2022

Failing to "Follow" the Sixth Amendment Threat Posed by Juror Social Media Access

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NOTE

UNITED STATES V. LOUGHRY: FAILING TO "FOLLOW" THE SIXTH AMENDMENT THREAT POSED BY JUROR SOCIAL MEDIA ACCESS

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In *United States v. Loughry*,[1] the Fourth Circuit wrestled with whether the district court abused its discretion in denying former West Virginia Justice Allen Loughry a *Remmer* hearing[2] after one of the jurors in his federal criminal trial accessed her Twitter account during trial.[3] Although the juror in question was "following" two journalists who were actively reporting on the trial, because she had not "liked" or "retweeted" any relevant tweets, the court affirmed the decision of the district court, holding that any potentially prejudicial extrinsic contact was too speculative to necessitate a hearing.[4] Juror social media access constitutes a threat to Sixth Amendment rights[5]

* J.D. Candidate, 2023, University of Maryland Francis King Carey School of Law. This Note is dedicated to Professor Kathryn Frey-Balter, whose support and mentorship throughout law school have meant more to the author than she can express. The author wishes to thank the staff of the *Maryland Law Review* for their patience, diligence, and thoughtful commentary; in particular, the author thanks Nancy Dordal, Robyn Lessans, Christine Parola, and Monica Garcia Montes. Nancy Dordal, especially, provided invaluable guidance, the least of which was ensuring the author could spell "TikTok." The author also wishes to thank her husband, Joshua Swetz, for his support, encouragement, and attention to detail in "auditing" every draft of every paper she produces, this Note included.

1. 983 F.3d 698 (4th Cir. 2020), *aff'd on reh'g en banc*, 996 F.3d 729 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022).

2. A *Remmer* hearing, derived from Remmer v. United States, 347 U.S. 227 (1954), is a hearing to determine whether a juror has been unfairly influenced by extrajudicial contact or communications during a trial.

3. *Loughry*, 983 F.3d at 700.

4. *Id.* at 712. "Following" someone on Twitter refers to clicking "Follow" on that person's Twitter feed and subscribing to that person's posted content. When someone follows someone else on Twitter, the followed person's posted content appears automatically on the follower's home feed. "Following" people on Twitter, then, is primarily a means of curating the content someone wishes to see when he or she logs in to the platform; an individual can follow, and thus see, another individual's posted content on Twitter even if he or she never chooses to directly interact with that user's content. "Liking" a tweet, conversely, refers to directly interacting with another user's post by clicking the "Like" button. Similarly, "Retweeting" refers to directly interacting with another user's post by clicking the "Retweet" button to display the other user's post on one's own Twitter feed. See *New User FAQ*, TWITTER, https://help.twitter.com/en/resources/new-user-faq (last visited Mar. 24, 2022) for more detailed explanations of these terms.

5. *See infra* Section IV.A.

that, thus far, courts have struggled to adequately address.[6] In *Loughry*, the Fourth Circuit succumbed to these struggles, relying on a profound misunderstanding of how modern social media platforms function.[7] In doing so, it set a higher threshold inquiry for *Remmer* hearings than dictated by its own precedent[8] and joined the ranks of sister circuits whose similarly heightened *Remmer* inquiries pose an imminent threat to Sixth Amendment rights.[9] Given the ubiquitous nature of social media and the fact that it is increasingly difficult for jurors to avoid contact with potentially prejudicial information, the court should, instead, have adhered to the minimal threshold inquiry established by *Remmer v. United States*[10] and reversed the decision of the lower court.[11]

I. THE CASE

In October 2017, the Charleston, West Virginia news media began to investigate suspect purchases by several justices of the West Virginia Supreme Court of Appeals, including then-Chief Justice Allen H. Loughry II.[12] This coverage and the subsequent federal investigation produced evidence that Loughry had used state vehicles and other funds for personal use[13] and had, furthermore, obstructed justice during the investigation itself.[14] By June 2018, Loughry and several of his fellow justices faced both extensive criminal charges and independent impeachment proceedings.[15]

Loughry's criminal trial commenced in October 2018 and lasted six days.[16] Following two days of deliberation, a jury found him guilty of one count of mail fraud, seven counts of wire fraud, one count of witness tampering, and two counts of making false statements to a federal agent.[17] Shortly after the jury returned this verdict, Loughry's counsel was approached on the street outside of the courthouse by a concerned individual

6. *See infra* Section IV.B.
7. *See infra* Section IV.C.
8. *See infra* Section IV.D.
9. *See infra* Section IV.E.
10. 347 U.S. 227 (1954).
11. *See infra* Section IV.F.
12. United States v. Loughry, 983 F.3d 698, 701 (4th Cir. 2020), *aff'd on reh'g en banc*, 996 F.3d 729 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022).
13. Most notably, Loughry was found to have removed a historical desk—the "Cass Gilbert desk"—from the courthouse and placed it in his private home. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 702.
17. *Id.* Loughry was also acquitted of several counts, one of which was mail fraud in connection with his removal of the Cass Gilbert desk from his office. *Id.*

who advised him to investigate the Twitter activity of a certain juror—Juror A.[18]

A subsequent investigation into Juror A's Twitter account revealed that in the four months preceding the trial, she had "liked" or "retweeted" four tweets that criticized the relevant conduct of the West Virginia Supreme Court justices.[19] Furthermore, it was clear she had accessed Twitter on at least two days during the trial itself.[20] Although on those occasions, she interacted solely with content related to football, Loughry's counsel discovered Juror A was actively "following" two journalists who had been reporting on the trial and, thus, could have seen their posted content on her home feed during that time frame.[21]

Based on this Twitter activity, Loughry filed a motion for a new trial, or, alternatively, for an evidentiary hearing.[22] He alleged that the tweets "liked" prior to trial evidenced Juror A's bias against him and, also, that she had engaged in misconduct by accessing her Twitter account at all while serving on the jury.[23]

The District Court for the Southern District of West Virginia denied this motion, turning Loughry's attention back to the events of voir dire.[24] During that process, Juror A answered "yes" when asked if she had knowledge of the impeachment proceedings against Loughry but "no" when asked if she had knowledge "of this case."[25] When asked if she could set any prior knowledge aside if asked to serve as a juror, she stated that she would be able to do so, and Loughry's counsel declined to question her further.[26] The district court found these responses indicative of a lack of bias, noting Juror A's knowledge of the impeachment proceedings may have overlapped with, but did not equate to, knowledge of the criminal proceedings.[27] The court noted, furthermore, that it had never asked jurors to refrain entirely from interacting

18. *Id.*

19. *Id.* at 702–03.

20. *Id.* at 703.

21. *Id.*

22. *Id.*

23. *Id.*

24. United States v. Loughry, No. 2:18-cr-00134, 2019 WL 177476 (S.D.W. Va. Jan. 11, 2019), *aff'd*, 983 F.3d 698 (4th Cir. 2020), *aff'd on reh'g en banc*, 996 F.3d 729 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022).

25. *Loughry*, 983 F.3d at 701–02.

26. *Id.*

27. *Id.* at 703. The court noted, furthermore, that this overlap related primarily to the removal of the Cass Gilbert Desk; as Loughry had been acquitted of that charge, it seemed unlikely Juror A had been biased by her prior knowledge on that front. *Id.*

with social media; it had only asked them to avoid information relevant to the case at hand.[28]

The court, having found not "even a threshold showing of juror misconduct," sentenced Loughry and entered judgment.[29] Loughry filed an appeal with the United States Court of Appeals for the Fourth Circuit, challenging solely the denial of the evidentiary hearing that would have allowed for investigation into the potential consequences of Juror A's Twitter use.[30]

II. LEGAL BACKGROUND

In *Remmer v. United States*, the Supreme Court established procedures for investigating potentially prejudicial extrinsic contact with jurors.[31] Section II.A discusses the constitutional justification for and origin of the *Remmer* doctrine. Section II.B discusses the evolution of that doctrine in response to *Smith v. Phillips*[32] and *United States v. Olano*,[33] subsequent Supreme Court cases. Section II.C discusses the impact of this evolution on *Remmer* hearing inquiry in the Fourth Circuit. Section II.D surveys the circuits who adhere to modified forms of the *Remmer* doctrine in response to *Phillips* and *Olano*. Lastly, Section II.E surveys the circuits, like the Fourth, that disregard those decisions and adhere to the original *Remmer* holding.

