TEMPLE LAW REVIEW ONLINE

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VOL. 97 **OCT. 2024**

RESPONSE

HOW TO IMPEACH A VERDICT: A RESPONSE TO MELANIE C. REGIS

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INTRODUCTION

The Sixth Amendment provides criminal defendants with the right to an *impartial* jury.[1] But there is no guarantee of that. Jurors carry "baggage" into the jury room (past experiences, family dynamics, mental health issues, etc.). That "baggage" can influence the way jurors view the evidence presented if they cannot set it aside during trial. This can lead defendants to question the validity of a jury verdict. However, the need for "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust . . . that relies on the decisions of laypeople would

* Associate Professor of Law, Touro University Jacob D. Fuchsberg Law Center. Thank you to my Lutie sister Melanie C. Regis for requesting my input on this important issue. I also express my sincere gratitude to my colleague (and mentor) Rodger D. Citron for his generous assistance. Many thanks as well to the phenomenal *Temple Law Review* editors.

1. U.S. Const. amend. VI (emphasis added).

all be undermined by a barrage of post-verdict scrutiny of juror conduct."[2] The "no impeachment" rule prevents jurors from testifying about deliberations post-verdict which creates a tension between the need to maintain the sanctity of the jury room and the defendant's right to an impartial jury. If a defendant suspects juror bias or juror misconduct, they can request a *Remmer* hearing to ensure that their Sixth Amendment right to a fair trial has not been compromised.[3]

In *Testing the Validity of a Verdict*, Professor Melanie C. Regis draws critical attention to the growing circuit split surrounding the standard for a *Remmer* hearing.[4] Professor Regis notes that it is currently unclear whether a party seeking a *Remmer* hearing must show a credible "unauthorized contact" that "reasonably draw[s] into question the integrity of the trial proceedings"[5] or whether they must make a "colorable claim of extraneous influence" that caused "actual" bias.[6] Professor Regis argues that "[n]ot only do federal circuits use different standards, but those standards . . . make use of complex language and require multistep analyses."[7] As a result, there are conflicting outcomes on the same legal issue.

Professor Regis calls for the Supreme Court to resolve the circuit split and makes a compelling argument that failure to resolve this split "leaves defendants to confront confusing and unfair procedural standards" when seeking "post-conviction relief as a result of juror misconduct."[8] This is a valid concern. I thank Professor Regis for not only shedding light on this important issue, but for calling the Supreme Court out for failing to resolve this issue despite *two* recent opportunities to do so.

Professor Regis persuasively advocates for federal courts to have a "uniform standard" to ensure consistent outcomes when deciding whether to grant a *Remmer* hearing or not.[9] I fully support the need for a uniform approach and commend Professor Regis for doing the work that the Supreme Court has failed to do. However, because it seems that Federal Rule of Evidence 606 requires the presentation of evidence to obtain a *Remmer* hearing,[10] I wonder if the proposed standard would be more effective if broken down into two steps—a standard to obtain the hearing and then a separate standard to be applied during the hearing itself.

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2. Tanner v. United States, 483 U.S. 107, 120–21 (1987).

3. Remmer v. United States (*Remmer II*), 347 U.S. 227, 229–30 (1954).

4. Melanie Cecelia Regis, *Testing the Validity of a Verdict*, 96 TEMP. L. REV. 181 (2024).

5. *See* United States v. Loughry (*Loughry II*), 983 F.3d 698, 705 (4th Cir. 2020) (quoting Johnson, 954 F.3d at 179).

6. *See* Cunningham v. Shoop (*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).

7. Regis, *supra* note 4, at 202.

8. Regis, *supra* note 4, at 184–85. Although Professor Regis's article focuses specifically on the Fourth and Sixth Circuits, Regis brings to light the varying standards being applied by the Third, Seventh, and Eighth Circuits as well.

9. *See* Regis, *supra* note 4, at 229–31.

10. *See* Fed. R. Evid. 606.

