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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Brief of Appellee the United States of America

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INTRODUCTION

The Sixth Amendment guarantees to a criminal defendant the right to trial by an impartial jury. The sole issue here is whether Loughry was entitled to an evidentiary hearing on his request for a new trial based on alleged juror misconduct and actual bias.

Loughry, a justice on the West Virginia Supreme Court of Appeals, was tried in October 2018 for mail and wire fraud, witness tampering, and making false statements to an FBI agent. The investigation leading up to his indictment received widespread local publicity. J.A. 266. Thus, the trial began with an extensive *voir dire* process. After six days of trial and two days of deliberation, the jury convicted Loughry on eleven counts, acquitted him on ten others, and hung on one. J.A. 269-70. The court subsequently entered a judgment of acquittal on one of the eleven counts of conviction, witness tampering. J.A. 270.

In a post-trial motion and supplemental pleadings, Loughry claimed his Sixth Amendment right was violated because a juror, referred to by the district court and in this appeal as Juror A, allegedly lied during *voir dire* to conceal actual bias against Loughry.[1] J.A. 791, 795. Basing his argument on instances of Juror A's social media

[1] The motions and memoranda filed by Loughry and the United States Response, all

activity in June and August 2018, months before the trial, Loughry requested a new trial under the test established in *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984). J.A. 838.

In his post-trial pleadings, Loughry also criticized Juror A's social media activity *during trial*, none of which related to Loughry's case. J.A. 275. He claimed Juror A *would have* seen Twitter posts by reporters about the trial, J.A. 834, but he did not provide evidence that Juror A read or saw any tweets by reporters. *See id.* He provided no evidence of any tweet by a reporter about the trial. Further, he argued that Juror A's mid-trial social media activity was "further evidence of [Juror A's] disregard for the Court's instructions and dishonesty in responding to questioning." J.A. 975. He did not ask for a new trial based on Juror A's alleged misconduct during trial. *See* J.A. 795, 840 ("Requests for Relief").

Loughry asked for a hearing for the first time in a reply memorandum. He said only this: "If the Court determines that the record is insufficient, the Defendant respectfully requests that an evidentiary hearing be held to further develop the record

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of which were filed under seal, contain Juror A's true identity. *See, e.g.*, J.A. 792, 834, 842.

concerning the issues raised in this motion." J.A. 975. He made no argument that a hearing was required and proffered nothing that he might present at a hearing. *Id.*

The district court denied Loughry's motion for a new trial and his request for a hearing. J.A. 301. Loughry now appeals solely from the decision not to hold a hearing. In this brief, the United States first addresses Loughry's *McDonough* and actual bias claims, which were his arguments below for a new trial. An analysis of Loughry's complaint about Juror A's mid-trial social media activity follows.

ISSUES PRESENTED

1. Loughry argues the district court applied an erroneous standard when it decided not to hold an evidentiary hearing on his claims under *McDonough* and about actual bias. Inasmuch as Loughry never advocated that a particular standard should apply and instead invited the court to determine on its own whether the record was sufficient, did the court plainly err in finding no need for a hearing?

2. The district court found that Juror A's mid-trial social media activity had nothing to do with Loughry's case. The court also found Loughry did not make even a threshold showing of misconduct by Juror A. Loughry did not base his motion for new trial on Juror A's alleged mid-trial misconduct and did not argue a hearing was

required. Did the court plainly err by not holding an evidentiary hearing on Juror A's social media activity during trial?

STATEMENT OF THE CASE

A. Investigation and Indictment.

This case resulted from a federal investigation into allegations of corruption and wasteful spending at the West Virginia Supreme Court of Appeals. J.A. 264. Loughry was the Chief Justice of the Supreme Court at the time the investigation began. *Id.* at 264-65.[2] Although the media reported extensively about wasteful spending, Loughry made his own report to the United States Attorney about wrongdoing at the Supreme Court. J.A. 265. The investigation eventually focused on him, and a federal grand jury indicted him on June 19, 2018. J.A. 5, 317. The indictment was unsealed the following day. J.A. 5.

There were other proceedings concerning the Supreme Court pertinent to Loughry's appeal. On June 6, 2018, before the federal indictment, the West Virginia Judicial Investigations Commission (JIC) filed a civil complaint against Loughry, alleging numerous violations of the State Judicial Code of Conduct. JA. 265, 922-56.

[2] The other justices voted to remove Loughry as Chief Justice in February 2018. J.A. 923.

And on August 7, 2018, the West Virginia House of Delegates Judiciary Committee approved Articles of Impeachment against all of the then-active Supreme Court justices. J.A. 265-66, J.A. 958-71.[3]

In mid-August 2018, the federal grand jury returned the superseding indictment on which Loughry was tried. J.A. 20-54. This indictment charged Loughry with mail and wire fraud against private entities, J.A. 40-42, and against the State of West Virginia. The fraud against West Virginia related to his use of state vehicles and gas credit cards for personal use and his taking a historic, antique desk, referred to as a "Cass Gilbert" desk, to his home. J.A. 43-45, 47. Loughry also was indicted for witness tampering, J.A. 46, and making false statements to a federal agent. J.A. 50-54. Loughry, however, "was not . . . indicted on any claims relating to office expenditures," which was one of the "more highly publicized allegations against Loughry." J.A. 270.

B. *Voir Dire.*

Due to the large *voir dire* pool, the court split *voir dire* into morning and afternoon sessions. J.A. 532-649, 650-776. The court began the afternoon session, which included Juror A, by stating, "[T]his is a criminal case and comes before us by

[3] The Articles of Impeachment did not include Menis Ketchum, J.A. 958-71, who had resigned as a justice on July 27, 2018. J.A. 265. Ketchum was charged with federal wire fraud by an information filed July 31, 2018. J.A. 265.

reasons of an indictment. I want to tell you just a little bit about it." J.A. 654. The court added, "In this case, Allen H. Loughry II is charged in a twenty-five count indictment." *Id.* The court went on to summarize the specific counts. J.A. 655-56.