A. The Sixth Amendment and Remmer v. United States

Concerns about juror access to extrinsic information are grounded in the Sixth Amendment, which guarantees criminal defendants "the right to a speedy and public trial, *by an impartial jury*."[34] United States Supreme Court decisions have long reflected the importance of these Sixth Amendment protections,[35] and, as early as 1892, the Court acknowledged the need for

28. *Id.* This approach is typical. *See infra* note 107. It fails to account, however, for the fact that any interaction with social media may inadvertently expose a juror to information relevant to the case at hand, especially in a high-profile case. *See infra* Section I.

29. *Id.* at 704.

30. *Id.* at 700.

31. Remmer v. United States, 347 U.S. 227, 229 (1954).

32. 455 U.S. 209 (1982).

33. 507 U.S. 725 (1993).

34. U.S. CONST. amend. VI (emphasis added). As of 1975, these concerns are further reflected in the Federal Rules of Evidence, which prohibit a juror from testifying regarding "any statement made or incident that occurred during . . . deliberations," unless "(A) *extraneous prejudicial information* was improperly brought to the jury's attention; [or] (B) an *outside influence* was improperly brought to bear on any juror." FED. R. EVID. 606(b)(2)(A)–(B) (emphasis added).

35. *See, e.g.*, Patterson v. Colorado, 205 U.S. 454, 462 (1907) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.").

procedural safeguards to prevent bias or partiality from impacting jury verdicts.[36] In 1954, perhaps as a result of the increasing ubiquity of the media in American homes,[37] the Court more clearly defined these procedural protections.[38] The Court held, in *Remmer v. United States*, that 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 [was] . . . presumptively prejudicial."[39] This presumption was not conclusive, the Court clarified, "but the burden rest[ed] heavily upon the Government to establish," at a hearing attended by the defendant, that any extrinsic contact was, in fact, harmless.[40] If the government failed to establish harmlessness during this hearing, the Court continued, a defendant would be entitled to a new trial.[41]

B. The Evolution of the Remmer Doctrine

Remmer's defendant-friendly holding has not been overturned by the Supreme Court.[42] The language employed by the Court in subsequent cases involving juror impartiality, however, led to questions regarding its proper application.[43] *Smith v. Phillips* was the first of these cases. Although the Supreme Court in *Phillips* maintained that *Remmer* hearings were necessary to address occurrences involving juror bias,[44] its discussion of the applicable burden of proof deviated significantly from that in *Remmer*. A *Remmer* hearing, the *Phillips* Court concluded, gave a *defendant* "the opportunity to prove actual bias."[45] This was a far cry from the language employed by the actual *Remmer* Court, which noted that the burden to prove *lack of bias*

36. *See* Mattox v. United States, 146 U.S. 140, 149–50 (1892) (noting that any suspicion of juror interference creates a rebuttable presumption that a new trial is warranted).

37. In 1946, only six thousand television sets were in use in the United States. Mitchell Stephens, *History of Television*, GROLIER ENCYCLOPEDIA, https://stephens.hosting.nyu.edu/History%20of%20Television%20page.html (last visited Apr. 9, 2022). By 1951, that number had increased to twelve million, and, by 1955, half of all United States homes had a television set. *Id.*

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

39. *Id.* at 229.

40. *Id.*

41. *Id.* at 230.

42. The *Loughry* Court, itself, relied on *Remmer*. *See* United States v. Loughry, 983 F.3d 698, 704–05 (4th Cir. 2020) (explaining the *Remmer* doctrine), *aff'd on reh'g en banc*, 996 F.3d 729 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022).

43. *See, e.g.*, United States v. Pennell, 737 F.2d 521, 532 (6th Cir. 1984) (questioning whether the Supreme Court had "so changed the rules relating to unauthorized communications with jurors that the presumptive prejudice standard as applied [by Sixth Circuit precedent] no longer govern[ed]").

44. Smith v. Phillips, 455 U.S. 209, 217 (1982) (noting judges must be "ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen").

45. *Id.* at 215 (citing *Remmer*, 347 U.S. at 229).

"rest[ed] heavily upon the Government."[46] Furthermore, the *Phillips* Court strongly implied that the occurrences necessitating *Remmer* hearings were no longer presumptively prejudicial, declining to automatically impute bias to a juror who applied for employment with the district attorney's office during the course of the trial.[47]

Roughly a decade later, the Supreme Court in *United States v. Olano* came to similarly ambiguous conclusions in its discussion of *Remmer* hearings.[48] The Court noted that "[t]here may be cases where an intrusion should be presumed prejudicial," but the "ultimate inquiry" should be: "Did the intrusion affect the jury's deliberations and thereby its verdict?"[49] Some courts viewed this language as having abrogated *Remmer*'s presumptive prejudice framework, absolving the government of its automatic burden to prove harmlessness absent some initial, threshold inquiry.[50]

C. The Remmer Doctrine in the Fourth Circuit: The "More Than Innocuous" Test

The Fourth Circuit has, by and large, adhered to the provisions of the original *Remmer* holding. In *Stockton v. Virginia*,[51] the court addressed the assumption that the presumption of prejudice established by *Remmer* had been overturned by *Phillips*.[52] The court differentiated circumstances involving "extrajudicial communications" from those involving juror bias, concluding that *Phillips* only dealt with the latter.[53] Accordingly, it found that extrajudicial communication with a juror remained presumptively prejudicial.[54] The court affirmed, furthermore, that in cases involving such contact, "the government [bore] the burden of establishing the nonprejudicial character of [that] contact."[55]

Two decades later, in *United States v. Lawson*,[56] the court addressed the ambiguities presented by *Olano*. The court interpreted *Olano* as having

46. *Remmer*, 347 U.S. at 229.

47. *Phillips*, 455 U.S. at 215.

48. United States v. Olano, 507 U.S. 725, 739 (1993).

49. *Id.*

50. *See, e.g.*, United States v. Sylvester, 143 F.3d 923, 934 (5th Cir. 1998) ("[O]nly when the court determines that prejudice is likely should the government be required to prove its absence."); United States v. Williams-Davis, 90 F.3d 490, 497 (D.C. Cir. 1996) ("[T]he district court was correct . . . to inquire whether any particular intrusion showed enough of a 'likelihood of prejudice' to justify assigning the government a burden of proving harmlessness.").

51. 852 F.2d 740 (4th Cir. 1988).

52. *Id.* at 744.

53. *Id.*

54. *Id.*

55. *Id.* (citations omitted).

56. 677 F.3d 629 (4th Cir. 2012).

merely held that inquiry during a *Remmer* hearing could be framed as either a "rebuttable presumption," as in *Remmer* itself, *or* as a more "specific analysis of the intrusion's effect on the verdict."[57] The court did not find *Olano* to have dictated the latter.[58] The court noted, furthermore, that it had continued to apply the "*Remmer* presumption" long after the *Olano* decision.[59] Accordingly, "the *Remmer* rebuttable presumption remain[ed] [a]live and well in the Fourth Circuit."[60]

The Fourth Circuit, then, has continued to assess allegations of extrajudicial influence by adhering to the two basic tenets of the original *Remmer* holding:[61] (1) external contact with a juror is presumptively prejudicial, and (2) a defendant who presents a credible allegation of such contact is entitled to an evidentiary hearing in which the government must rebut that presumption.[62]

In light of this adherence, the Fourth Circuit employs a three-part process in analyzing allegations of extrajudicial juror contact.[63] First, the party alleging improper contacts bears an initial burden of introducing evidence to show those "contacts were 'more than innocuous interventions.'"[64] If this "minimal standard" is met, the *Remmer* presumption of prejudice is triggered, and a hearing is held.[65] This hearing constitutes the second step.[66] The court then moves to the final step, where the burden shifts to the government, which must prove the contacts were harmless, or,

57. *Id.* at 642.

