**NO. 19-4137**

IN THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

*Respondent–Appellee*,

v.

ALLEN H. LOUGHRY, II,

*Petitioner–Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON CRIMINAL ACTION NO. 2:18-cr-00134-1

# PETITION FOR REHEARING *EN BANC*

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## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

## Cases



## Other Authorities

## GROUNDS FOR REHEARING *EN BANC*

This petition for rehearing *en banc* presents a single question of exceptional and growing importance: whether circumstantial evidence that a juror was exposed on social media to extraneous information about a trial can ever entitle a criminal defendant to a hearing under *Remmer v. United States*, 347 U.S. 227 (1954). The panel majority decided, over dissent, that circumstantial evidence cannot suffice. That holding conflicts with *Barnes v. Joyner*, 751 F.3d 229 (4th Cir. 2014), and *Porter v. Zook*, 898 F.3d 408 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 2012 (2019), and with the Sixth Circuit's decision in *United States v. Harris*, 881 F.3d 945 (6th Cir. 2018), which remanded for a *Remmer* hearing based only on circumstantial evidence.

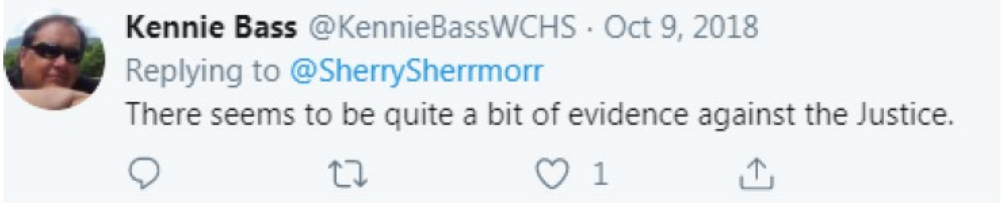
## INTRODUCTION

In *Remmer*, the Supreme Court mandated a hearing for a criminal defendant who meets the "minimal standard" of "a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury" that could "reasonably draw into question the integrity of the verdict." *Barnes v. Joyner*, 751 F.3d 229, 244 (4th Cir. 2014). The standard is minimal precisely because defendants will not always have all the relevant facts. The hearing ensures them sufficient "opportunity to uncover facts that could prove a Sixth Amendment violation." *Id.* at 250.

Social media presents new dangers to the fairness of criminal trials, dangers that *Remmer* hearings can and will be needed to counteract. External information that may be relevant to a trial is more pervasive, harder to avoid, and more privately accessible than ever before. When consuming traditional media, a juror can simply have the "local news" section taken out of a newspaper or turn off the television if she knows a segment about a trial is coming up. Not so with social media. A juror need not be "tuned in" at the moment something is posted in order to see it. Social media posts linger in jurors' feeds, which also are customized and curated such that they may actually concentrate the precise information that must be avoided. Moreover, whether a juror has accessed social media can be harder to determine. Perusing social media is just one of many things a juror could be doing on her phone. And even if it is known that someone looked at Twitter, that person leaves no public trace of what she read unless she actively interacts with a tweet (by liking, replying, or retweeting). Where there is sufficient reason for concern, *Remmer* hearings will be indispensable to "uncover[ing]" the precise extent of a juror's social media activity. *Barnes*, 751 F.3d at 250.

In this case, defendant Allen H. Loughry, II confronted these novel, but increasingly common, challenges and yet was refused the modest relief of a *Remmer* hearing. Loughry offered undisputed evidence that Juror A liked and retweeted comments and a news article criticizing Loughry in the months leading up to the

trial, accessed Twitter on multiple trial days, and followed reporters who tweeted about the case 73 times during trial, including about the strength of the evidence:




Loughry sought a *Remmer* hearing to ask about what he could not otherwise know but that, in light of this *circumstantial evidence*, was reasonably possible: whether Juror A had read a tweet about the trial without leaving any public trace. But the panel majority refused on the ground that Loughry presented no *direct evidence* that Juror A actually saw any of the reporters' tweets. In short, the majority required of Loughry exactly what a *Remmer* hearing is needed and meant to discover.