The court then asked a series of questions to determine their qualifications "to sit as fair and impartial jurors in the trial of this case." J.A. 657, 664. Those questions included eight that Loughry claimed Juror A should have answered affirmatively. J.A. 835-36. The eight questions:

> Question 1: "You've heard what I told you about –– what little I've told you about this case as set forth in the indictment. Do any of you have any personal knowledge of the facts of this case?" J.A. J.A. 674.
>
> Question 2: "[H]ave you heard this case discussed at anytime by anyone in your presence?" J.A. 674. Only a couple of people, not Juror A, responded. J.A. 674-75.
>
> Question 3: "[A]part from whether you've discussed this case with anyone or anyone has discussed it with you, let me ask you this further question: Have any of you read or heard anything about this case in the news media or television or radio?" J.A. 676.[4]

[4] Eleven people, but not Juror A responded. The court then asked several of these eleven, in the presence of all, if they could "base a verdict solely upon the evidence that is presented through the witnesses in this case." J.A. 679; *see also* J.A. 678, 681-84 (posing essentially the same question).

> Question 4: "[I]s there anything further that any of you would want to relate to the Court about your knowledge of this case that goes beyond what we've already covered?" J.A. 687.
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> Question 5: "[D]o any of you now have an opinion or have you at any time expressed an opinion as to the guilt or innocence of the defendant of the charge or charges contained in the indictment in this case?" J.A. 688.
>
> Question 6: "Have you heard anything at all from any source about the facts of this case from social networking websites, such as Twitter, Facebook, Instagram, any of you?" J.A. 693.
>
> Question 7: "Ladies and gentlemen, are you sensible to any bias or prejudice in this matter or can you think of anything that may prevent you from rendering a fair and impartial verdict based solely upon the evidence and my instructions to you as to the law applicable to that evidence?" J.A. 714-15.
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> Question 8: "Let me ask, whether reflecting on all the questions that I've asked you so far, are there any of them to which you would wish to change or supplement your answer that you've already given me? Have you thought of anything later that you believe you should have told me? Do any of you have anything further to add?" J.A. 715.

The court also asked the group "whether or not any of you have heard anything about the impeachment proceedings taking place before the state legislature." J.A. 684. Thirteen people, including Juror A, responded affirmatively. J.A. 685-86. Ten of these thirteen were among the eleven people who answered yes to Question 3, J.A.

268, so the total number of people who had heard something about the impeachment proceeding or "this case" was fourteen. *Id.*

After asking about the impeachment proceedings, the court asked, "And so, do I understand, then, to put it another way, that all of you who have answered with respect to impeachment . . . can set that aside and listen to the evidence and base a verdict solely upon the evidence received here in this courtroom?" J.A. 687. All of the prospective jurors, including Juror A, responded, "Yes." *Id.*

The court followed up with another question to the group, clarifying "personal knowledge"—"Based on your personal knowledge, excluding what you've read, either online or in print or read or heard through the media, leaving that part out, do you have any information about the facts of this case?" J.A. 694. No one responded affirmatively. *Id.*

The court subsequently asked if the potential jurors believed they "could not follow all of the instructions by the Court as to the law applicable to the case and apply it to the evidence in this case?" J.A. 707. All indicated they could follow the court's instructions. J.A. 707.

The court then allowed for individual *voir dire* examination. Throughout this process, Loughry carefully distinguished between the current *criminal* proceeding and

the separate *impeachment* proceedings. He began by asking the court to call to the bench those prospective jurors who, in his words, "indicated their awareness of the impeachment proceedings, as well as the criminal proceeding, based upon either news media, print media, or social media." J.A. 718.

Loughry named eight of the fourteen who had heard something about the impeachment proceedings or this case, and "No one further." J.A. 718-19. Loughry did not request individual *voir dire* of Juror A and several other people who had heard something about either this case or the impeachment proceedings. J.A. 268.

During the actual questioning of those who had heard something, Loughry continued to distinguish the impeachment proceedings from the criminal case against him. For example, Loughry, through counsel, asked a potential juror, "Could you tell us a little bit more, in just a little bit more detail to the depth and scope of your knowledge about either the impeachment proceedings or other criminal proceedings involving the West Virginia Supreme Court?" J.A. 727-28. Loughry asked similar questions of others. *See* J.A. 733-34, 736, 744, 751. Throughout, Loughry never mentioned the civil complaint filed against him by the Judicial Investigation Commission (JIC) before he was indicted.[5]

[5] The closest he came to mentioning the JIC proceeding was when he mentioned

Of the fourteen people who indicated they had heard about the impeachment proceedings or this case, two were excused for cause by agreement of the parties without any individual *voir dire*. J.A. 719, 724. The court excused another person, because his answers suggested he had already formed an opinion about the case. J.A. 766.

At the end of the day, the court selected a pool of thirty-six people from which the parties could exercise peremptory challenges. J.A. 776-79. Eight people from the afternoon session who had heard about impeachment or this case were a part of the pool, including Juror A. J.A. 778-79. Of these eight, Juror A and one other person became trial jurors. J.A. 264, 783-84.