58. *Id.*

59. *Id. See, e.g.*, United States v. Cheek, 94 F.3d 136, 141 (4th Cir. 1996) (applying the *Remmer* presumption three years after *Olano*).

60. *Id.*

61. *See* Barnes v. Joyner, 751 F.3d 229, 250 (4th Cir. 2014) (noting the continuing importance of *Remmer* in explaining "that without a hearing, a criminal defendant is deprived of the opportunity to uncover facts that could prove a Sixth Amendment violation" (citing Remmer v. United States, 347 U.S. 227, 229 (1954))).

62. *Id.* at 242.

63. *Cheek*, 94 F.3d at 141.

64. *Id.* (quoting Haley v. Blue Ridge Transfer Co., 802 F.2d 1532, 1537 n.9 (4th Cir. 1986)). It should be noted that requiring this threshold inquiry departs somewhat from *Remmer*'s formula, which established that *any* extrinsic contact is presumptively prejudicial. *Remmer,* 347 U.S. at 229. The Fourth Circuit has reasoned, however, that an automatic presumption of prejudice may not be justified when a contact is so innocuous as to be an obvious non-issue. *Haley*, 802 F.2d at 1537 n.9. This initial inquiry is also expressed as follows: "A defendant seeking a *Remmer* hearing must present a 'credible allegation' that 'an unauthorized contact was made,' and that the contact 'was of such a character as to reasonably draw into question the integrity' of the trial proceedings, constituting 'more than an innocuous intervention.'" United States v. Johnson, 954 F.3d 174, 179 (4th Cir. 2020) (quoting Barnes v. Joyner, 751 F.3d 229, 242–45 (4th Cir. 2014)).

65. *Cheek*, 94 F.3d at 141.

66. *Id.*

essentially, that there was no "reasonable possibility that the jury's verdict was influenced by" external information.[67]

In *United States v. Small*,[68] the court, relying on *Remmer*, articulated the first step of this process more explicitly, laying out the factors to be considered in determining whether a contact is "more than innocuous."[69] A contact is "more than innocuous," the court noted, if it constitutes "(1) any private communication; (2) any private contact; (3) any tampering; (4) directly or indirectly with a juror during trial; (5) about the matter before the jury."[70] The *Small* court held, considering these factors, that a *Remmer* hearing was not warranted when a juror was merely watched by unidentified individuals while leaving the courthouse; being watched, alone, did not constitute "contact."[71]

D. The Phillips/Olano Circuits

Several circuits have deviated from this Fourth Circuit approach, holding that either *Phillips* or *Olano* significantly modified the *Remmer* formula. The Sixth Circuit, for example, has repeatedly held that *Phillips* shifted the burden of proving bias or harm during *Remmer* hearings conclusively to the defendant.[72] Accordingly, in determining whether a *Remmer* hearing is justified, the Sixth Circuit considers whether the defendant has raised "a 'colorable claim of extraneous influence.'"[73] If the defendant is found to have done so, a *Remmer* hearing is warranted, but the burden remains with the defendant to then prove the extrajudicial contact engendered actual bias.[74] Although this burden shift is patently government-friendly, the Sixth Circuit's threshold "colorable claim" test is a particularly lenient one.[75] In *United States v. Harris*,[76] for example, a court found a *Remmer* hearing was warranted based on the mere *possibility* a juror had discussed the trial with his girlfriend.[77]

67. *Id.* (quoting Stephens v. South Atlantic Canners, Inc., 848 F.2d 484, 488–89 (4th Cir. 1988)).

68. 944 F.3d 490 (4th Cir. 2019).

69. *Id.* at 504.

70. *Id.* (quoting *Cheek*, 94 F.3d at 141).

71. *Id.* at 505.

72. *See, e.g.*, United States v. Zelinka, 862 F.2d 92, 95 (6th Cir. 1988).

73. United States v. Lanier, 988 F.3d 284, 294 (6th Cir. 2021) (quoting United States v. Davis, 177 F.3d 552, 557 (6th Cir. 1999)).

74. *Id.* at 295.

75. *See infra* text accompanying note 77.

76. 881 F.3d 945 (6th Cir. 2018).

77. *Id.* at 954.

The Fifth and D.C. Circuits have similarly held that *Phillips* and *Olano* modified the *Remmer* framework.[78] These circuits do not go so far as to automatically shift the burden to the defendant during an actual *Remmer* hearing, but they have held the government only bears that burden if a court has concluded, first, that prejudice is *likely* to have resulted from an extraneous contact.[79]

The Eighth Circuit takes a similar approach, holding a defendant must prove "a reasonable possibility of prejudice to the verdict" for a *Remmer* hearing to be warranted in the first place.[80] It departs from *Remmer* even further, however, by finding that even when that threshold inquiry is met, judges retain considerable discretion in determining whether holding a hearing is the best course of action.[81] Though the Eighth Circuit has, on occasion, applied the "colorable claim" test employed by the Sixth Circuit, it sets a higher bar for what constitutes a colorable claim.[82] In *United States v. Wintermute*,[83] for example, the court found an allegation that a juror had "*probably*" found information on the internet to be too speculative to warrant further action.[84]

Although the First Circuit has declined to explicitly address whether *Remmer* remains good law following *Phillips* and *Olano*,[85] its holdings largely imply at least some reliance on the latter.[86] In *United States v. Boylan*,[87] for example, the court held that the *Remmer* "presumption is applicable only where there is an *egregious* tampering or third party communication which directly injects itself into the jury process."[88]

The Ninth Circuit, similarly, has relied implicitly on *Olano*, interpreting it to have held that only circumstances directly involving jury tampering warrant an immediate *Remmer* hearing.[89] In all other circumstances, courts "must consider the content of the allegations, the seriousness of the alleged

78. *See supra* note 50.

79. *See supra* note 50.

80. United States v. Tucker, 137 F.3d 1016, 1030 (8th Cir. 1998).

81. United States v. Schoppert, 362 F.3d 451, 459 (8th Cir. 2004) (noting trial judges have "discretion in determining what steps, if any, are required to make certain that a jury has not been tainted").

82. *See infra* text accompanying note 84.

83. 443 F.3d 993 (8th Cir. 2006).

84. *Id.* at 1003.

85. United States v. Bradshaw, 281 F.3d 278, 288 (1st Cir. 2002).

86. *See infra* text accompanying note 88.

87. 898 F.2d 230 (1st Cir. 1990).

88. *Id.* at 261 (emphasis added).

89. United States v. Brande, 329 F.3d 1173, 1176 (9th Cir. 2003) (citing *Olano* as standing for the proposition that certain conduct does not trigger an automatic *Remmer* hearing).

misconduct or bias, and the credibility of the source" to establish whether a hearing is necessary.[90]

E. The Remmer Circuits[91]

The remaining circuits, in overtly denying the influence of *Olano* and *Phillips* on *Remmer's* rebuttable presumption framework, largely rely on the original *Remmer* holding. The Seventh Circuit takes the Fourth Circuit approach to *Remmer*, and, together, they represent the "more than innocuous" circuits.[92] The tests the remaining circuits apply in analyzing allegations of extrajudicial contact, however, vary widely.[93]

The Second Circuit, for example, has adhered more strictly to *Remmer* than even the Fourth Circuit, holding that "the law presumes prejudice from a jury's exposure to extra-record evidence" and forgoing any threshold inquiry as to whether a hearing is warranted.[94] The government must rebut this presumption of prejudice, and courts accordingly consider "(1) the nature of the information or contact at issue, and (2) its probable effect on a hypothetical average jury."[95] The Third Circuit takes a similar approach in holding that a *Remmer* hearing should be held in response to any extrajudicial contact.[96] During that hearing, however, not only must the government prove the communication did not prejudice the defendant, the court must also conduct a voir dire of all affected jurors.[97]

The Tenth Circuit has interpreted *Remmer* more literally and, thus, more narrowly than the other circuits; it has held that *Remmer* applies only in circumstances involving improper juror contact with a third party, and, even then, only when that contact is "about the matter pending before the jury."[98]

90. *Id.* at 1176–77 (quoting United States v. Angulo, 4 F.3d 843, 847 (9th Cir. 1993)).