*En banc* review is needed. The majority held that circumstantial evidence can *never* be enough for a *Remmer* hearing on social media exposure. But it can be, and it is here. Demanding direct evidence of social media contact with a juror forecloses *Remmer* hearings in precisely the scenarios in which they are most needed. This rigorous new requirement threatens disastrous consequences for all criminal defendants—given that "[i]t is a now-ingrained instinct to check our phones whenever possible," *Dietz v. Bouldin*, 136 S. Ct. 1885, 1895 (2016). And it conflicts with several of this Court's precedents and that of the Sixth Circuit in *United States*

*v. Harris*, 881 F.3d 945 (6th Cir. 2018), which granted a *Remmer* hearing based purely on circumstantial evidence of social media contact with a juror.

## BACKGROUND

In the fall of 2017, the West Virginia Supreme Court of Appeals came under intense media scrutiny for office renovations and spending. There were impeachment proceedings against multiple justices. Loughry, the former chief justice, was convicted of mail fraud and wire fraud for purchases of gasoline and for reimbursement from a private institution. Op. at 1.

One of the jurors in Loughry's trial, Juror A, devoted a substantial percentage of her Twitter activity in the months before the trial to Loughry's investigation and impeachment,[1] and followed on Twitter two reporters who covered the impeachment proceedings, judicial ethics investigation, and trial. Op. at 26. These reporters tweeted or retweeted content about the case a combined total of 73 times during the trial, and this content would have appeared in Juror A's Twitter feed. *Id.* One tweeted twelve times on October 3 alone, one of the trial days on which it is undisputed that Juror A accessed Twitter. *Id.*[2]

[1] Juror A liked or retweeted 11 tweets during the four months before trial. Four of them related to the justices of the West Virginia Supreme Court of Appeals. Op. at 5.

[2] Juror A indisputably accessed other social media on two other trial days: October 7 and 8. *Id.* at 26.

One reporter was not a mere bystander either. He was directly implicated in the trial based on allegations that Loughry had lied to him during an interview, which was presented to the jury during Loughry's trial. JA 129–31. The day before deliberations began, the reporter commented: "There seems to be quite a bit of evidence against the justice." *Id*. at 27.

In his appeal to this Court, Loughry sought and was refused, 2 to 1, a remand for a *Remmer* hearing to establish what he could not otherwise know: precisely what Juror A saw while she was indisputably on Twitter during trial. In a precedential opinion, the panel majority denied the hearing because Loughry presented no *direct evidence* that Juror A actually read the reporters' tweets. *See* Op. at 11 ("But there is no evidence that Juror A read that tweet."). The majority faulted Loughry for showing only that Juror A "*could have seen* the reporter's tweet on October 9 or other tweets by the reporters." *Id*. (emphasis in original); *see also id.* at 13 (rejecting Loughry's evidence as showing only "the *possibility* that Juror A saw the reporters' tweets about the trial") (emphasis in original). The majority did not quarrel with the strength of Loughry's circumstantial evidence (*i.e.*, it did not suggest the possibility was too speculative), but rather found that evidence categorically insufficient. To justify its demand for direct evidence, the majority offered only that, otherwise, a

*Remmer* hearing would be required for any juror "who had a social media account." Op. at 11.[3]

Dissenting, Judge Diaz concluded that Loughry had met the "minimal standard" for a *Remmer* hearing. Op. at 25 (Diaz, J., dissenting in part) (quoting *Barnes*, 751 F.3d at 245). Judge Diaz found it appropriate to consider Loughry's circumstantial evidence, which he concluded constituted "a credible allegation that Juror A was likely exposed to tweets from reporters commenting about the trial." Op. at 28. He disagreed with the majority's demand that Loughry "prove with certainty that Juror A saw the reporters' tweets." *Id.* at 30. Given the way social media works, circumstantial evidence was "the most [Loughry] could possibly offer without the opportunity to conduct discovery or question Juror A." *Id.* at 28. The majority's inflexible rule asks too much: "it's impossible to obtain direct evidence of which tweets Juror A saw without a hearing." *Id.* Responding to the majority, Judge Diaz noted that relying on circumstantial evidence would open no floodgates since, as was true here, there would have to be circumstantial evidence showing more than merely that "a juror used social media during a trial." *Id.* at 30. Finally, Judge

[3] The panel unanimously refused two alternative grounds for a hearing—*McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984), and actual bias—that are not presented in this petition.

Diaz observed that the Sixth Circuit had granted a *Remmer* hearing in *Harris* based on "much less" compelling circumstantial evidence. *Id.*

## SUMMARY OF ARGUMENT

**I**. The majority's demand for direct evidence of social media contact—and its categorical refusal to consider Loughry's circumstantial evidence—set the bar for a *Remmer* hearing too high. The new, unique dangers that social media poses to fair trials can and should be met by *Remmer*. But the majority's strict rule ignores how social media works and forecloses *Remmer* hearings where they are most needed.