C. The Verdicts.

Loughry's trial, during which he testified, lasted six days. J.A. 229, 243. The jury deliberated for two days and returned its verdicts in the afternoon of October 12, 2018. J.A. 229. The jury found defendant Loughry guilty of eleven counts—one count of mail fraud (Count 3), seven counts of wire fraud (Counts 5, 6, 10, 11, 12, 15, and 18), one count of witness tampering (Count 20), and two counts of making false

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"investigations"—"[W]hat exposure you have had to any news or social media concerning the West Virginia Supreme Court, whether that be impeachment proceedings or investigations or a criminal case?" J.A. 751.

statements (Counts 23 and 25). J.A. 206, 210, and 269. The jury acquitted Loughry on ten counts—nine counts of wire fraud (Counts 1, 4, 7, 9, 13, 14, 16, 17, and 21) and one count of mail fraud (Count 2). J.A. 206-10, 270. The jury hung on one count of wire fraud (Count 8). J.A. 207, 270. [6] In addition, as the court explained, "the jury returned a verdict of not guilty on the wire fraud claim related to the Cass Gilbert desk (Count 21), [one] of the more highly publicized allegations against the defendant." J.A. 270.

Following trial, the court granted a judgment of acquittal as to Count 20 (witness tampering) for insufficient evidence. J.A. 270. The court denied Loughry's motion for judgment of acquittal on the wire fraud counts, J.A. 243, based on "more than ample evidence." J.A. 241.[7]

D. Loughry's Motion for New Trial Based on Alleged Misconduct by Juror A.

In late October 2018, Loughry filed a new trial motion. He argued that during *voir dire*, Juror A should have disclosed certain activity on Juror A's social media accounts, which included four instances of activity on Twitter about Loughry or the West Virginia Supreme Court. They are:

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[6] The United States dismissed counts 19, 22, and 24 before trial commenced on October 3, 2018. J.A. 9 (docket entry 59).

[7] Loughry did not seek a judgment of acquittal on the false statement counts. J.A. 230.

1) On June 7, 2018, Juror A retweeted and liked a tweet by a state legislator, Delegate Mike Pushkin. Pushkin's tweet: "When the soundness of the judiciary is questioned, coupled with the corrupt activities of other branches of government, how is the public ever to have any faith in State government?" J.A. 805. The tweet contained a link to West Virginia Gazette Mail article about the civil complaint filed by the Judicial Investigations Commission. J.A. 807-11.

2) On June 26, 2018, Juror A liked a tweet by another Delegate, Rodney Miller. Miller's tweet: "Legis Special Session begins at noon today looking at Supreme Court impeachments;" "more state employees quitting/fired;" "DHHR $1 million overspending for nothing;" "RISE program dysfunctional until Gen. Hoyer gets involved." J.A. 818.

3) On June 26, 2018, Juror A liked a tweet by Delegate Pushkin. Pushkin's tweet: "Justice Loughry should resign. The people of WV already paid for his couch, he should spare them the cost of his impeachment." J.A. 817. The tweet contained a link to a West Virginia Gazette Mail opinion piece entitled, "Ken Hall: WV Justices who take advantage of public funds should resign." JA. 821-22.

4) On August 7, 2018, Juror A liked a tweet by James Parker. Parker's tweet: "Yes, it is a sad day in WV to think these individuals who are supposed to be the pillars of what is right, just and truthful would be overcome with such an attitude of self importance that they thought the lavish spending was appropriate!" J.A. 816.

See J.A. 793-95.[8] Based on the activity, Loughry contended that Juror A failed to

[8] Loughry also cited two other instances of Juror A's social media activity—a Facebook posting on August 15, 2018, and a tweet on October 13, 2018. J.A. 794-95. The court found the Facebook post "appears to be wholly unrelated" to Loughry and the facts of his case. J.A. 271 n.2. As for the tweet on October 13, 2018, it occurred after the trial, and the court found it was not indicative of bias. J.A. 287. Loughry does not challenge the court's rulings about either activity in his brief.

answer honestly material questions during *voir dire* and that honest answers would have provided a valid basis for a challenge for cause. J.A. 795. Loughry supplemented his motion in mid-November 2018 with a memorandum in which he specified the eight questions noted above, and which he contends Juror A answered dishonestly. J.A. 835-37.

Loughry also criticized social media activity *during* trial, claiming Juror A accessed and posted on social media, "[d]espite the Court's clear and repeated admonitions to the jury to refrain from social media during the pendency of their service." J.A. 795. He identified specific dates that Juror A accessed Twitter—October 3 and 6, 2018—and declared that Juror A accessed Instagram on October 7, 2018, and Facebook on October 8, 2018. J.A. 834.[9] Loughry, however, did not explain the activity on those social media applications. *Id.* He then claimed that because Juror A follows reporters Brad McElhinny and Kennie Bass on Twitter, Juror A "would have seen their near constant 'tweets' concerning the trial, [since] such posts appear on a user's home timeline." J.A. 834. Again, he did not present any evidence that Juror A saw or read anything posted by McElhinny or Bass; nor did he provide evidence of

[9] Loughry also claimed, "upon information and belief," five jurors other than Juror A accessed social media during the trial. J.A. 835.

any of their tweets. *See id.* Furthermore, in his "Request for Relief," Loughry focused solely on Juror A's alleged dishonesty during *voir dire*, concluding that honest answers would have furnished justification to excuse the juror for cause. J.A. 795, 840.

It was not until Loughry's reply that he first suggested the possibility of an evidentiary hearing, stating only that: "If the Court determines that the record is insufficient, the Defendant further respectfully requests that an evidentiary hearing be held to further develop the record concerning the issues raised by this motion." J.A. 975. Loughry presented no legal authority for a right to a hearing, and he did not explain what more he might offer or develop at a hearing. *See id.*

E. The District Court's Ruling on Loughry's New Trial Motion.

The court denied Loughry's motion for new trial based on alleged juror misconduct in a lengthy opinion. J.A. 264-306. The court made numerous findings about Juror A's answers to the question about impeachment and the questions Loughry labeled Questions 2, 3, 4, and 5:

- "Juror A expressed having heard about the impeachment proceedings in the state legislature, but affirmed having the ability to set that aside and listen to the evidence and base a verdict solely upon the evidence received in the courtroom." J.A. 276.