91. The Eleventh Circuit is omitted from this discussion; although it adheres to the *Remmer* rebuttable presumption of prejudice, it does not appear to have a consistent standard for doing so. *See* United States v. Ronda, 455 F.3d 1273, 1299 n.36 (11th Cir. 2006) (describing conflicting precedent regarding Eleventh Circuit interpretation of *Remmer*).

92. United States v. Martin, 692 F.3d 760, 765 (7th Cir. 2012) (citing Whitehead v. Cowan, 263 F.3d 708, 725–26 (7th Cir. 2001)) (noting that where extrajudicial contact is "ambiguous or innocuous, no *Remmer* hearing may be necessary").

93. *See* United States v. Farhane, 634 F.3d 127, 168–69 (2d Cir. 2011) (applying the test employed by the Second Circuit); United States v. Vega, 285 F.3d 256, 266 (3d Cir. 2002) (applying the test employed by the Third Circuit); United States v. Robertson, 473 F.3d 1289, 1294 (10th Cir. 2007) (applying the test employed by the Tenth Circuit).

94. *Farhane*, 634 F.3d at 168 (citing Remmer v. United States, 347 U.S. 227, 229 (1954)).

95. *Id.* at 169 (citing United States v. Schwarz, 283 F.3d 76, 99 (2d Cir. 2002)).

96. *Vega*, 285 F.3d at 266.

97. *Id.*

98. *Robertson*, 473 F.3d at 1294 (quoting *Remmer*, 347 U.S. at 229).

III. THE COURT'S REASONING

Judge Niemeyer, writing for the Fourth Circuit Court of Appeals, affirmed the district court's decision, holding that it had not abused its discretion in denying Loughry's request for an evidentiary hearing when no evidence suggested that Juror A's access to social media had robbed Loughry of a fair trial.[99]

The court first addressed Loughry's argument that, under *Remmer*, Juror A's use of her Twitter account during the trial itself entitled Loughry to an evidentiary hearing.[100] The *Remmer* Court held that "communication . . . with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial" and that a defendant should be permitted to determine the extent of that prejudice "in a hearing with all interested parties."[101] The Fourth Circuit acknowledged this holding, but found Loughry had failed to "present 'a credible allegation that an unauthorized contact was made.'"[102] Loughry's claims that Juror A had been exposed to information about the trial itself, the court reasoned, were merely speculative.[103] According to the court, although Juror A had accessed her Twitter account during the trial, she had only interacted with tweets about football, and Loughry could not prove she had even seen, much less read, a potentially prejudicial tweet posted by one of the journalists she followed.[104] The court also noted the illogical implications of Loughry's argument: if Juror A's mere access to social media was sufficient to entitle Loughry to a hearing under *Remmer*, every juror in the case would be similarly implicated.[105]

The court rejected Loughry's related argument that Juror A had nonetheless engaged in misconduct by violating instructions that she avoid social media *entirely* during the trial on similar grounds.[106] The court acknowledged the dangers modern social media poses to jury impartiality, noting that model jury instructions had been revised to explicitly address that very issue.[107] The court noted, however, that nowhere in these revised model

99. United States v. Loughry, 983 F.3d 698, 712 (4th Cir. 2020), *aff'd on reh'g en banc*, 996 F.3d 729 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022).

100. *Id.* at 704.

101. *Remmer*, 347 U.S. at 229–30.

102. *Loughry*, 983 F.3d at 705 (quoting United States v. Johnson, 954 F.3d 174, 179 (4th Cir. 2020)).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 707.

107. *Id.* at 706 ("To remain impartial jurors . . . you must not communicate with anyone about this case, whether in person, in writing, or through email, text messaging, blogs, or social media websites and apps (like Twitter, Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and

instructions, or elsewhere, are jurors forbidden from accessing social media to discuss non-case-related materials.[108] Loughry's argument, then, that the jury had, on a single occasion, been told that they should "avoid *all* social media" was disingenuous; a reasonable juror would have known "that social media was prohibited *only in connection with the case*."[109]

Next, the court addressed Loughry's argument that because Juror A had interacted with tweets involving the facts of the case during the four months prior to trial, she had lied during voir dire when asked about her prior knowledge.[110] The court shot down this argument on much the same grounds as the district court.[111] The tweets Juror A interacted with prior to the trial indicated only that she had knowledge of the impeachment proceedings, and she fully admitted to having this knowledge during voir dire.[112] Loughry presented no evidence, however, that Juror A had interacted with tweets that related to the criminal proceedings at issue, so there was no reason to believe she had been dishonest in asserting she had no knowledge of those proceedings.[113] Furthermore, the court reasoned that Loughry's counsel, knowing that the facts of the impeachment proceedings overlapped with those of the criminal ones, could simply have chosen to ask more questions of Juror A.[114] They failed to do so, however, and were "satisfied to let her sit on the jury."[115]

Lastly, the court addressed Loughry's argument that the district court had abused its discretion in failing to allow him an evidentiary hearing to at least investigate whether Juror A's Twitter use had biased her against him.[116] The court, in shooting down this argument, noted only that Juror A had stated during voir dire that she was fully capable of rendering "a verdict based solely on the evidence at trial."[117] Absent additional evidence, there was no reason to believe her preexisting knowledge of the impeachment proceedings

Snapchat)." (quoting JUD. CONF. COMM. ON CT. ADMIN. AND CASE MGMT., PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO LEARN OR COMMUNICATE ABOUT A CASE (2020), https://www.uscourts.gov/sites/default/files/proposed_model_jury_instructions.pdf)).

108. *Id.* at 707.

109. *Id.*

110. *Id.* at 709.

111. *Id.* at 710.

112. *Id.*

113. *Id.*

114. *Id.* at 711.

115. *Id.*

116. *Id.*

117. *Id.* at 712.

prejudiced Loughry in any way.[118] As such, the district court had not abused its discretion in failing to grant him an evidentiary hearing.[119]

Judge Diaz, in his dissenting opinion, disagreed with the court's conclusion as to Loughry's first argument.[120] Under *Remmer*, Judge Diaz argued, Loughry was entitled to an evidentiary hearing to determine the extent of Juror A's Twitter activity during the trial itself.[121] Judge Diaz noted, first, that the two reporters followed by Juror A posted about the criminal proceedings a combined total of seventy-three times during the trial, so merely scrolling through her home feed could have exposed Juror A to prejudicial information.[122] Judge Diaz acknowledged the speculative nature of this argument; he argued, however, that it would have been impossible for Loughry to acquire direct evidence without the benefit of an evidentiary hearing during which he could further question Juror A.[123] In light of this, and because Loughry's circumstantial evidence alone was stronger than that present in cases where *Remmer* hearings *had* been granted in the past,[124] Judge Diaz argued the majority had erred in failing to do the same.[125]

IV. ANALYSIS

In *United States v. Loughry*, the Fourth Circuit upheld the district court's decision to deny a defendant a *Remmer* hearing after a juror accessed her Twitter account during his trial and potentially saw tweets relating to the trial itself.[126] Social media access by jurors presents an ongoing problem[127] that courts have struggled to adequately address.[128] In affirming the *Loughry* judgment, the Fourth Circuit succumbed to these struggles, relying on a fundamental misunderstanding of how social media platforms like Twitter display content to users[129] and setting a higher threshold inquiry for *Remmer* hearings than dictated by its own precedent.[130] In doing so, it joined the ranks

118. *Id.*
119. *Id.*
120. *Id.* at 713 (Diaz, J., dissenting).
121. *Id.*
122. *Id.* at 713–14.
123. *Id.* at 714.
124. In support of this argument, Judge Diaz relied primarily on United States v. Harris, 881 F.3d 945 (6th Cir. 2018). *Id.* at 715. The majority, conversely, distinguished *Harris*, finding that the defendant had "presented a colorable claim of extraneous influence on a juror" where Loughry had not. *Id.* at 707 (majority opinion) (quoting *Harris*, 881 F.3d at 948).
125. *Id.* at 714 (Diaz, J., dissenting).
126. *Id.* at 712.
127. *See infra* Section IV.A.
128. *See infra* Section IV.B.
129. *See infra* Section IV.C.
130. *See infra* Section IV.D.

