No. 19-4137

In The
United States Court of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

ALLEN H. LOUGHRY II,
Appellant.

Appeal from the United States District Court
for the Southern District of West Virginia
The Honorable John T. Copenhaver, Jr., Senior United States District Judge

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RESPONSE OF THE UNITED STATES IN OPPOSITION TO DEFENDANT'S PETITION FOR REHEARING *EN BANC*

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INTRODUCTION

The sole question presented here is whether Allen H. Loughry II (hereinafter "Defendant") is entitled to a rehearing *en banc* following the majority panel's holding on direct appeal that he failed to present a credible allegation that a juror was exposed to extraneous information on social media, thereby triggering a hearing under *Remmer v. United States*, 347 U.S. 227 (1954).[1] Because the majority based its opinion solely on the facts of this case, and the application of existing 4th Circuit precedent, Defendant is not entitled to a rehearing *en banc*.

Defendant, a former West Virginia Supreme Court Justice, was convicted of multiple counts of mail and wire fraud following a jury trial. He appealed his conviction on limited grounds claiming juror bias and misconduct. Defendant argued that the district court erred in failing to grant a *Remmer* hearing. Defendant's request for that hearing concerned a juror's activity on social media unrelated to the trial. Defendant, without any evidence, direct or circumstantial, argued that the juror *may have* seen tweets by reporters covering the trial. A more detailed outline of the

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[1] The United States Supreme Court held in *Remmer* that outside contact with a juror during trial about the subject matter of the trial is presumptively prejudicial. It further provided for a hearing to determine if the contact was prejudicial in fact if there is a credible allegation of communications or contact between a juror and a third party. *Remmer*, 347 U.S. at 229.

relevant facts found by the majority panel as to the *Remmer* issue are contained on pages 5 through 8 of the opinion. The panel, based on factual findings, affirmed, and found the district court did not abuse its discretion in refusing to grant a *Remmer* hearing. Defendant now seeks a rehearing *en banc*. Defendant's petition should be denied.

APPLICABLE LAW

Whether a defendant is entitled to a rehearing *en banc* following a direct appeal is governed by Rule 35 of the Federal Rules of Appellate Procedure. That rule provides, in pertinent part:

> An *en banc* hearing or rehearing is not favored and ordinarily will not be ordered unless:
>
> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> (2) the proceeding involves a question of exceptional importance.

Fed. R. App. P. 35.

ARGUMENT

I. The majority panel based its decision on facts related specifically to this case based on current law. As a result, Defendant is not entitled to *en banc* review.

Defendant posits that the majority panel held that circumstantial evidence would never entitle a criminal defendant to a hearing under *Remmer*.[2] However, that was not what the court held. Nowhere in its opinion does the court use the term "circumstantial evidence" to decide Defendant was not entitled to a *Remmer* hearing; nor was it implied. Rather, the majority panel stated that "there is *no evidence* that [the juror] accessed her Twitter account" in the manner Defendant claimed. Op. at 11. The court found that the facts of this case not only failed to give rise to a *Remmer* hearing, but also that Defendant failed to present any evidence that the juror had contact with any outside party about the case during trial.

The majority opinion based its decision on the application of existing law to the specific facts of this case. While Defendant may disagree with those factual findings, he is not entitled to a rehearing *en banc* predicated upon that disagreement.

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[2] Defendant also mistakenly relies on language in the dissent that indicated the majority panel required him to prove "with certainty" that the juror saw reporters' tweets during trial. Op. at 30. Again, the majority did not require certainty, holding that there was *no evidence* the juror saw reporters' tweets about the trial.

II. The majority decision is not inconsistent with a decision of the Sixth Circuit.

Defendant contends that the majority panel's decision conflicts with the decision in *United States v. Harris*, 881 F.3d 945 (6th Cir. 2018). Defendant's contention is incorrect. The majority panel discussed the *Harris* opinion at length and distinguished it *on its facts*. Op. at 13-14. The majority panel stated: "[t]he facts in *Harris*, however, are readily distinguishable for those before us . . ." Op. at 14. In *Harris*, there was direct evidence that a juror's girlfriend had viewed the defendant's LinkedIn page during the trial. Contrary to Defendant's trial, the *Harris* trial received minimal publicity. The majority court noted that "the girlfriend had no reason to research the defendant." Op. at 13. Therefore, she must have had discussion with her boyfriend/juror.

The facts in *Harris* therefore, are starkly different than those involving the juror in Defendant's trial. Here, Defendant argued that the juror accessed her Twitter account on October 3 and October 6 (a Saturday).[3] Her limited Twitter activity on those days concerned football. Unlike the situation in *Harris*, Defendant presented no

[3] Interestingly, Defendant did not submit any of the reporters' tweets from either day to the district court. It is difficult to see how the district court could have erred in denying the *Remmer* hearing given the paucity of information supplied to the court.

evidence that the juror had seen reporters' posts. The juror did not re-tweet any post by a reporter during trial. She did not "like" any post by a reporter during trial. As the majority panel noted, "the standard for justifying a hearing under *Remmer* requires a defendant to present 'a credible allegation that an unauthorized contact was made.'" Op. at 14 (citations omitted). The majority panel found that there was no evidence of such contact and Defendant's allegations amounted to nothing more than mere speculation.

III. Defendant fails to meet the standard of "exceptional importance" as required by Rule 35 of the Federal Rules of Appellate Procedure.

Defendant states that his petition for rehearing involves an issue of exceptional importance. Defendant's view, followed to its logical conclusion, presents untenable results. In application, it requires that every juror be isolated for the duration of a trial, to the extent that a newspaper subscription on a juror's front porch would trigger suspicion of outside contact. A juror known to watch television would also come under suspicion should the trial be covered on the evening news report of one network channel, without evidence the juror even watched the programming.

The majority panel, as an alternative, discussed at length the model jury instructions proposed by the Judicial Conference Committee regarding the use of

electronic media. Op. at 11. Courts have long held that jurors are presumed to follow instructions. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

CONCLUSION

Given that the majority panel's opinion was based on the facts of this particular case, Defendant's petition for rehearing *en banc* should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January29, 2021, I electronically filed the foregoing "Response of the United States of America in Opposition to Defendant's Petition for Rehearing *En Banc*" with the Clerk of court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

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