- "[T]here is no reason to believe that Juror A was anything but truthful in answering questions 2, 3, 4, and 5." J.A. 281.

- "Juror A may have had a preconceived notion that Loughry should resign from his seat on the Supreme Court of West Virginia, as indicated by the juror's 'like' of the June 26, 2018 tweet from Mike Pushkin, but that does not indicate any preconceived notion towards his guilt or innocence in this case." J.A. 281-82.

- "Nor do Juror A's answers to these questions [2, 3, 4, and 5] suggest an unwillingness to be forthcoming." J.A. 282.

- "Those answers were not inherently misleading or disingenuously technical; rather, Juror A indicated a willingness to be forthcoming by alerting the court and the parties of Juror A's knowledge of the impeachment proceedings." *Id.*

- "[A]s for questions 7 and 8, the court finds no dishonesty." *Id.*

- "Juror A's failure to elaborate on the extent of Juror A's knowledge of the impeachment proceedings when asked if one had any additional information to disclose is not a dishonest response, but a simple innocent failure to disclose information that could have been elicited by questions counsel chose not to ask." J.A. 282-83.

The court differentiated "questions 1 and 6" from the others because they asked about "the facts of this case," as opposed to simply asking about "this case." J.A. 283 (emphasis in original). The court noted that the facts of the federal indictment "overlap[ped] slightly with the facts contained in the judicial complaint and the articles of impeachment." *Id.* The court posited that assuming Juror A read and remembered details from the June 7, 2018 article about the JIC complaint, Juror A "may have failed to answer fully" in response to questions about knowledge of "the facts of this case."

J.A. 283. Nevertheless, Loughry still did not make out a claim under *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984). His claim foundered on the second prong of the *McDonough* test—that a true answer would not have been sufficient reason to excuse Juror A for cause. J.A. 283-84. The court, therefore, did not make a finding on the first prong of the test as to questions 1 and 6—whether Juror A had been dishonest in answering them.

The court issued findings as to whether the fairness of Loughry's trial was affected by Juror A's non-disclosure of any knowledge Juror A may have had during *voir dire*. First, "[t]he overlapping facts of this case and the facts contained in the pertinent news articles relate to the Cass Gilbert desk and the vehicle usage." J.A. 284. Next, the court noted that Loughry was acquitted of the wire fraud charge related to the Cass Gilbert desk and seven counts of wire fraud related to his use of state-owned vehicles. *Id.* The court also found there was "ample evidence" of Loughry's guilt on the wire fraud counts on which the jury convicted him. J.A. 285. Therefore, the court found that Juror A "apparently set aside any preconceived notions, as Juror A affirmed under oath would be done, and judged the defendant fairly and impartially." *Id.* Based on these findings, the court denied Loughry's claim based on *McDonough*. J.A. 285.

The court also made findings on Loughry's actual bias claim. The court said, "Even assuming that Juror A was aware of some of the facts and issues involved in the case at the start of the trial, and even assuming Juror A had a preconceived notion that the defendant was guilty of something, there is simply no evidence that Juror A was not capable and willing to set that aside and decide the case solely on the evidence presented." J.A. 286. This was followed by further findings: "[T]here is evidence that after a thorough deliberation, the jury found evidence to be insufficient in several instances, and therefore ruled in the defendant's favor on those counts." J.A. 286-87. Finally, Juror A's tweet on October 13, 2018, after trial had ended, was not evidence of bias, as the court found, "A juror's willingness to sit on a jury . . . and relief when it is finished, is surely not indicative of any bias against the defendant." J.A. 287. Accordingly, the court denied Loughry's actual bias claim. *Id.*

The court next dealt with Loughry's complaint about Juror A's social media activity during trial. Regarding Loughry's assertion that the court admonished the jurors "not to make use of social media during the course of the trial," the court found, "The defendant, who fails to support that assertion with any citation of the record, is incorrect." J.A. 289. The court added, "Indeed, the jurors were not told that they could make no use of their cell phones, landline telephones, iPhones, or the tools of

social media." J.A. 290. The court then listed several instances during the trial when the court instructed the jurors to avoid social media (and all other media) reports about "the case" or "it," as the court sometimes referred to the case. J.A. 290-94. The court's final finding about the instructions: "[T]he court's instructions . . . were limited to avoiding social media contacts concerning this case." J.A. 294 (emphasis in original).

The court also made a critical finding about whether Juror A had any improper contacts with third parties: "The defendant has not shown that any such unauthorized contact was made." J.A. 294. The court also found that Loughry failed even to show that there were any tweets about the trial, in the midst of finding that Loughry failed to show that Juror A saw any tweet about it: "Furthermore, the defendant has not shown that accidental glimpses of a tweet regarding the defendant's trial, if any should ever be shown to exist, would reasonably call into question the integrity of the verdict." *Id.*

Lastly, the court dealt with Loughry's request for a hearing. In explaining why it ruled without holding a hearing, the court stated, "It is apparent to the court that the record is sufficient and that no hearing is warranted." J.A. 295. The court carefully examined numerous cases, J.A. 295-300, and made these findings:

- "[H]ere, there are mere thin allegations that Juror A came into the case with allegedly prejudicial pretrial knowledge." J.A. 300.

- Loughry "speculates that Juror A may have lied on voir dire because Juror A could have remembered facts from an article retweeted months prior, and that Juror A may have seen information related to the case when accessing Twitter during the trial." *Id.* (emphasis in original).