I. THE NO IMPEACHMENT RULE AND FEDERAL RULE OF EVIDENCE 606

The "no impeachment" rule prohibits jurors from testifying about jury deliberations after a verdict has been handed down.[11] Originally a common law rule that was incorporated into the Federal Rules of Evidence as Rule 606, the public policy rationale behind the rule is clear—"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."[12] Despite this respect for the finality of a jury verdict, there are some exceptions. Under Rule 606(b)(2), a juror may testify about jury deliberation when:

(1) extraneous prejudicial information was improperly brought to the attention of the jury;

(2) there has been an improper outside influence; or

(3) a mistake was made in entering a verdict on the jury form.[13]

Although these exceptions exist, Professor Regis notes that utilizing them has proven quite difficult.[14]

II. *REMMER* AND A SPLIT WORTH RESOLVING

Notwithstanding the challenges surrounding Rule 606, parties may seek an evidentiary hearing known as a *Remmer* hearing if they allege juror bias or juror misconduct.[15] The goal of the hearing is "to determine whether the incident complained of was harmful to the petitioner" and if so, "warranted a grant of a new trial."[16]

Professor Regis raises an important question that the Supreme Court has failed to answer: What standard applies when determining whether to grant a *Remmer* hearing? As noted by Professor Regis, currently the Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits apply different standards.[17] For example, as the Supreme Court did in *Remmer*, in the Fourth Circuit,[18] if a petitioner alleges juror bias or misconduct there is a presumption of prejudice.[19] However, "the juror must have made or been subject to 'an unauthorized contact.'"[20] A hearing will be granted when the allegation is "credible" and the contact is of "such a character as to reasonably draw into question the integrity of the trial proceedings, constituting more than an *innocuous*

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11. *See* McDonald v. Pless, 238 U.S. 264, 267 (1915).

12. Fed. R. Evid. 606 advisory committee's note to 1974 enactment (citing S. Rep. No. 93-1277, at 13–14 (1974)).

13. Fed. R. Evid. 606(b)(2).

14. *See* Regis, *supra* note 4, at 188–91.

15. *See* Smith v. Phillps, 455 U.S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."); *Remmer II*, 347 U.S. 227, 229–30 (1954).

16. *Remmer II*, 347 U.S. at 230.

17. *See* Regis, *supra* note 4, at 202–05.

18. *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).

19. *See* Regis, *supra* note 4, at 203.

20. *Id*.

intervention."[21] In contrast, the Sixth Circuit[22] "abandoned" *Remmer*'s presumption of prejudice.[23] A petitioner must show that the alleged contact caused "actual bias," and an evidentiary hearing will be granted when there is a "colorable claim of extraneous influence."[24]

Both *United States v. Loughry* and *Cunningham v. Shoop* recently came before the Supreme Court, and both were *denied* certiorari despite the conflicting standards applied and despite the Court's discretion under Supreme Court Rule 10(a) to grant certiorari if "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."[25] Although a writ of certiorari is not a matter of right, and is only granted for compelling reasons, Professor Regis fairly argues that the Supreme Court should have resolved this circuit split to ensure consistent and fair outcomes.

III. PROPOSED STANDARD FOR *REMMER* HEARINGS

Given the Supreme Court's failure to resolve the split, Professor Regis proposes a standard that "seeks to address the current difficulties faced by the 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."[26]

The proposed standard reads 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.

This is a very thoughtful proposal that accounts for the varied approaches by the federal courts while preserving the presumption of prejudice from *Remmer*. However, I have a few concerns. First, as written, the proposed multi-pronged standard may unintentionally cause confusion.[27]

When interpreting the proposed standard, I read it 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:
   - a. a biased outside communication or contact; *or*
   - b. an extraneous influence, *that*
   - c. has *either* a direct or close relationship to the case, *and*

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21. *Id.* at 209 (emphasis added).
22. *Cunningham V*, 23 F. 4th 636 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 37 (2022).
23. Regis, *supra* note 4, at 203.
24. *Id.*
25. SUP. CT. R. 10. The rule is titled, "Considerations Governing Review on Writ of Certiorari."
26. Regis, *supra* note 4, at 229.
27. I fully appreciate Professor Regis acknowledging the possible pitfalls of the proposed standard. As the various standards applied by the circuit courts are a minefield to parse, I admire Professor Regis for taking on this daunting task.

i. shows through direct, *or* circumstantial evidence

1. a prejudicial effect on the jury's verdict.