of sister circuits whose similarly heightened *Remmer* inquiries pose an imminent threat to Sixth Amendment rights.[131] Given the ubiquitous nature of social media and the fact that it is increasingly difficult for jurors to avoid contact with potentially prejudicial information, the Fourth Circuit should, instead, have adhered to the minimal threshold inquiry established by its own precedent and the original *Remmer* holding and reversed the decision of the lower court.[132]

A. Social Media Access Represents a Threat to Sixth Amendment Rights Exceeding That Posed by Access to Traditional Forms of News Media

The increasing prevalence of social media has troubling implications for Sixth Amendment rights.[133] A juror prior to the advent of social media could easily avoid picking up a newspaper or flipping to suspect channels on the television while fulfilling his or her duties; now, however, the process of avoiding extrinsic contact or information is considerably more difficult.[134]

These difficulties are twofold. First, in the age of social media, a juror need no longer actively seek out extrinsic information—that information may simply be thrust upon them.[135] Users of platforms like Facebook, Twitter, and TikTok[136] "are involuntarily exposed to a wide range of information just by logging into their accounts."[137] Because that information is tailored to a user's location, an unsuspecting juror can stumble upon content relevant to a local trial, having made no conscious attempt to seek out that information.[138] This issue is, of course, compounded for jurors serving on high profile cases,

131. *See infra* Section IV.E.

132. *See infra* Section IV.F.

133. See Nancy S. Marder, *Jurors and Social Media: Is a Fair Trial Still Possible?*, 67 SMU L. REV. 617 (2014) for further discussion of these implications.

134. *Id.* at 628.

135. *Id.* ("[W]ith the advent of social media, the discussion is round-the-clock and references to a trial can pop up anywhere.").

136. TikTok may be even more problematic than Twitter, in that many users scroll through content using the platform's "For You feed," a complex and somewhat mysterious "recommendation system that delivers content to each user that is likely to be of interest to that particular user." *How TikTok Recommends Videos #ForYou*, TIKTOK (Jun 18, 2020), https://newsroom.tiktok.com/en-us/how-tiktok-recommends-videos-for-you. A TikTok user viewing this feed sees not only videos from individuals they actively "follow" but also a seemingly infinite stream of additional videos "curated" by the platform. *Id.*

137. Daniel J. Ain, The Tweeting Juror: Prophylactic and Remedial Methods for Judges to Manage the Risk of Internet-Based Juror Misconduct, 98 MASS. L. REV. 16, 17 (2016).

138. *Twitter Trends FAQ*, TWITTER, https://help.twitter.com/en/using-twitter/twitter-trending-faqs (last visited Feb. 21, 2022) ("Location Trends identify popular topics among people in a specific geographic location.").

where social media platforms are flooded with information and speculation likely to bias a juror.[139]

The second difficulty posed by social media is that the algorithms used by these platforms make it difficult to avoid information if one has engaged with similar content in the past.[140] The algorithms employed by Twitter, for example, ensure that users' "Home timeline[s]" display "recommendations of other content [Twitter] think[s] [they] might be interested in based on accounts [they] interact with frequently, Tweets [they] engage with, and more."[141] A juror then, such as Juror A, who has engaged with tweets about a case or related matters prior to serving on a trial, is likely to see similar content on her Home timeline in the future.[142] This prejudicial contact would occur, to some extent, even in a situation where the juror was not actively following potentially problematic accounts, as Juror A was.[143]

To analogize the dangers posed by these platforms with those posed by traditional news media is illogical. If a person turns on her television and flips immediately to a football game, she is in very little danger of suddenly encountering a news program. The algorithms used by social media platforms, however, dramatically increase the chance that a juror with even a passing prior interest in the events of her case will come into contact with extrinsic information.[144] Her television will switch to that news program, so to speak, whether she wishes it to or not.

B. Common Measures Taken to Prevent Juror Social Media Access Are Insufficient to Protect Defendants' Sixth Amendment Rights

The *en banc* oral arguments following the *Loughry* decision[145] suggest that even those judges who are cognizant of and even knowledgeable about those Sixth Amendment problems posed by social media access struggle with

139. A simple Twitter search for "Justice Loughry," for example, produces hundreds, if not thousands, of potentially prejudicial results, including photos and video. TWITTER, https://twitter.com/search?q=Justice%20Loughry&src=typed_query (last visited Oct. 29, 2021).

140. *See* Rummam Chowdhury & Luca Belli, *Examining Algorithmic Amplification of Political Content on Twitter*, TWITTER (Oct. 21, 2012), https://blog.twitter.com/en_us/topics/company/2021/rml-politicalcontent (explaining how the Twitter algorithm analyzes past user engagement to display new, related content).

141. *Id.*

142. *Id.* During oral arguments, Judge Wynn demonstrated shrewd understanding of this issue, urging his peers to "look into what [was] fed into this Twitter algorithm" because Juror A had engaged with tweets relevant to the trial in the past. Oral Argument at 31:43, United States v. Loughry, 996 F.3d 729, 729 (4th Cir. 2021) (No. 19-4137), https://www.ca4.uscourts.gov/OAarchive/mp3/19-4137-20210503.mp3.

143. *See supra* text accompanying note 21.

144. *See supra* text accompanying note 141.

145. See *infra* Section IV.C for discussion of these oral arguments.

how to address them.[146] It is clear that traditional methods of preserving juror impartiality, such as changing the venue, delaying the trial, or sequestering jurors, are not sufficient to protect defendants from this new threat.[147] Absent guidance from the Supreme Court,[148] however, or evidence as to the true scope of the problem posed by juror social media access,[149] judges have struggled to develop systems to replace these antiquated ones.

Some judges have attempted to address the social media problem by simply banning jurors from accessing electronic devices in either the courtroom or the jury room.[150] Although well-meaning, this approach is likely ineffective, as it does nothing to stop jurors from accessing these devices in their homes, where the majority of misconduct undoubtedly occurs.[151]

A more common approach across the circuits has simply been to address the social media problem via the use of adopted model jury instructions, which ask jurors not to communicate about the trial on *any* forum.[152] *Loughry* itself points to the use of these instructions,[153] and some evidence suggests this measure can successfully deter jurors from engaging in improper online conduct.[154] An informal 2014 survey of jurors at both the state and federal level, for example found that only 47 of the 583 jurors surveyed were tempted to use social media after receiving jury instructions dictating that they refrain from doing so.[155] A similar, smaller survey conducted two years prior produced similar results, with several jurors explicitly citing "the judge's instructions" as the reason they chose not to access social media platforms or

146. One judge, for example, asked if future "juror voir dire would include requests for the court to require the perspective jurors to turn over their electronic devices for review by counsel." Oral Argument at 4:40, United States v. Loughry, 996 F.3d 729, 729 (4th Cir. 2021) (No. 19-4137), https://www.ca4.uscourts.gov/OAarchive/mp3/19-4137-20210503.mp3.

147. Blake A. Klinkner, *Social Media, Jury Trials and the Threat to the Rule of Law*, 44 WYO. L. 42, 44 (2021) (briefly discussing the limitations of these approaches in the modern courtroom).

148. *See* Ahunanya Anga, *Jury Misconduct: Can Courts Enforce a Social Media and Internet Free Process? We "Tweet," Not*, 18 J. TECH. L. & POL'Y 265, 277 (2013) ("The profession needs guidelines about the use, type of information, and what levels of conduct constitute 'a serious misuse of social media.'") (internal citation omitted).

149. Marder, *supra* note 133, at 618.

150. *Id.*

151. *Id.*

152. In 2012, sixty percent of judges reported, in response to a Federal Judicial Center questionnaire, that they employed the Committee on Court Administration and Case Management model jury instructions to address social media issues. Hon. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring An Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 18 (2012).

153. *See supra* note 107 and accompanying text.

154. Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64, 90 (2014).