- Loughry failed to make a threshold showing: "Without even a threshold showing of juror misconduct. . . ." *Id.*

The court decided that "those facts" did not demonstrate that the defendant's Sixth Amendment right was violated. J.A. 300. Accordingly, and because there was not even a "threshold showing" of misconduct, the court "decline[d] to expend its resources to allow the defendant to pry into a juror's pretrial conduct and fish for evidence of bias." J.A. 301.

F. Sentencing, Judgment, and Appeal.

The court sentenced Loughry in February 2019. J.A. 307. The court imposed a sentence of 24 months' imprisonment, a three-year term of supervised release, a $10,000 fine, $1,000 in special assessments ($100 for each count of conviction), and $1,273.53 in restitution. JA. 309-10, 313. The court entered judgment on February 25, 2019, J.A. 307, and Loughry filed a notice of appeal the next day. J.A. 315.

In his appeal, Loughry does not press the substantive Sixth Amendment argument raised in his new trial motion. Rather, he now makes only a procedural argument, challenging the district court's decision not to hold an evidentiary hearing on his request for a new trial.

SUMMARY OF ARGUMENT

Loughry's entire appeal stems from a single sentence he included at the very end of his reply memorandum: "If the Court determines that the record is insufficient, the Defendant further respectfully requests that an evidentiary hearing be held to further develop the record concerning the issues raised by this motion." J.A. 975. His request was literally an afterthought. Not only did he not claim entitlement to a hearing, he offered no legal analysis about the standard the district court should apply in determining whether the record was sufficient. And he did not proffer, and has not proffered in this appeal, any additional evidence he might present or develop at a hearing.

Loughry now claims the district court erred by applying an overly strict standard in evaluating the sufficiency of the record and deciding not to hold a hearing to consider his juror bias claim under *McDonough Power Equip., Inc. v. Greenwood*, 464

U.S. 548 (1984). Because he made no argument about the legal standard the court should apply, this Court reviews his asserted error for plain error.

Loughry cannot demonstrate the court plainly erred or that it erred at all. The court made correct factual findings about Juror A's honesty and lack of deceit. The court also properly ruled against Loughry on the second prong of the test established by *McDonough*, which requires a showing that had a juror correctly answered a *voir dire* question, that answer would have provided a valid basis for an excusal for cause. The court also did not err in finding that Juror A's answers were not similar to jurors' answers in cases where hearings should have occurred.

Moreover, Juror A alerted Loughry that Juror A had knowledge of the impeachment proceedings. For trial strategy reasons Loughry chose not to question Juror A and some other prospective jurors who had heard about the impeachment proceedings. Having exercised that choice, he should not receive a second chance to pose questions he chose not to ask in *voir dire*. Most significantly, Juror A voted to acquit Loughry on ten counts, despite abundant evidence of his guilt and that he had lied in his trial testimony. This Court should not exercise its discretion to notice any asserted error; the fairness, integrity, and public reputation of judicial proceedings have not been seriously affected.

This last factor, Juror A's voting to acquit Loughry on ten counts, also is overwhelming evidence that Juror A was not actually biased against Loughry. The jury, including Juror A, considered the evidence at trial fairly and impartially.

This Court should also apply plain error review to Loughry's argument about social media activity during trial. He did not argue below that he was entitled to a hearing on the issue. He treated Juror A's social media activity as propensity evidence, relevant to his *McDonough* and actual bias claims. Finally, his argument about Juror A's social media activity was wholly unsupported by competent evidence.

ARGUMENT

I. The district court did not plainly err by applying an incorrect standard to its decision not to hold an evidentiary hearing on Loughry's claims under *McDonough* and that Juror A was actually biased.

A. Standard of Review.

In the proceedings below, Loughry never argued that an evidentiary hearing was necessary or even appropriate. Rather, he merely stated, "*If the Court determines that the record is insufficient*, the Defendant further respectfully requests that an evidentiary hearing be held. . . ." J.A. 975 (emphasis supplied). He did not advocate for a particular legal standard to determine whether a hearing should be held, did not explain what facts would support an evidentiary hearing, and did not offer anything he hoped to

develop in a hearing. Accordingly, any error that Loughry now alleges is an asserted error not brought to the district court's attention, and is reviewable only as plain error. Fed. R. Crim. P. 52(b). *United States v. Furlow*, ___ F.3d ___, 2019 WL 2621773, at *3 & n.4, *9 (4th Cir. June 27, 2019) (applying plain error review to defendant's argument against using prior arson conviction as predicate for sentencing enhancements; his challenge below to using the arson conviction was on a different ground).

To obtain relief for plain error, a defendant must establish (1) that an error occurred, (2) the error was plain, and (3) that it affected his substantial rights. *United States v. Hastings*, 134 F.3d 235, 239 (4th Cir. 1998) (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). Even then, this Court exercises discretion to correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Hastings*, 134 F.3d at 239.

B. Analysis.

1. *The district court did not plainly err; Loughry admits this Court has not settled on a standard for determining whether the record is sufficient on a McDonough or actual bias claim, and an unsettled proposition does not amount to "plain" error.*

Loughry admits "this Court has never set forth the standard for determining when a defendant is entitled to a hearing for the purpose of proving a *McDonough*

claim." Appellant's Brief at 38. But for an error to be "plain," the law must be settled at the time of appellate review. *Johnson v. United States*, 520 U.S. 461, 468 (1997). It is not, as Loughry acknowledges in his brief. Therefore, even had the district court applied an erroneous standard based on language in *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989), that error is not "plain" error.