If permitted to stand, this novel holding will bring about sweeping practical and legal consequences in this Circuit. Practically, the majority's decision will deprive criminal defendants of *Remmer*'s benefits in many cases where a hearing would make a material difference. Without a hearing, there is virtually no scenario in which a defendant could ever establish that a juror passively viewed a tweet or similar social media content, even where the circumstantial evidence suggests it is extremely likely that a juror did. Legally, the majority's new rule is at odds with several prior opinions of this Court, including *Barnes* and *Porter*, both of which make clear that *Remmer* hearings are meant to provide criminal defendants the opportunity to "uncover" exactly the kind of direct evidence the majority demands here.

**II**. Rehearing is also necessary to prevent a circuit split between this Court and the Sixth Circuit. As the majority itself acknowledged, the Sixth Circuit granted a *Remmer* hearing in *United States v. Harris* based solely on "circumstantial evidence." Op. at 13. Indeed, it did so *despite* that the defendant "did not establish that Juror 12 was exposed to unauthorized communication," *Harris*, 881 F.3d at 954, precisely the sort of direct evidence the majority demanded here. Unlike the majority here, the Sixth Circuit would have found Loughry entitled to a *Remmer* hearing.

## ARGUMENT

### I. The panel majority's demand for direct evidence of social media contact with jurors forecloses *Remmer* hearings where most needed and contradicts this Court's precedent.

The bar to obtain a *Remmer* hearing is intentionally low, reflecting "the Supreme Court's concern in cases involving juror bias [] that without a hearing, a criminal defendant is deprived of the opportunity to uncover facts that could prove a Sixth Amendment violation." *Barnes*, 751 F.3d at 250. That concern remains justified—if not heightened—today, as the internet generally and social media particularly create challenges not posed before. Unsurprisingly, *Remmer* hearings have frequently been ordered to explore internet contacts. *See United States v. Lawson*, 677 F.3d 629, 651 (4th Cir. 2012) (visiting Wikipedia merits hearing); *Ewing v. Horton*, 914 F.3d 1027, 1029 (6th Cir. 2019) (Facebook usage merits hearing); *Harris*, 881 F.3d at 952 (LinkedIn usage merits hearing).

The panel majority's decision flies in the face of all of this. Its demand for direct evidence—and categorical refusal to consider circumstantial evidence—ignores how social media works. And it makes obtaining a *Remmer* hearing impossible in precisely the scenarios in which this Court has said hearings are most appropriate: where a criminal defendant must uncover facts that she reasonably believes exist but has no other means of discovering.

### A. Social media poses heightened challenges to the fairness of criminal jury trials.

Social media can be far more pervasive than traditional media. As the Supreme Court recognized, "[i]t is a now-ingrained instinct to check our phones whenever possible." *Dietz*, 136 S. Ct. at 1895. This creates an "extraordinarily high" risk that jurors will "read reactions . . . on Twitter" and other social media applications either during trial or after. *Id*. at 1890, 1895. It is also possible for anyone with a smartphone to post on social media, vastly increasing the number of people who might comment on a trial. "Although the possibility of inadvertent exposure [to extraneous information] existed before social media, coverage was less pervasive and more readily avoided." Nancy S. Marder, *Jurors and Social Media: Is a Fair Trial Still Possible?*, 67 SMU L. REV. 617, 628 (2014).

Social media can also be far more prejudicial. Consider Twitter, the application at issue here. Opening the Twitter app takes a user immediately to his or her feed, a collection of viewpoints and content the user has chosen to appear by

"following" other users. Unlike the morning newspaper or an evening newscast, a user's Twitter feed could be intensely focused on just a few topics.

These heightened dangers of social media are amplified by its uniquely private nature. To begin, whether a juror has viewed social media in the first place is often impossible to know, although that is undisputed in this case. While a defendant might have difficulty proving that a juror read a particular newspaper or saw a particular television broadcast, it is harder still to prove a juror accessed social media. A bystander can easily tell whether someone is reading a newspaper or watching television. Not so when a person is using his or her phone. Scrolling through Twitter, reading email, checking the latest scores, and reading a weather forecast look identical to the passerby.