155. *Id.* at 79.

conduct online research.[156] Although these responses are promising, model jury instructions which ask jurors not to affirmatively engage with social media platforms do little to prevent the type of conduct at issue in *Loughry*.[157] The *Loughry* majority made exceedingly clear, after all, that these instructions solely forbid jurors from accessing social media to communicate about case-related materials,[158] and Juror A never broke that rule; at most, she logged in and irresponsibly fell victim to a Twitter algorithm.[159]

Even more stringent, hypothetical jury instructions, asking jurors to abstain *entirely* from social media use, would likely be somewhat ineffective because these platforms are explicitly designed to be addictive.[160] The infinite scroll feature on platforms like Twitter, Facebook, and TikTok, for example, that generates a constant stream of content on a single page, has such potential for addiction that Congress has attempted to ban it.[161] To combat the issues presented by social media, then, by simply asking jurors to abstain from accessing their accounts, may be difficult to impossible, especially in cases involving prolonged trials.

More nuanced jury instructions requiring both judges and jurors to employ some technological know-how may be necessary to truly combat the social media issue.[162] During the en banc rehearing following *Loughry*, Elbert Lin, Loughry's attorney, laid out what he described as a "much less intrusive prophylactic approach" to the problem, than, for instance, searching juror cell phones to analyze their social media activity.[163] He explained that district courts could simply direct jurors to use Twitter's filter function or unfollow any potentially suspect individuals for the duration of trial.[164] This would allow jurors to access their social media accounts as usual, while reducing the likelihood of inadvertent contact with potentially prejudicial content.[165]

156. Eve, *supra* note 152, at 24. See Marder, *supra* note 133, at 638–41 for discussion of the limitations inherent in these surveys, which asked participants to self-report potential misconduct.

157. *See supra* note 107.

158. *See supra* text accompanying note 108.

159. *See supra* note 142 and accompanying text.

160. Christian Montag et al., Addictive Features of Social Media/Messenger Platforms and Freemium Games Against the Background of Psychological and Economic Theories, 16 INT'L J. ENV'T RSCH. & PUB. HEALTH 1, 6 (2019) (noting several features of social media platforms have been developed to grasp and hold the user's attention).

161. Social Media Addiction Reduction Technology Act, S. 2314, 116th Cong. § 3(1) (2019).

162. Oral Argument at 38:43, United States v. Loughry, 996 F.3d 729, 729 (4th Cir. 2021) (No. 19-4137), https://www.ca4.uscourts.gov/OAarchive/mp3/19-4137-20210503.mp3.

163. *Id.*

164. *Id.*

165. Of course, this approach is dependent on platforms other than Twitter sharing these content-filtering features.

C. The Loughry Court Relied on a Flawed Understanding of How Twitter and Similar Platforms Display Content to Users

The Supreme Court has come a long way since 2010, when Justice Scalia referred to himself as "Mr. Clueless" when asked by a House Judiciary subcommittee whether he had "ever considered tweeting or twitting."[166] First Amendment cases have inevitably strayed into the realm of social media, and at least some Justices have, accordingly, demonstrated an increasingly competent understanding of the platforms on which modern communication occurs.[167] The proceedings following the *Loughry* decision evidence attempts by the Fourth Circuit to take similar strides toward increased understanding of social media, with limited success.[168]

On February 25, 2021, the Court granted Loughry's petition for rehearing en banc.[169] The resulting opinion provided little guidance as to how to address jury social media access in the future, stating only that "[t]he judgment of the district court is affirmed by an equally divided court."[170] The May 3 oral arguments were telling, however, especially in their indication that several judges on the Fourth Circuit may not understand how platforms like Twitter actually display content to users. The arguments were littered with analogies to traditional forms of news media, with one judge asking, "[i]f someone had been reading the Charleston Gazette . . . and the only information that they were reading the newspaper about [was] an unrelated event . . . would that warrant a *Remmer* hearing?"[171] Later, when Loughry's

166. Jordan Fabian, *Chairman to Justices: 'Have Either of Y'all Ever Considered Tweeting or Twitting?'*, HILL (May 21, 2010), https://thehill.com/policy/technology/99209-chairman-to-justices-have-either-of-yall-ever-considering-tweeting-or-twitting-; *see also* Stephanie Francis Ward, *Justice Breyer's on Twitter & Facebook, But Don't Count on Him Friending You*, A.B.A. J. (Apr. 14, 2011), https://www.abajournal.com/news/article/breyer_on_facebook_but_dont_count_on_him_friending_you (quoting Justice Breyer as having said he "wouldn't want to have followers on the *tweeter*" (emphasis added)).

167. *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2047 (2021) (noting, in a First Amendment case, the significance of the fact that a cheerleader's suspect speech had been directed at "her private circle of Snapchat friends"); Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (Thomas, J., concurring) (examining, with acute understanding of the platform, the First Amendment implications of the removal of President Trump's Twitter account).

168. *See* Alison Frankel, *4th Circuit Skips Chance to Provide Social Media Guidance in W. Va. Justice's Case*, REUTERS (May 21, 2021), https://www.reuters.com/business/legal/4th-circuit-skips-chance-provide-social-media-guidance-w-va-justices-case-2021-05-21/ ("It . . . became clear in the course of the [en banc] hearing that not all of the 4th Circuit judges understand how Twitter works.").

169. United States v. Loughry, 837 F. App'x 251, 251 (4th Cir. 2021).

170. United States v. Loughry, 996 F.3d 729, 729 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022).

171. Oral Argument at 20:36, United States v. Loughry, 996 F.3d 729, 729 (4th Cir. 2021) (No. 19-4137), https://www.ca4.uscourts.gov/OAarchive/mp3/19-4137-20210503.mp3. The answer to this question is very likely "No." *See supra* Section IV.A. It is much easier, though, for a juror to

counsel, Elbert Lin, tried to explained that "many people are on Twitter all the time and don't do anything that leaves a public trail,"[172] a second judge was quick to rebut, noting that it is also impossible to know "how many times a juror walks by a newsstand and reads a headline."[173] Ironically, it was Judge Motz, who prefaced her statement by claiming that she was not very "technically alert," who got to the heart of the matter.[174] "This person could have been on Twitter for everything and seen everything," she said.[175] "We know she followed those people so it would automatically have come up."[176]

As the arguments proceeded, however, it became obvious that Judge Motz, claiming to be behind the times, had a far more nuanced understanding of the issue than many of her colleagues. Several questions indicated that judges struggled to understand the very concept of "following" someone on Twitter, viewing the platform as a means to directly contact individuals or conflating "following" someone with simply "liking" a tweet.[177] One judge noted, for example, that it would not have been relevant for *Remmer* purposes if a juror accessed Twitter solely to tweet to his or her daughter prior to picking them up after school.[178] He then analogized the situation to that of Juror A, who had only *interacted* with tweets about football.[179] Putting aside the independent issue that Twitter would almost never be used to contact one's child in this way, such contact likely *would* be relevant for *Remmer*

avoid potentially prejudicial sections of a newspaper than to avoid potentially prejudicial tweets, which are displayed somewhat unpredictably, in their entirety, on one's "home" feed. *See supra* Section IV.A.

172. *Id.* at 25:04.

173. *Id.* at 25:17. This analogy persisted throughout the oral arguments, with a frustrated judge ultimately asking how a juror "following" someone could possibly be any different than a juror failing to cancel a newspaper subscription. *Id.* at 1:21:58.

174. *Id.* at 30:38.

175. *Id.* at 30:54.

176. *Id.* at 31:02.

177. As a result of this confusion, long and somewhat contentious stretches of the oral arguments were devoted to judges questioning whether there was explicit proof Juror A had been following these reporters in the first place. *See, eg.*, *id.* at 1:17:02 ("Do any of those twitters show her following the reporters?"); *id.* at 1:24:34 ("There's no evidence that she followed the reporters. . . . She followed some news stories or some individuals during the summer four times in four months."). Proof that a Twitter user is following someone is simple to establish—anyone can see who a Twitter user is following simply by clicking the "Following" button at the top of that user's page. *New User FAQ*, TWITTER, https://help.twitter.com/en/resources/new-user-faq (last visited Mar. 24, 2022). That Juror A had been following these reporters during the *Loughry* trial was never actually in dispute. *See* United States v. Loughry, 983 F.3d 698, 701 (4th Cir. 2020), *aff'd on reh'g en banc*, 996 F.3d 729 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022) ("Counsel also learned that Juror A was 'following' two local journalists who had reported on the trial . . .").

