref-276)
277. *. Id.* [↑](#footnote-ref-277)
278. *. Id.* [↑](#footnote-ref-278)
279. *. Id.*; *see also* Helgason, *supra* note 196, at 261. [↑](#footnote-ref-279)
280. *. Loughry II*,983 F.3d at 715 (Diaz, J., dissenting in part). [↑](#footnote-ref-280)
281. *. Id.* [↑](#footnote-ref-281)
282. *. Id.* [↑](#footnote-ref-282)
283. *. Id.*; *see also* United v. Harris,881 F.3d 945, 954 (6th Cir. 2018). [↑](#footnote-ref-283)
284. *. Loughry II*,983 F.3d at 715 [↑](#footnote-ref-284)
285. . United States v. Loughry (*Loughry III*), 996 F.3d 729, 729 (4th Cir. 2021) (en banc) (per curiam), *cert. denied*, 142 S. Ct. 897 (2022). [↑](#footnote-ref-285)
286. . Three judges (King, Thacker, and Rushing) took no part in the decision of the case. *Id.* [↑](#footnote-ref-286)
287. . Petition for Writ of Certiorari, *Loughry*, *supra* note 233, at App. 73–74. [↑](#footnote-ref-287)
288. *. Loughry III*, 996 F.3d at 729. [↑](#footnote-ref-288)
289. . Oral Argument, *Loughry III*, 996 F.3d 729 (4th Cir. 2021) (No. 19‑4137), https://www.ca4.‌uscourts.gov/OAarchive/mp3/19‑4137‑20210503.mp3 [https://perma.cc/KH3L‑XWEV]. [↑](#footnote-ref-289)
290. . Petition for Writ of Certiorari, *Loughry*, *supra* note 233, at App. 101. Assistant United States Attorney Gregory McVey, in response to a question about what the hearing would look like, stated, “And what [the hearing] ends up being in the United States’ mind is, in essence, a fishing expedition; is that they’re using the hearing itself to develop a credible allegation of that unauthorized contact. And that’s what that hearing would be . . . and that’s just simply not what Remmer stands for; that that has to occur before a hearing is granted.” *Id.* [↑](#footnote-ref-290)
291. *. Id.* at App. 109 (“And, but that’s a different thing altogether from somebody trying to exert an outside influence upon a particular juror, which seems to me a much more serious problem than the [mere] fact of exposure, and that I—As I understand the record, I don’t think that there was a kind of outside influence brought on the jury by anyone, and that, to me, when that line is crossed, that’s a real red flag to me.”) (statement of Judge Wilkinson). Earlier in oral argument Judge Richardson made similar point. *See id.* at App. 84. [↑](#footnote-ref-291)
292. *. Id.* To this, appellate counsel for Loughry responded that there had been a case in 2012 from the Fourth Circuit, *United States v. Lawson*, where reading a Wikipedia entry was enough to warrant the grant of a hearing even though it did not appear that any information was affirmatively brought back to other jurors. *Id.*; *see also* United States v. Lawson, 677 F.3d 629, 639–40 (4th Cir. 2012). [↑](#footnote-ref-292)
293. . Petition for Writ of Certiorari, *Loughry*, *supra* note 233, at App. 82–83. [↑](#footnote-ref-293)
294. *. Id.* at App. 91–92(“[W]hen you got people who are following people [online] who are to be making decisions in the case . . . why not simply just ask the question? And that’s all you got to do, and then the judge can make the decision.”). [↑](#footnote-ref-294)
295. *. Id.* at App. 99. [↑](#footnote-ref-295)
296. *. See generally id.* [↑](#footnote-ref-296)
297. *. Id.* at 14. [↑](#footnote-ref-297)
298. *. Id.* [↑](#footnote-ref-298)
299. . *Id.* [↑](#footnote-ref-299)
300. *. Id.* at 27. [↑](#footnote-ref-300)
301. *. Id.* at 19 (emphasis added). [↑](#footnote-ref-301)
302. *. Id.* at 24. [↑](#footnote-ref-302)
303. *. Id.* at 25. [↑](#footnote-ref-303)