2. *The district court did not err. It did not apply an incorrect standard based on a Second Circuit case; rather it based its ruling on factual findings and a long-settled principle of law about the second part of the test established in McDonough.*

Putting aside that Loughry cannot show "plain" error, he fails to show any error at all. First, Loughry is wrong to claim the district court applied an incorrect standard based on language in *Ianniello,* 866 F.2d at 543. While the court cited that case, its analysis shows it actually found that Loughry had not made even a plausible showing of juror misconduct—the standard Loughry now argues for. Appellant's Brief at 39.

Loughry's claim first requires an analysis of the test established in *McDonough v. Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). A defendant has the right under the Sixth Amendment to a trial by impartial jurors. *Conaway v. Polk,* 453 F.3d 567, 582 (4th Cir. 2006). That right allows him to establish juror bias by showing that a juror "failed to answer honestly a material question on *voir dire* and then further

show[ing] that a correct response [to that question] would have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 556 (the "*McDonough*" test).[10]

A trial entails significant investment of societal resources, and finality is an important end. *Id.* at 555. Accordingly, it is not enough for a defendant to argue that a correct answer would have prompted him to exercise a peremptory challenge, *id.*, or to ask additional questions of a potential juror. The correct answer itself must form the basis for an excusal for cause, as demonstrated by this Court in *United States v. Fulks*, 454 F.3d 410, at 431-33 (4th Cir. 2006). In that capital murder case, this Court affirmed the district court's ruling that had a juror fully answered a question during *voir dire*, and thus disclosed that her husband had been murdered, that would not have been enough to exclude the juror for cause. *Id.* at 433.[11]

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[10] *McDonough* was a civil case, but its test for evaluating a claim of juror dishonesty during *voir dire* also applies to criminal cases. *See United States v. Fulks*, 454 F.3d 410, 432 (4th Cir. 2006) (applying *McDonough* test to federal criminal case on direct appeal).

[11] The district court's explanation in *Fulks* further illustrates the point: "Had Ms. Allison answered Question 42 honestly, the court would not have automatically excused her for cause, but rather, the court would have asked follow up questions and made a decision based on the totality of the circumstances. *Because the fact of her husband's murder, standing alone, would not have formed the basis for disqualification*, the second prong of the test has not been satisfied and the defendant is not entitled to a new trial based on *McDonough*." *United States v. Fulks*, Crim. No. 402-992-17, 2004 WL 5042206, at *5 (D.S.C. Dec. 23, 2004) (emphasis supplied), *aff'd*, 454 F.3d 410 (4th Cir. 2006).

Furthermore, to satisfy the second part of the *McDonough* test—that a correct answer would have provided a valid basis for a challenge for cause—a defendant must prove actual or implied bias on the part of the juror. As this Court explained in *Jones v. Cooper*, 311 F.3d 306 (4th Cir. 2002), "'The category of challenges for cause is limited,' and traditionally, a challenge for cause is granted only in the case of actual bias or implied bias (although a third category, inferred bias, might also be available)." *Id.* at 312 (citation omitted).[12]

Mere knowledge of a case before trial is insufficient to support a finding of actual bias by a juror. "It is not required . . . that the jurors be totally ignorant of the facts and issues involved." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Even a preconceived notion about a defendant's guilt or innocence is not sufficient to rebut the presumption of a juror's impartiality. *Id.* "It is sufficient if the juror can lay aside

[12] Actual bias means bias in fact, *Porter v. Zook*, 803 F.3d 694, 698 (4th Cir. 2015), and implied bias refers to a bias "conclusively presumed as [a] matter of law." *United States v. Wood*, 299 U.S. 123, 133 (1936). Inferred bias "is closely linked to both" actual and implied bias. *United States v. Torres*, 128 F.3d 38, 47 (2d Cir. 1997) ("[T]he court is allowed to dismiss a juror on the ground of inferable bias only after having received responses from the juror that permit an inference that the juror in question would not be able to decide the matter objectively. In other words, the judge's determination must be grounded in facts developed at voir dire.").

his impression or opinion and render a verdict based on the evidence presented in court." *Id.*

A district court may exercise its discretion not to hold a hearing about a *McDonough* claim. As this Court noted in *Billings v. Polk*, 441 F.3d 238, 245 (4th Cir. 2006), a district court is not "obliged to hold an evidentiary hearing any time that a defendant alleges juror bias," particularly when the defendant does not take advantage of pre-trial procedures to ensure juror impartiality. "Otherwise, defendants would be able to sandbag the courts by accepting jurors onto the panel without exploring on *voir dire* their possible sources of bias and then, if their gambit failed and they were convicted, challenging their convictions by means of post-trial evidentiary hearings based on newly discovered evidence of juror bias." *Billings*, 441 F.3d at 246. A defendant must produce more than "thin allegations of jury misconduct" to get a post-trial hearing about misconduct during *voir dire*. *United States v. Brooks*, 569 F.3d 1284, 1288 (10th Cir. 2009) (citing *United States v. Easter*, 981 F.2d 1549, 1553 (10th Cir. 1992)).

In this appeal, Loughry argues that the district court applied an overly strict standard, "requiring Loughry to present 'clear, strong, substantial and incontrovertible evidence,' of a *McDonough* violation. Appellant's Brief at 41 (citing

Ianniello, 866 F.2d at 543). But, by focusing solely on the quote from *Ianniello* in the court's opinion, Loughry misses the forest for a tree. The court's ruling rested on numerous factual findings and a legal determination about the second prong of the *McDonough* test, not the *Ianniello* language.

First, the factual findings. The court found Juror A was unquestionably truthful in answering Questions 2, 3, 4, and 5 during *voir dire*, J.A. 281. Also, Juror A's answers to those questions did not suggest an unwillingness to be forthcoming, J.A. 282, and the answers were not inherently misleading or disingenuously technical. *Id.* In addition, "Juror A indicated a willingness to be forthcoming by alerting the court and the parties of Juror A's knowledge of the impeachment proceedings." *Id.* Similarly, the court found, as a fact, "no dishonesty" in Juror A's answers to Questions 7 and 8. J.A. 282.