178. *Id.* at 1:09:55.

179. *Id.* at 1:10:09.

purposes, if said juror was also following reporters who were covering the trial on which she was serving, as Juror A was.[180]

The extent to which some of the judges had failed to understand the concept of following someone on Twitter was perhaps not entirely evident to Lin until one judge noted, pensively, with three minutes remaining in oral arguments, that there were "perfectly innocent" ways to "follow" people—he, himself, liked to follow various comics and sports writers in the daily paper, for example.[181] Lin, with Judge Wynn's support, then explained in more detail what following someone on Twitter actually entailed,[182] but he ran up against the clock, and some judges were almost inevitably left confused.[183]

Mark Grabowski, an associate professor at Adelphi University who specializes in internet law and digital ethics, wrote about the failure of the Supreme Court to "get with the times" in 2012, warning that "[i]f the Court cannot grasp how business inventions have changed since the Industrial Revolution, or how communication methods have evolved since Alexander Graham Bell, then they might make decisions that misapply the law due to a misunderstanding of the facts about technology."[184] Judge Wynn, during these oral arguments nearly a decade later, took a similar stance: "Whenever we wade into developing technology with traditional legal jurisprudence," he stated, "our understanding of how it works is critical. . . . We can't just do it as though we're looking at a newspaper."[185] As is evidenced by those questions posed by the judges during these oral arguments, however, *Loughry* was likely decided on exactly that premise—as if Twitter were a traditional form of news media.[186]

180. One of the judges emphasized this point shortly thereafter, noting that someone does not actually have to post or engage with any Twitter content to actively follow someone, such as a reporter. *Id.* at 1:13:48.

181. *Id.* at 1:31:38–1:32:30.

182. Essentially, that content created by the "followed" individual would then be displayed on a user's timeline without that user actively seeking it out. *See supra* Section 0.

183. Oral Argument at 1:33:30, United States v. Loughry, 996 F.3d 729, 729 (4th Cir. 2021) (No. 19-4137), https://www.ca4.uscourts.gov/OAarchive/mp3/19-4137-20210503.mp3.

184. Mark Grabowski, *Are Technical Difficulties at the Supreme Court Causing a "Disregard of Duty"?*, 2012 REVISTA FORUMUL JUDECATORILOR, no. 3, 2012, at 18, 20.

185. Oral Argument at 31:18, United States v. Loughry, 996 F.3d 729, 729 (4th Cir. 2021) (No. 19-4137), https://www.ca4.uscourts.gov/OAarchive/mp3/19-4137-20210503.mp3.

186. Judge Niemeyer, who wrote the *Loughry* opinion, was especially prone to analogizing to traditional forms of media during these oral arguments. Frankel, *supra* note 168.

D. In Part Because It Failed to Understand the Technology at Issue, the Loughry Court Deviated from Its Own Precedent, Raising the Standard for Remmer Threshold Inquiry

This fundamental lack of understanding undoubtedly contributed to the *Loughry* court's finding that Loughry had failed to make a "credible allegation" of improper contact.[187] Because many judges did not fully understand what "following" a reporter entailed,[188] they did not recognize that Juror A's potential exposure to seventy-three tweets regarding the trial while serving on the jury was far more than "speculative."[189] It is clear, after all, that Juror A was actively on Twitter when these tweets were published because she interacted with several tweets about football during the same time frame; it seems incredibly unlikely, if not impossible, given Twitter's algorithms, that she was not exposed to at least *some* of those seventy-three potentially prejudicial tweets.[190]

This issue was compounded, however, by the *Loughry* court raising the standard for *Remmer* threshold inquiry established by its own precedent.[191] The Fourth Circuit has traditionally been considered one of the more generous circuits in terms of granting *Remmer* hearings.[192] As discussed in *infra*, it has adhered largely to the guidelines of the original *Remmer* hearing, requiring only a "credible allegation" of "more than an innocuous" juror contact.[193] The *Loughry* court paid lip service to this traditional threshold inquiry, quoting *United States v. Johnson*[194] in stating that a defendant seeking a *Remmer* hearing "must present 'a credible allegation that an unauthorized contact was made, and that the contact was of such a character as to reasonably draw into question the integrity of the trial proceedings, constituting more than an innocuous intervention.'"[195] In its actual analysis, however, the *Loughry* court implicitly raised that threshold inquiry, focusing not on whether Juror A could, credibly, have seen prejudicial tweets but,

187. *See supra* text accompanying note 102.

188. *See supra* Section IV.B.

189. *See supra* text accompanying note 122.

190. See *supra* text accompanying note 140–143.

191. *See supra* text accompanying note 62.

192. *See* B. Samantha Helgason, Note, *Opening Pandora's Jury Box*, 89 FORDHAM L. REV. 231, 245 (2020) ("[The Fourth Circuit] comparatively places a greater burden on the government's rebuttal than on the defendant's initial showing."); United States v. Cheek, 94 F.3d 136, 141 (4th Cir. 1996) (referring to the defendant's initial showing as a "minimal standard").

193. United States v. Johnson, 954 F.3d 174, 179 (4th Cir. 2020) (quoting Barnes v. Joyner, 751 F.3d 229, 242–45 (4th Cir. 2014)). *See supra* note 64.

194. United States v. Johnson, 954 F.3d 174, 179 (4th Cir. 2020).

195. United States v. Loughry, 983 F.3d 698, 705 (4th Cir. 2020) (quoting United States v. Johnson, 954 F.3d 174, 179 (4th Cir 2020)), *aff'd on reh'g en banc*, 996 F.3d 729 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022).

instead, on whether there was explicit evidence available to prove she had actually done so.[196]

A credible allegation, however, need not be rooted in explicit evidence of improper conduct.[197] Ironically, it is *United States v. Harris*, a case cited by the *Loughry* majority, that best stands for this proposition. The majority distinguished *Harris* on the grounds that the court, in that case, found "credible evidence" a juror had discussed the case with his girlfriend.[198] That "credible evidence," however, was solely that, given the circumstances, said girlfriend had "potentially" relayed some information she had Googled to the juror.[199] There was no concrete or direct evidence she had actually done so; nevertheless, the *Harris* court held "the district court abused its discretion by failing to conduct [a *Remmer*] hearing."[200] Far from proving that a "credible allegation" must be rooted in explicit evidence, *Harris* implicitly recognizes that the very purpose of a *Remmer* hearing is to ascertain whether such evidence of improper conduct exists once a credible allegation has been made.[201] Judge Diaz emphasized this point in his *Loughry* dissent.[202] He agreed with the majority in finding that "Loughry's evidence [was] admittedly circumstantial," but emphasized that it would be "impossible to obtain direct evidence of which tweets Juror A saw without a hearing."[203]

The ultimate problem with this raised threshold inquiry is not solely the departure from precedent, but the fact that social media use such as that at issue in *Loughry* would, arguably, never meet the burden imposed.[204] As one of the judges noted in oral arguments, "[t]he nature of this technology is such that there's never going to be any direct evidence of someone who simply looks at his or her feed during the course of a trial."[205] A hypothetical future juror could, under the standard set by the *Loughry* court, seek out any information on social media at all, and, so long as he or she did not engage

196. *Id.*

197. *See, e.g.*, United States v. Harris, 881 F.3d 945, 953–54 (6th Cir. 2017) (finding circumstantial evidence of improper juror contact sufficient to justify a *Remmer* hearing).

198. *Loughry*, 983 F.3d at 706–07.

199. *Harris*, 881 F.3d at 953–54.

200. *Id.* at 954.

201. Remmer v. United States, 347 U.S. 227, 229 (1954) (requiring a hearing on the grounds that "[w]e do not know from this record . . . what actually transpired, or whether the incidents that may have occurred were harmful or harmless"); *see supra* note 61.