304. *. Id.* at 25–26. The process by which defendants can challenge their convictions on a writ of habeas corpus is more complex than that associated with a direct appeal. Under 28 U.S.C. § 2254(d), which applies to convictions handed down in state courts, petitioners cannot receive post‑conviction relief unless they are able to demonstrate that their convictions (1) were contrary to clearly established federal law, (2) involved an unreasonable application of federal law, or (3) resulted from an unreasonable determination of the facts in light of the evidence presented during the state‑court proceedings. 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 32.3 (7th ed. 2022). By contrast, under 28 U.S.C. § 2255(a), which applies to convictions handed down in federal courts, petitioners can receive post‑conviction relief if they are able to demonstrate (1) that the sentence imposed on them was in violation of the Constitution or laws of the United States, (2) that the court lacked jurisdiction to impose the sentence, or (3) that the sentence exceeds the maximum penalty prescribed by law or is subject to collateral attack. *Id.* § 41.1. [↑](#footnote-ref-304)
305. . Petition for Writ of Certiorari, *Loughry*, *supra* note 233, at 25. [↑](#footnote-ref-305)
306. *. Loughry IV*, 142 S. Ct. 897 (2022). [↑](#footnote-ref-306)
307. *. Cunningham VI*, 143 S. Ct. 37 (2022). [↑](#footnote-ref-307)
308. . The facts restated here come from the federal district court opinion denying Cunningham habeas corpus relief. Cunningham v. Hudson (*Cunningham I*), No. 06CV167, 2010 U.S. Dist. LEXIS 129636, at \*2–6 (N.D. Ohio Dec. 7, 2010), *vacated*, 756 F.3d 477 (6th Cir. 2014). [↑](#footnote-ref-308)
309. *. Id.* at \*2. [↑](#footnote-ref-309)
310. *. Id.* at \*3. [↑](#footnote-ref-310)
311. *. Id.* [↑](#footnote-ref-311)
312. *. Id.* [↑](#footnote-ref-312)
313. *. Id.* at \*3–4. [↑](#footnote-ref-313)
314. *. Id.* at \*4. [↑](#footnote-ref-314)
315. *. Id.* [↑](#footnote-ref-315)
316. *. Id.* [↑](#footnote-ref-316)
317. *. Id.* [↑](#footnote-ref-317)
318. *. Id.* [↑](#footnote-ref-318)
319. *. Id.* at \*5–6. [↑](#footnote-ref-319)
320. . Some of the procedural history is irrelevant for purposes of this Article, but there have been at least a dozen proceedings in both state and federal courts on issues related to post‑conviction relief. Much of the subsequent procedural history and facts are recounted in a different federal district court opinion. Cunningham v. Shoop (*Cunningham III*), No. 06 CV 167, 2019 U.S. Dist. LEXIS 218220 (N.D. Ohio Dec. 18, 2019), *rev’d*, 23 F.4th 636 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 37 (2022); *see also* Petition for Writ of Certiorari at 7–10, *Cunningham VI*, 143 S. Ct. 37 (No. 21‑1587) [hereinafter Petition for Writ of Certiorari, *Cunningham*]. [↑](#footnote-ref-320)
321. *. Cunningham III*, 2019 U.S. Dist. LEXIS 218220, at \*4. [↑](#footnote-ref-321)
322. *. Cunningham I*, 2010 U.S. Dist. LEXIS 129636, at \*45–58, 65–68. [↑](#footnote-ref-322)
323. *. Cunningham III*, 2019 U.S. Dist. LEXIS 218220, at \*4–5. [↑](#footnote-ref-323)
324. *. Id.* at \*5. [↑](#footnote-ref-324)
325. *. Id.* [↑](#footnote-ref-325)
326. *. Id.* [↑](#footnote-ref-326)
327. *. Id.* [↑](#footnote-ref-327)
328. *. Id.* [↑](#footnote-ref-328)
329. *. Id.* at \*6. [↑](#footnote-ref-329)
330. *. Id.* [↑](#footnote-ref-330)
331. *. Id.* at \*6–7. [↑](#footnote-ref-331)
332. *. Id.* at \*7 (first alteration in original). [↑](#footnote-ref-332)