Even if it is known that a juror accessed social media, it is difficult, if not impossible, to know what the juror read. Tweets are perpetual unless affirmatively deleted, and a feed will contain tweets from hours or days before. They appear either chronologically or by a user's interests, as determined by Twitter's algorithm. And even if a tweet does not scroll by in a user's feed, it will appear on the poster's homepage and come up in searches. In all events, there is no record that a user has viewed any particular tweet unless the user publicly interacts with that content—by liking, replying to, or retweeting a tweet.

As Judge Diaz summarized in dissent, "Twitter 'can be accessed by phone virtually anywhere and for any length of time, and includes no visible record of whether a tweet has been seen or not.'" Op. at 28 (Diaz, J., dissenting in part). Contrast this with traditional media, where a bystander's testimony that a juror was reading Section A of Monday's *New York Times* would reveal quite a bit about the content the juror likely saw.

### B. The majority's decision should be revisited *en banc*.

These challenges posed by social media can and should be met by *Remmer*. Where there is credible and sufficient circumstantial evidence showing that a juror likely viewed tweets about a trial, a *Remmer* hearing provides criminal defendants the critical "opportunity to uncover facts" that they reasonably believe exist but cannot otherwise access. *Barnes*, 751 F.3d at 250.

As Judge Diaz observed, this case is the paradigmatic example. Loughry provided "the most he could possibly offer without the opportunity to conduct discovery or question Juror A" on the ultimate question. Op. at 28 (Diaz, J., dissenting in part). *First*, much of Juror A's Twitter usage in the months before trial related to negative coverage of Loughry. *Id*. *Second*, Juror A followed two reporters who tweeted a combined 73 times during the trial, and those tweets would be visible in her feed. *Id*. at 26. *Third*, Juror A was indisputably active on Twitter on two dates during trial. *Id*. at 28. *Fourth*, Juror A was active on other social media sites during

additional trial days, which "indicates that she likely scrolled through her Twitter feed passively on at least some" other days. *Id*. To borrow a phrase, Loughry credibly showed that Juror A had "motive, means, and opportunity" even though he could not directly prove that Juror A read a tweet about the trial.

The majority's demand instead for direct evidence—"fault[ing] Loughry for failing to prove with certainty that Juror A saw the reporters' tweets," *id*. at 30—ignores the realities of social media and nullifies *Remmer* where it is most needed. The majority requires a defendant to produce exactly what, in the social media context, a *Remmer* hearing is needed to uncover. Without a hearing, there is virtually no circumstance in which a defendant could ever establish that a juror passively viewed a tweet or similar social media content. *Id*. at 28 ("it's impossible to obtain direct evidence of which tweets Juror A saw without a hearing"). And yet a juror who did so poses the same risk to a defendant's fair trial as one who read, but also publicly "liked," the tweet.

The majority's stated justification for its strict new rule—that considering circumstantial evidence would open the floodgates to a *Remmer* hearing for any "juror who ha[s] a social media account"—makes no sense. Op. at 11 (maj. op.). As the dissent correctly noted, Loughry does not contend that the mere facts that Juror A had a Twitter account and used Twitter during trial are sufficient. Op. at 30 (Diaz, J., dissenting in part). In every case, including this one, the circumstantial evidence

must be weighed to determine whether the defendant has presented a "credible allegation" of external social media contact about the trial. In a low-profile case lacking the plethora of undisputed facts present here, the circumstantial evidence is likely to fail. But the fact that circumstantial evidence will not (and should not) be sufficient in some cases isn't reason to categorically hold that circumstantial evidence can *never* be sufficient.

In fact, it is the majority's decision that will bring about sweeping practical and legal consequences. The evidentiary difficulties posed by social media are neither limited to the facts of this case nor likely to abate in the foreseeable future. Practically, the majority's requirement of direct evidence will be disastrous for criminal defendants in this Circuit, as social media and smartphones continue to proliferate. And there is no exception. Whether the juror is known to have been on Twitter once or constantly, or the juror is likely to have viewed innocuous or highly prejudicial tweets, or the defendant faces one year or life in prison, the majority's rule forecloses the benefits of *Remmer*. Without *direct evidence* that a juror actually saw the specific information, no hearing would be required.

Legally, the majority's decision is at odds with several prior opinions of this Court. In *Barnes*, this Court made clear that circumstantial evidence can justify a *Remmer* hearing to "uncover" direct evidence that a defendant cannot otherwise obtain but has a reasonable basis to believe exists. 751 F.3d at 250. Indeed, "[t]he

absence of evidence highlighted by the dissent" in that case was "precisely why *Remmer* require[d]" a hearing. *Id.* This majority's "focus[] not on what is alleged by [Loughry], but rather on [the direct evidence] missing from his allegations," is exactly what the *Barnes* court rejected. *Id.* Similarly, the majority's new rule runs afoul of *Porter*, in which this Court rejected as "a classic catch-22" the requirement that a defendant submit as support for a hearing the very evidence the defendant needs that hearing to discover. 898 F.3d at 427.