All of those findings are *factual findings*. In *Connor v. Polk*, 407 F.3d 198, 208 (4th Cir. 2005), which involved the retrial of a murder case, this Court held that a similar finding by a state court—how a juror interpreted a *voir dire* question—was a factual finding. *Id.* at 208. The *voir dire* question was whether the jurors in the retrial had talked to persons with "firsthand knowledge" of the facts about the case. *Id.* at 205. The juror was a journalist who, in reporting on the first trial, had interviewed

police and investigators who had talked to witnesses, but the juror had not talked to the witnesses. The state court found that the juror believed the question did not apply to her, because she had not talked to people who had observed the defendant at the crime scene or who had discovered the murder victims. *Id.* at 205-06. This Court held the state court's finding was a factual finding, and there was no error in the denial of an evidentiary hearing. *Id.* at 208.

This Court reviews factual findings for clear error, *United States v. Green*, 436 F.3d 449, 456 (4th Cir. 2006), and Loughry points to nothing in the record indicating the court clearly erred in its factual findings.

As to the remaining two questions raised by Loughry, Questions 1 and 6, the court did not make any finding on the first prong of the *McDonough* test—whether Juror A answered the questions dishonestly. *See* J.A. 283. Instead, the court analyzed the second prong of the *McDonough* test—whether a correct answer would have been sufficient to excuse Juror A for cause. Even assuming Juror A should have answered that Juror A had some knowledge of the "facts of this case"—because of the slight overlap of the facts underlying the federal criminal indictment and the facts in the JIC complaint and impeachment articles, J.A. 283—such knowledge would have been insufficient to sustain a challenge for cause. J.A. 283-84.

That determination reflected the long-settled legal principle that "mere knowledge of a case is insufficient to support a finding of actual prejudice." *United States v. Higgs*, 353 F.3d 281, 309 (4th Cir. 2003) (affirming denial of venue change in a death penalty case, and *citing Irvin*, 366 U.S. at 722-23). Accordingly, a "correct" answer in Loughry's view—"yes, I have heard something about the facts of this case"—would not have been sufficient, by itself, to excuse Juror A for cause. Loughry simply could not establish his *McDonough* claim.[13]

Thus, while Loughry argues the court should have merely required Loughry to make a "plausible, colorable, or nonfrivolous claim of juror misconduct," Appellant's Brief at 39, the court essentially applied that standard and concluded Loughry did not

[13] In addition, Question 1 asked whether any prospective juror had "*personal knowledge* of the facts of this case." J.A. 674. A reasonable person would interpret "personal knowledge" to mean "first-hand" knowledge, especially in light of how the court explained "personal knowledge" later in voir dire: "Based on your personal knowledge, excluding what you've read, either online or in print or read or heard through the media, leaving that part out, do you have any information about the facts of this case." J.A. 694. There is no evidence Juror A had first-hand knowledge of the facts of this case or of the civil proceedings involving Loughry.

Moreover, Question 6 came soon after the question about knowledge of the impeachment proceedings, which Juror A answered affirmatively. *See* J.A. 684 (impeachment proceedings question) and J.A. 693 (Question 6). Having recently answered about the impeachment proceedings, it was entirely reasonable for Juror A to distinguish the term "facts of this case" in Question 6 from the impeachment proceedings.

meet it. After making its factual findings and ruling on the second *McDonough* prong, the court compared Juror A's responses to the jurors' responses in *Porter v. Zook*, 898 F.3d 408, 431 (4th Cir. 2018), and *Williams v. Taylor*, 529 U.S. 420 (2000). J.A. 300. The court found Loughry's claim of misconduct woefully inadequate in comparison. J.A. 300.

Unlike *Porter* and *Williams*,[14] Loughry's claims consisted of "mere thin allegations that Juror A came into this case with allegedly prejudicial pretrial knowledge." J.A. 300. He had not made "even a threshold showing of juror misconduct." *Id.* Accordingly, the court properly exercised its discretion to deny Loughry's last minute, conditional request for a hearing "to allow the defendant to pry into a juror's pretrial conduct and fish for evidence of bias." J.A. 301. *See, e.g.*, *United States v. French*, 904 F.3d 111, 117 (1st Cir. 2018) (trial courts should not accommodate fishing expeditions; when defendants come forward with colorable or plausible claims, trial court has discretion in deciding how to investigate, and depending on the circumstances, a formal hearing is not required), *cert. denied*, 139 S. Ct. 949 (2019).

[14] The court noted that *Porter* involved a juror's failure to disclose his brother, like the victim, was a police officer, while in *Williams*, a juror failed to disclose her ex-husband was a witness and the prosecutor had previously represented her. J.A. 300.

Furthermore, Loughry asked for a hearing only *if the court* determined the record was insufficient. J.A. 975 (emphasis added). His phrasing signified that he believed he had given the court everything he needed to prevail. And in light of his failure even to proffer what else he might present or develop at a hearing, Loughry's conditional request—not a claim that the law required the court to hold a hearing—further demonstrates the court did not err at all in denying his *McDonough* claim without first holding a hearing.

In sum, the court did not decide Loughry's *McDonough* claim based on an erroneous standard. The court ruled on facts in the record and well-established law. Nothing in the record suggests the court clearly erred in its factual findings, and the court did not err in deciding that Loughry could not satisfy the second part of the *McDonough* test. No hearing was necessary.