333. *. Id.* [↑](#footnote-ref-333)
334. *. Id.* [↑](#footnote-ref-334)
335. *. Id.* [↑](#footnote-ref-335)
336. *. Id.* at \*8. [↑](#footnote-ref-336)
337. . During this subsequent deposition of Wobler, there is some inconsistency as to whether Mikesell had stated that she had been working with the families or if she would be working with them through the Welfare Job and Family Services agency. *Id.* at \*8–9. [↑](#footnote-ref-337)
338. *. Id.* at \*10. [↑](#footnote-ref-338)
339. *. Cunningham I*, 2010 U.S. Dist. LEXIS 129636, at \*58–59. [↑](#footnote-ref-339)
340. . Cunningham v. Hudson (*Cunningham II*), 756 F.3d 477 (6th Cir. 2014) (per curiam). [↑](#footnote-ref-340)
341. *. Cunningham III*, 2019 U.S. Dist. LEXIS 218220, at \*10. [↑](#footnote-ref-341)
342. *. Cunningham II*, 756 F.3d at 479 (quoting Wagner v. Smith, 581 F.3d 410, 419 (6th Cir. 2009)). [↑](#footnote-ref-342)
343. *. Id.* at 485. [↑](#footnote-ref-343)
344. *. Cunningham III*, 2019 U.S. Dist. LEXIS 218220, at \*13. [↑](#footnote-ref-344)
345. *. Id.* at \*13–14. [↑](#footnote-ref-345)
346. *. Id.* at \*14. [↑](#footnote-ref-346)
347. *. Id.* at \*19–23. [↑](#footnote-ref-347)
348. *. Id.* at \*34–39. [↑](#footnote-ref-348)
349. *. Id.* at \*39. [↑](#footnote-ref-349)
350. . Ohio Evid. R. 606. In July 2022, subsection (B) of that rule was “amended to more closely mirror [Fed. R. Evid. 606(b)].” Ohio Evid. R. 606 staff notes on the 2022 amendments. The aim of the amendment was “to address constitutional challenges to the former rule as being violative of a criminal defendant’s constitutional rights because it infringed upon the defendant’s fair trial rights.” *Id.* The text of the amended subsection of the rule is as follows:

(1) Inquiry Into Validity of Verdict or Indictment. *Prohibited Testimony or Other Evidence.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith. A juror’s affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying will not be received by the court for these purposes.

(2) *Exceptions.* A juror may testify about whether:

(a) extraneous prejudicial information was improperly brought to the jury’s attention;

(b) any outside influence was improperly brought to bear on any juror; or,

(c) any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court occurred.

*Id.* 606. [↑](#footnote-ref-350)
351. *. Cunningham III*, 2019 U.S. Dist. LEXIS 218220, at \*47. [↑](#footnote-ref-351)
352. *. Id.* [↑](#footnote-ref-352)
353. *. See id.* at \*48. [↑](#footnote-ref-353)
354. *. Id.* at \*42–43 (citing Irvin v. Dowd, 366 U.S. 717, 723 (1961)). [↑](#footnote-ref-354)
355. *. Id.* at \*51–56. During the voir dire of the lower court petit jury, Mikesell was never directly questioned as to whether or not she had a relationship with the family members of the victims. *Id.* at \*52. She was, however, forthcoming about her employment with the Allen County Children Services and admitted that she knew both prosecutors and attorneys because of her employment. *Id.* at \*51–52. Mikesell responded in the negative when asked if her employment had any “bearing” or “taint” on her being an impartial or fair juror. *Id.* at \*52–54. [↑](#footnote-ref-355)
356. . Cunningham v. Shoop (*Cunningham IV*), 814 F. App’x 132, 133 (6th Cir. 2020), *rev’d*, 23 F.4th 636 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 37 (2022). [↑](#footnote-ref-356)
357. . 28 U.S.C. §§ 2241–2255. [↑](#footnote-ref-357)
358. . 28 U.S.C. § 2254. State custody; remedies in Federal courts:

. . . .