But, I can also see the proposed standard being interpreted 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:

a. a biased outside communication; *or*

b. a [biased] contact; *or*

c. an extraneous influence

that

d. has a direct *or* close relationship to the case

and

e. shows through direct or circumstantial evidence

f. a prejudicial effect on the jury's verdict.

Although both interpretations can potentially lead to the same result, I am not fully convinced that this will occur.

Second, I agree with Professor Regis that requiring a colorable allegation of juror misconduct or bias leads a trial court to hold an evidentiary hearing only "if the allegation raised more than a mere speculative claim."[28] However, I am concerned that requiring direct or circumstantial evidence of a prejudicial effect on the jury's verdict is unfair to petitioners. I agree with Professor Regis that this is better than courts requiring direct evidence of juror bias or misconduct.[29] But if the goal is to obtain an evidentiary hearing that will ultimately require a petitioner to provide direct or circumstantial evidence of juror bias or misconduct; why require such evidence beforehand? That seems counterintuitive.

Lastly, the proposed language highlights some important questions that appear to not have been fully resolved by the courts. For instance, what is a "biased outside communication"? I am presuming this is an "improper" outside communication. However, this is not explicit from the language itself and no definition is provided. Professor Regis's research indicates that the case law is unclear and calls into question the use of "bias" without further clarification. What is the difference between a "communication" and a "contact"? One can argue that there is no difference between the two, thus making the distinction unnecessary. Does the phrase "biased outside" modify "contact" as well as "communication"? I presume it does, but as written, it does not make that clear.

Given these concerns, I wonder if dividing the proposed standard into two parts—first obtaining the *Remmer* hearing and then proving juror bias or misconduct during the *Remmer* hearing—would make it more effective. If the goal of the proposed standard is to present enough evidence to obtain a *Remmer* hearing, and not to *prove* that there was *actual* juror bias or misconduct, then the proposed standard should

28. Regis, *supra* note 4, at 229.

29. *See id.*

reflect this goal.[30] Furthermore, I wonder if simplifying the proposed language would reduce the possibility of misapplying it.

With that in mind, I propose the following revision:

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:

a. an improper outside contact, *or*

b. an extraneous influence,

that has a close relationship to the case;

and

(2) the party presents evidence that the improper outside contact, or extraneous influence, had a prejudicial effect on the jury's verdict.

Again, this first revision focuses on obtaining a *Remmer* hearing and not *proving* juror bias or misconduct.

Once a *Remmer* hearing is obtained, then the remainder of the proposed standard, which seems to require an evidentiary showing of juror bias or misconduct, should apply. [31]

Thus, I propose the following:

At the evidentiary hearing, the party *must* show:

(1) through direct or circumstantial evidence, that:

a. the improper outside contact, or

b. the extraneous influence

(2) had a prejudicial effect on the jury's verdict by a preponderance of the evidence.

This proposed revision supports Regis's argument that the point of the *Remmer* hearing is to determine through qualitative evidence the viability of the claim of juror misconduct.[32]

CONCLUSION

I thank Professor Regis for tackling this important issue and explaining why this circuit split matters. Professor Regis does an excellent job of advocating for a uniform standard that the Supreme Court should consider adopting to ensure consistent outcomes and avoid the current state of confusion in this area. I present a revised version of Professor Regis's proposal to continue the discussion of how the Supreme Court can resolve this issue. Although litigants are not guaranteed a perfect trial, I could not agree more with Professor Regis that perfect cannot be the enemy of good.

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30. In making this argument, I am presuming that to obtain a *Remmer* hearing, there is a burden on the party seeking the hearing to present affidavits or other admissible evidence before the court. This accommodates the concern that courts will be deluged with requests to set aside verdicts based upon any improper contact with the jury.

31. I removed the reference to "direct or close relationship to the case" because I felt that it was redundant. However, I defer to Professor Regis's expertise in this instance.

32. *See* Regis, *supra* note 4, at 229.