Finally, to the extent the majority relied alternatively on the district court's instructions as the basis for refusing the hearing, that reliance also works a substantial change to this Court's *Remmer* jurisprudence. The majority notes in passing that "[i]n any event, the jurors were repeatedly instructed to avoid social media 'about this case,' and we presume that the jury followed these instructions." Op. at 11. No court, including this one, has ever held that this presumption of juror obedience alone negates *Remmer* or a defendant's reliance on circumstantial evidence. Jurors have long been instructed to avoid external contacts; *Remmer* exists precisely because those instructions are not always followed.

## II. The panel majority's demand for direct evidence of social media contact conflicts with a decision of the Sixth Circuit.

As the majority itself admitted, the Sixth Circuit granted a *Remmer* hearing in *United States v. Harris* based solely on "circumstantial evidence." Op. at 13. The Sixth Circuit held that the defendant, Harris, had presented "a colorable claim of

extraneous influence, which necessitated investigation." 881 F.3d at 954. To support that claim, Harris had shown only that a juror's live-in girlfriend, Goleno, had viewed Harris's LinkedIn profile during a period of time that partially overlapped with the trial.[4] From there, the Sixth Circuit filled in a series of cascading assumptions. There was no evidence that Goleno ever discussed with the juror either the defendant or Goleno's exploits on the internet. Nor was there evidence of trial-related information on the LinkedIn page. Instead, the Sixth Circuit *assumed* that Goleno used Google to look up the defendant (which presumably led her to the defendant's LinkedIn page), *assumed* that the list of Google results likely exposed her to information about the trial, and *assumed* that Goleno then discussed what she saw with the juror. *Id*. at 952. The Sixth Circuit described these nesting dolls of assumptions as follows: "it is quite possible that Juror 12 told Goleno about the trial, leading her to Google Harris and to potentially communicate her findings to her live-in boyfriend, Juror 12." *Id.* at 953-54.

The majority's holding squarely conflicts with *Harris*. The majority refused even to consider circumstantial evidence and "fault[ed] Loughry for failing to prove

[4] LinkedIn is a professional networking site where users showcase their experience in what is essentially an extended online resume. LinkedIn, unlike Twitter, records which users have viewed a profile, which allowed Harris to determine that the juror's live-in girlfriend had viewed Harris' profile. Op. at 29 n.5 (Diaz, J., dissenting in part).

with certainty that Juror A saw the reporters' tweets." Op. at 30 (Diaz, J., dissenting in part). It refused to grant a hearing based only on "the possibility that Juror A saw the reporters' tweets about the trial." Op. at 13. But that is exactly what the Sixth Circuit did; it found Harris entitled to a hearing because the "*mere possibility* of inappropriate communication with a juror [in *Harris*] was enough to warrant a *Remmer* hearing." Op. at 29 (Diaz, J., dissenting in part) (emphasis added). The Sixth Circuit granted a *Remmer* hearing based solely on circumstantial evidence and *despite* that Harris "did not establish that Juror 12 was exposed to unauthorized communication." *Harris*, 881 F.3d at 954.

There is no doubt that, in light of *Harris*, the Sixth Circuit would have found Loughry entitled to a *Remmer* hearing. In *Harris*, the Sixth Circuit built a bridge of three assumptions from the circumstantial evidence that the juror's girlfriend had viewed the defendant's LinkedIn profile. Here, the circumstantial evidence is far stronger. It is undisputed that Juror A had shown interest in Loughry on social media, followed two journalists who regularly tweeted about the trial on trial days, and accessed Twitter *during trial*. There is just *one* final missing step here, rather than the *three* in *Harris*: whether Juror A read any of the tweets.

## CONCLUSION

For these reasons and those in Loughry's merits briefing, the Court should rehear and reconsider the panel majority's opinion *en banc*.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 40(b)(1) because the portion of the brief subject to that rule is 3,878 words and therefore does not exceed the 3,900 word limit.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point Times New Roman typeface using Microsoft Word.

January 11, 2021

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## CERTIFICATE OF SERVICE

I certify that on this 11th day of January, 2021, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

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