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

*Id.* § 2254(e). [↑](#footnote-ref-358)
359. . In his dissenting opinion, Justice Thomas asserted that the nature of the habeas proceedings was part of the reason he would have summarily reversed the Sixth Circuit Court of Appeals. *See Cunningham VI,* 143 S. Ct. 37, 44–45 (2022). [↑](#footnote-ref-359)
360. . 28 U.S.C. § 2253(c)(2) (“A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.”). [↑](#footnote-ref-360)
361. *. Cunningham V,* 23 F.4th 636, 654 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 37 (2022). [↑](#footnote-ref-361)
362. . 529 U.S. 420 (2000). [↑](#footnote-ref-362)
363. *. Id.* at424. [↑](#footnote-ref-363)
364. *. Id.* at 440–43. [↑](#footnote-ref-364)
365. *. Id.* at 441. [↑](#footnote-ref-365)
366. *. Id.* at 429, 440–45. [↑](#footnote-ref-366)
367. *. Id.* at 429. [↑](#footnote-ref-367)
368. *. Id.* at 430. [↑](#footnote-ref-368)
369. *. See id.* at 434, 440; *see also* 28 U.S.C. § 2254(e)(2). [↑](#footnote-ref-369)
370. *. Cunningham V*,23 F.4th 636, 659 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 37 (2022). [↑](#footnote-ref-370)
371. *. Id.* at 661. [↑](#footnote-ref-371)
372. *. Id.* at 662. [↑](#footnote-ref-372)
373. *. Id.* at 661. [↑](#footnote-ref-373)
374. *. Id.* at 651 (quoting Ewing v. Horton, 914 F.3d 1027, 1030 (6th Cir. 2019)). [↑](#footnote-ref-374)
375. *. Id.* [↑](#footnote-ref-375)
376. *. Id.* [↑](#footnote-ref-376)
377. *. Id.* (quoting *Remmer II*, 347 U.S. 227, 229 (1954)). [↑](#footnote-ref-377)
378. *. Id.* [↑](#footnote-ref-378)
379. *. Id.* [↑](#footnote-ref-379)
380. *. Id.* at 652 (quoting *Remmer II*, 347 U.S. at 229). [↑](#footnote-ref-380)
381. *. Id.* at 650. The Sixth Circuit was clear that, due to the holding in *Cullen v. Pinholster*, its decision was only based on the information produced in the state courts (based on Cunningham’s first state post‑conviction motion), as any discovery obtained during the federal habeas proceedings leading up to the decision was prohibited from consideration. *Id.* (citing *Pinholster*, 563 U.S. 170, 181, 185–86 (2011)). [↑](#footnote-ref-381)
382. *. Id.* at 661. [↑](#footnote-ref-382)
383. *. Id.* at 639. [↑](#footnote-ref-383)
384. *. Id.*at 661 (quoting English v. Berghuis, 990 F.3d 804, 813 (6th Cir. 2018)). [↑](#footnote-ref-384)
385. *. Id.* [↑](#footnote-ref-385)
386. *. Id.* [↑](#footnote-ref-386)
387. *. Id.* [↑](#footnote-ref-387)
388. *. Id.* at 662 (citations omitted) (quoting United States v. Lanier, 998 F.3d 284, 295 (6th Cir. 2021)). [↑](#footnote-ref-388)
389. *. Id.* at 680 (Kethledge, J., concurring in the judgment and dissenting in part) (quoting 28 U.S.C. § 2254(d)(1)). [↑](#footnote-ref-389)
390. *. Id.* at 682–83. [↑](#footnote-ref-390)
391. *. Id.* at 681. [↑](#footnote-ref-391)
392. *. Id.* at 678 (majority opinion) (“We reverse and remand so that the district court can conduct an evidentiary hearing to investigate Cunningham’s two juror‑bias claims consistent with this opinion.” (emphasis omitted)). [↑](#footnote-ref-392)
393. *. See generally* Petition for Writ of Certiorari, *Cunningham*, *supra* note 310. [↑](#footnote-ref-393)
394. *. Id.* at 15–23. [↑](#footnote-ref-394)
395. *. Id.* at 13 (quoting *Cunningham V*,23 F.4th at 680 (Kethledge, J., concurring in the judgment and dissenting in part)). [↑](#footnote-ref-395)
396. *. Id.* at 15 (“But its reasoning as to both theories [for providing a hearing] exhibits an identical flaw: it ignores AEDPA and this Court’s precedent.”). [↑](#footnote-ref-396)