202. *Loughry*, 983 F.3d at 714 (Diaz, J., dissenting).

203. *Id.*

204. *See* Oral Argument at 55:03, United States v. Loughry, 996 F.3d 729, 729 (4th Cir. 2021) (No. 19-4137), https://www.ca4.uscourts.gov/OAarchive/mp3/19-4137-20210503.mp3 (noting that circumstantial evidence should be sufficient for *Remmer* purposes).

205. *Id.*

with any of that information, the wronged defendant could not procure a *Remmer* hearing.[206]

E. The Combination of Increased Social Media Access and Heightened Remmer Threshold Inquiry Threatens Sixth Amendment Rights Across the Circuits

The Fourth Circuit is far from the only circuit where increased threshold inquiry for *Remmer* hearings threatens Sixth Amendment rights.[207] Of all the circuits, in fact, only the Second, Third, and Sixth Circuits would *likely* have granted a *Remmer* hearing based on those facts presented by *Loughry*, where no *direct evidence* existed to suggest improper contact had occurred, but such contact was nonetheless likely.[208]

The Second Circuit[209] and Third Circuit, as discussed *infra*, often employ no initial threshold inquiry to determine whether a *Remmer* hearing is warranted.[210] As such, an allegation, like that made in *Loughry*, that a juror *could* have seen prejudicial tweets, would likely have been sufficient to trigger a hearing.[211] Likewise, although the Sixth Circuit does employ threshold inquiry, it would likely be bound by its own precedent; in *Harris*, speculative but likely social media access was sufficient to implicate *Remmer*.[212]

Those *Remmer* tests employed by the remaining circuits vary so hugely that to apply the facts of *Loughry* to each would involve more bald speculation than analysis.[213] It is sufficient to note, in the wake of *Olano* and *Phillips*, that the majority of these circuits employ significantly higher threshold inquiry than that required by the initial *Remmer* holding, and, accordingly, that it has become increasingly difficult for defendants in many of these jurisdictions to contest the violation of their Sixth Amendment rights when jurors access social media.[214]

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206. Judge Wynn spoke to these repercussions during the en banc rehearing. *Id.* at 39:18.

207. Eva Kerr, Note, Prejudice, *Procedure, and a Proper Presumption: Restoring the Remmer Presumption of Prejudice in Order to Protect Criminal Defendants' Sixth Amendment Rights*, 93 IOWA L. REV. 1451, 1473 (2008).

208. *See supra* text accompanying note 122.

209. A case remarkably similar to *Loughry* was recently decided in the Second Circuit Court of Appeals. United States v. Loera, 24 F.4th 144 (2d Cir. 2022). Joaquin "El Chapo" Guzman, the notorious drug lord, appealed his conviction on the grounds that jurors "followed the trial on social media." Aaron Katersky, *El Chapo Appeals His Conviction, Argues for New Trial*, ABC NEWS (Oct. 25, 2021), https://abcnews.go.com/US/el-chapo-appeals-conviction-argues-trial/story?id=80776864.

210. *See supra* text accompanying notes 94 and 96.

211. *See supra* text accompanying notes 94 and 96.

212. *See supra* text accompanying note 77.

213. *See supra* Sections II.D and II.E.

214. *See supra* Sections II.D and II.E.

This deprivation of rights is problematic, especially because juror misconduct is only likely to increase as social media platforms become more pervasive.[215] The only tool defendants have in their pockets when such misconduct occurs is the *Remmer* hearing, and, if it becomes increasingly difficult to obtain one, a degradation of Sixth Amendment rights is inevitable.

F. To Preserve Sixth Amendment Rights, the Fourth Circuit Should Have Adhered to the Minimal Threshold Inquiry Established by the Original Remmer Holding

Social media platforms are not going anywhere,[216] and neither are the threats they pose to Sixth Amendment rights.[217] To protect defendants from these threats, judges on the Fourth Circuit and beyond must take affirmative steps to familiarize themselves with modern social media platforms; they cannot remain "ignorant of technology in a way they would be ashamed to be ignorant of patent or bankruptcy law."[218] With this knowledge in hand, judges may be able to take a more effective approach to juror social media misconduct by appropriately adapting jury instructions, thus mitigating, somewhat, the need to hold *Remmer* hearings in circumstances such as those affecting Juror A.[219]

In the meantime, however, the Fourth Circuit must hold true to the original *Remmer* holding and its own precedent by setting a minimal threshold inquiry for what constitutes a "credible allegation" of juror misconduct.[220] Doing so will help to prevent another *Loughry*, where judges failed to grant a *Remmer* hearing where one was warranted, depriving a

215. Jesse Gessin, *Bit by Bit: Breaking Down the Ninth Circuit's Frameworks for Jury Misconduct in the Digital Age*, 18 NEV. L.J. 709, 733 (2018) ("As new conduits of communication carry ever increasing depths of content to jurors, trial courts should expect jury misconduct to skyrocket.").

216. A Pew Research Center study on social media access in 2021 found that 84 percent of adults ages 18 to 29, 81 percent of adults 30 to 49, 73 percent of adults ages 50 to 64, and 45 percent of adults 65 and older use social media platforms, and that use of most platforms has trended upward or remained consistent over the past decade. Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/.

217. Unfortunately, the Supreme Court has declined to provide guidance as to *Remmer's* role in addressing these threats. Although Loughry filed a petition for writ of certiorari on October 18, 2021, Petition for Writ of Certiorari, United States v. Loughry, No. 19-4137 (4th Cir. Oct. 18, 2021), *cert. denied*, 142 S. Ct. 897 (2022) (No. 21-581), it was ultimately denied. Chris Dickerson, *U.S. Supreme Court Refuses to Hear Loughry's Appeal*, W. VA. RECORD (Jan. 25, 2022), https://wvrecord.com/stories/619044166-u-s-supreme-court-refuses-to-hear-loughry-s-appeal.

218. Grabowski, *supra* note 184, at 21.

219. *See supra* text accompanying note 164.

220. *See supra* Section IV.D.

defendant of his Sixth Amendment rights, largely because they did not fully understand the nature of the technology at issue.[221]

The bottom line is that granting a defendant a hearing is a small price to pay to prevent a violation of the Constitution.[222] When the next case involving speculative social media contact inevitably arises, and there is question as to whether that contact occurred as alleged, the Fourth Circuit ought to follow Judge Wynn's simple logic: "Let's just have a small hearing to find out."[223]

V. CONCLUSION

In *United States v. Loughry*, the Fourth Circuit affirmed that a defendant was not entitled to a *Remmer* hearing when a juror, who was actively "following" two journalists covering the case, accessed her Twitter account during the trial.[224] This decision exemplifies the dilemma faced by modern judges, who have struggled to fully understand and adapt to meet the challenges posed by ubiquitous juror use of social media platforms.[225] In relying on a flawed understanding of how the Twitter algorithm presents information to its users,[226] the *Loughry* court raised the threshold *Remmer* inquiry established by its own precedent[227] and joined those circuits where similarly heightened inquiries threaten the right to an impartial jury guaranteed by the Sixth Amendment.[228] Ultimately, the Fourth Circuit should devote itself to a stronger understanding of those social media platforms, such as Facebook, Twitter, and TikTok, that jurors inevitably use in their everyday lives; until that understanding is established, however, the court must adhere to a minimal threshold inquiry for *Remmer* hearings.[229]

221. *See supra* text accompanying notes 187–189.

222. Oral Argument at 1:15:12, United States v. Loughry, 996 F.3d 729, 729 (4th Cir. 2021) (No. 19-4137), https://www.ca4.uscourts.gov/OAarchive/mp3/19-4137-20210503.mp3 (emphasizing that a *Remmer* hearing would likely have taken only fifteen minutes).

223. *Id.* at 1:27:45.

224. United States v. Loughry, 983 F.3d 698, 712 (4th Cir. 2020), *aff'd on reh'g en banc*, 996 F.3d 729 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022).

225. *See supra* Section IV.A–B.

226. *See supra* Section IV.C.

227. *See supra* Section IV.D.

228. *See supra* Section IV.E.

229. *See supra* Section IV.F.