397. *. Id.* (“Of those many ‘rebukes, twelve . . . were by per curiam decision on petitions for writs of certiorari.’” (omission in original) (quoting Cassano v. Shoop, 10 F.4th 695, 697 (6th Cir. 2021) (Griffin, J., dissenting))). [↑](#footnote-ref-397)
398. *. Id.* at 26. [↑](#footnote-ref-398)
399. *. Id.* at 26–28. [↑](#footnote-ref-399)
400. *. Id.* at 30–31. [↑](#footnote-ref-400)
401. *. Id.* at 31–32. [↑](#footnote-ref-401)
402. . Brief in Opposition at 25–26, *Cunningham VI*, 143 S. Ct. 37 (2022) (No. 21‑1587). [↑](#footnote-ref-402)
403. *. Id.* at 10–11. [↑](#footnote-ref-403)
404. *. Id.* at 9–10. [↑](#footnote-ref-404)
405. *. Id.* at 8, 11. [↑](#footnote-ref-405)
406. *. Id.* at 11. [↑](#footnote-ref-406)
407. *. Cunningham VI*, 143 S. Ct. at 37 (Thomas, J., dissenting). [↑](#footnote-ref-407)
408. *. Id.* [↑](#footnote-ref-408)
409. *. Id.* [↑](#footnote-ref-409)
410. *. Id.* at 43. [↑](#footnote-ref-410)
411. *. Id.* at 37. Justice Thomas subsequently cited *Cassano v. Shoop*, a case where the dissenting judge in that opinion detailed twenty‑two other instances in which the Supreme Court had reversed the Sixth Circuit “for not applying the deference to state‑court decisions mandated by AEDPA.” *Id.* at 44 (quoting 10 F.4th 695, 696–97 (6th Cir. 2021) (Griffin, J., dissenting from denial of rehearing en banc)). [↑](#footnote-ref-411)
412. *. Id.* at 44. [↑](#footnote-ref-412)
413. *. Id*. at 42–43. [↑](#footnote-ref-413)
414. *. Id.* at 44 (emphasis omitted). [↑](#footnote-ref-414)
415. . Cunningham v. Shoop (*Cunningham VII*), No. 06 CV 167, 2023 WL 2865647 (N.D. Ohio Apr. 10, 2023). [↑](#footnote-ref-415)
416. *. Cunningham VI*, 143 S. Ct. at 42 (Thomas, J., dissenting). [↑](#footnote-ref-416)
417. . The majority in the Sixth Circuit’s *Cunningham V* wrote that “[w]e have treated a trial court’s failure to hold a *Remmer* hearing as a due process violation closely related to, but distinct from the underlying question of juror bias in violation of the Sixth Amendment right to an impartial jury.” 23 F.4th 636, 661 (6th Cir. 2022) (citing Ewing v. Horton, 914 F.3d 1027, 1030 (6th Cir. 2019)). [↑](#footnote-ref-417)
418. *. Cunningham VI*, 143 S. Ct. at 42 (Thomas, J., dissenting); *see also* *id.* at 42 n.5 (“Contrary to the panel majority’s apparent understanding, *Smith v. Phillips*,455 U.S. 209 (1982), did not hold that *Remmer* was binding on state courts as a matter of constitutional due process; rather, it held only that a state court did not *violate* due process by responding to an allegation of juror impartiality with a hearing that would have satisfied *Remmer* had it occurred in the federal system. 455 U.S., at 218. Dicta in *United States v. Olano*, 507 U.S. 725 (1993), arguably characterize *Remmer* as a constitutional decision, see 507 U.S. at 738‑739, but even that is doubtful and regardless, dicta are not ‘clearly established Federal law’ under §2254(d)(1). The actual holdings of *Olano* have nothing to do with the Constitution, and the third case, *Rushen v. Spain*, 464 U.S. 114 (1983) (*per curiam*), also explicitly decided no constitutional question.” (some citations and parallel citations omitted)). [↑](#footnote-ref-418)
419. *. See* Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia*, 70 Hastings L.J. 75, 80 (2018); *see also* David N. Mayer, *Justice Clarence Thomas and the Supreme Court’s Rediscovery of the Tenth Amendment*, 25 Cap. U. L. Rev. 339, 411–22 (1996). [↑](#footnote-ref-419)
420. . 580 U.S. 206, 225 (2017). [↑](#footnote-ref-420)
421. *. Id.* at 230 (Thomas, J., dissenting). [↑](#footnote-ref-421)
422. *. Id.* at 235 (Alito J., dissenting). [↑](#footnote-ref-422)
423. *. Id.* at 231 (Thomas, J., dissenting). [↑](#footnote-ref-423)
424. *. Id.* [↑](#footnote-ref-424)
425. *. Id.* at 232 (citing Vaise v. Delaval (1785) 99 Eng. Rep. 944 (KB)). [↑](#footnote-ref-425)
426. *. Id.* at 232. [↑](#footnote-ref-426)
427. *. Id.* at 234–35. [↑](#footnote-ref-427)
428. *. See id.* at 235–55 (Alito, J., dissenting). [↑](#footnote-ref-428)
429. *. Id.* at 240–42. [↑](#footnote-ref-429)
430. *. Id.* at 250 (emphasis added). [↑](#footnote-ref-430)
431. *. Id.* at 251 (quoting *Id.* at 224 (majority opinion)). [↑](#footnote-ref-431)
432. *. Id.* [↑](#footnote-ref-432)
433. *. Id.* at 229 (majority opinion). [↑](#footnote-ref-433)
434. . Tanner v. United States*,* 483 U.S. 107, 134 (1987) (Marshall, J., concurring in part and dissenting in part) (quoting Jordan v. Massachusetts, 225 U.S. 167, 176 (1912)). [↑](#footnote-ref-434)
435. *. Id.* at 137. [↑](#footnote-ref-435)
436. *. Id.* (first citing Parker v. Gladden, 385 U.S. 363 (1966); and then citing Mattox v. United States, 146 U.S. 140 (1892)). [↑](#footnote-ref-436)
437. . Petition for Writ of Certiorari, *Loughry*, *supra* note 233, at 19 (quoting *Remmer II*, 347 U.S. 227, 229 (1954)). [↑](#footnote-ref-437)
438. *. See* *Tanner*, 483 U.S. at 126–27. [↑](#footnote-ref-438)
439. *. Id.* at 142 (Marshall, J., dissenting). [↑](#footnote-ref-439)
440. . 455 U.S. 209, 221 (1982). [↑](#footnote-ref-440)
441. *. Id.* at 217. [↑](#footnote-ref-441)
442. *. Id.* [↑](#footnote-ref-442)
443. *. Id.* [↑](#footnote-ref-443)
444. *. Id.* [↑](#footnote-ref-444)
445. *. See, e.g.*,Tanner v. United States, 483 U.S. 107, 127 (1987) (“Petitioners’ Sixth Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process. The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire.* Moreover, during the trial the jury is observable by the court, by counsel and by court personnel. Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict.” (citation omitted)); *Warger III*, 574 U.S. 40, 51 (2014). [↑](#footnote-ref-445)
446. *. Cunningham V*, 23 F.4th 636, 681 (6th Cir. 2022). [↑](#footnote-ref-446)
447. . Petition for Writ of Certiorari, *Cunningham*, *supra* note 310, at 20 (“The Court has never, however, announced a standard that would guide courts in deciding when to hold a *Remmer* hearing otherwise.”). [↑](#footnote-ref-447)
448. *. See* *Remmer II*, 347 U.S. 227, 229 (1954) (“[A]ny private communication, contact or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . . The 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.”). [↑](#footnote-ref-448)
449. *. See supra* Section I. [↑](#footnote-ref-449)
450. *. Id.* [↑](#footnote-ref-450)
451. *. See supra* Part II.A.3. [↑](#footnote-ref-451)
452. *. See, e.g.*, *Loughry II*, 983 F.3d 698, 714 (4th Cir. 2020) (Diaz, J., dissenting in part), *aff’d en banc*, 996 F.3d. 729 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022). [↑](#footnote-ref-452)
453. . Fed. R. Evid. 606(b)(2)(A)–(B). [↑](#footnote-ref-453)
454. . See *supra* PartII.A.5 discussing the Eighth Circuit’s standard for granting a *Remmer* hearing. [↑](#footnote-ref-454)
455. . See *supra* Part II.A.6 discussing the Tenth Circuit’s standard for granting a *Remmer* hearing. [↑](#footnote-ref-455)
456. *. See* Garfield Tenzer, *supra* note 52, at 174. [↑](#footnote-ref-456)
457. *. Remmer II*, 347 U.S. at 229 (emphasis added). [↑](#footnote-ref-457)
458. *. Loughry II*, 983 F.3d 698, 713 (4th Cir. 2022) (Diaz, J., dissenting). [↑](#footnote-ref-458)
459. . Petition for Writ of Certiorari, *Loughry*, *supra* note233 233, at 21. [↑](#footnote-ref-459)
460. . Helgason, *supra* note 196, at 260. [↑](#footnote-ref-460)