3. *The district court also did not err in not holding a hearing on Loughry's actual bias claim; Loughry did not tell the court what more he might offer at a hearing, and he would have been barred by Rule 606(b) of the Federal Rules of Evidence from offering Juror A's own testimony to impeach the verdicts.*

A defendant may raise a Sixth Amendment claim about juror bias independently of the *McDonough* test, by demonstrating a juror's actual bias. *Jones v. Cooper*, 311 F.3d at 310. Actual bias means bias in fact. *Porter v. Zook*, 803 F.3d at 698.

Here, even if Juror A had some knowledge of the "facts of this case" and a preconceived notion about Loughry's guilt in his federal criminal case, because of a belief he should resign as a justice of the Supreme Court, that notion would not have been enough to excuse Juror A for cause. *See, e.g.*, *Calley v Callaway*, 519 F.2d 184, 205 (5th Cir. 1975) ("(N)o court has held that the only impartial juror is an uninformed one. We cannot expect jurors to live in isolation from the events and news of concern to the community in which they live."). As this Court noted in *United States v. Powell*, 850 F.3d 145, 149 (4th Cir. 2017), "in the context of pretrial publicity, 'the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is [not] sufficient to rebut the presumption of a prospective juror's impartiality.' Reduced to its essentials, the inquiry is whether 'the juror can lay aside [her] impression or opinion and render a verdict based on the evidence presented in court.'" *Powell*, 850 F.3d at 149 (brackets in original, citations omitted).

The district court found that Juror A did just that. "[T]here is no evidence that Juror A was not capable and willing to set [any preconceived notion] aside and decide the case solely on the evidence presented." J.A. 286. Powerful evidence supported that finding, as the court noted: "[A]fter a thorough deliberation, the jury found the evidence to be insufficient in several instances, and therefore ruled in defendant's

favor on those counts." J.A. 286-87. *See, e.g., United States v. Smith*, 424 F.3d 992 (9th Cir. 2005) (no evidence of bias where juror voted to acquit one defendant completely, another defendant on 88 out of 111 counts, and defendant Smith on three counts); *United States v. Cuthel*, 903 F.2d 1381, 1383 (11th Cir. 1990) (jury's split verdicts, convicting defendants on some counts while acquitting on others, supported district court's factual finding that jury reached its conclusions free of undue influence). Indeed, Juror A ruled in Loughry's favor on numerous counts, despite ample evidence that he lied during his trial testimony. *See* J.A. 243 (court's finding there was abundant evidence contradicting Loughry's trial testimony that he never used a state vehicle for personal use; jurors could reasonably believe his testimony was false). Thus, the jury's unanimous verdicts *acquitting* Loughry on 10 of 22 counts demonstrates that even if there were any preconceived notions about Loughry's guilt or innocence, Juror A and the other jurors decided the case on the evidence at trial.

The district court's finding was further buttressed by its findings about Juror A's truthfulness, that answers were not misleading, and that Juror A indicated a willingness to be forthcoming. See discussion above, page 28. Those findings preceded the ultimate finding, that Loughry failed to make even a threshold showing of misconduct by Juror A. J.A. 300. None of the court's findings were clearly erroneous.

Loughry has never explained what he would have offered at any hearing beyond what he presented in his post-trial pleadings. *See* J.A. 975 (requesting hearing without explaining the evidence to be presented). Had there been a hearing, Loughry would not have been allowed to ask Juror A about alleged biases and impressions, due to the longstanding doctrine that jurors may not impeach their own verdicts. That doctrine, now codified in Rule 606(b) of the Federal Rules of Evidence, states that "[d]uring an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters." Fed. R. Evid. 606(b).

The rule serves important ends. As this Court explained in *United States v. Birchette*, 908 F.3d 50 (4th Cir. 2018), "Jury service needs to come to a timely conclusion. . . . The judicial system . . . possesses an interest in protecting the confidentiality of juror discussions and in allowing jurors to resume their normal routines." *Id.* at 55. Their willingness to serve depends on that protection. *Id.*

The rule allows for two exceptions. A juror may testify about whether "extraneous prejudicial information was improperly brought to the jury's attention" or whether "an outside influence was improperly brought to bear upon any juror." Fed. R. Evid. 606(b). Neither exception applies here. Courts have consistently held that a juror's biases and mental impressions are "internal" influences, and are covered by the prohibition against juror testimony in Rule 606(b). In *Warger v. Shauers*, 574 U.S. 40, ___, 135 S. Ct. 521, 529 (2014), the Supreme Court explained that "internal" matters include "the general body of experiences that jurors are understood to bring with them to the jury room." *See also Tanner v. United States*, 483 U.S. 107, 118 (1987) (noting courts treat allegations of physical or mental incompetence of a juror as "internal" matters); *Birchette*, 908 F.3d at 56 (no exception in Rule 606(b) where juror "neglected to disclose bias during *voir dire*," *citing Warger*, 135 S. Ct. at 529). Rule 606(b) thus would have barred any testimony by Juror A about alleged biases against Loughry.[15]

[15] Although the court below did not discuss Rule 606(b), this Court may consider it as a basis for affirming the district court. *See Keller v. Prince George's County*, 923 F.2d 30, 32 (4th Cir. 1991) ("[T]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.") (citation omitted).

Inasmuch as Loughry offered nothing new to present on actual bias at an evidentiary hearing, he has not established any clear error by the district court in its finding. Further, since he would not have been able to question Juror A about perceived biases, the court properly decided not to hold a hearing on his actual bias claim.

4. This Court should not exercise its discretion to correct a perceived error, because the fairness, integrity, and public reputation of judicial proceedings have not been seriously affected.

This Court should not exercise its discretion to correct any perceived error, for several reasons. First, the jury voted *to acquit* Loughry ten times. See discussion above on pages 33-34; J.A. 286-87. The jury acquitted Loughry on eight counts of wire fraud involving use of a state vehicle for personal use. J.A. 270, J.A. 43-44. They did so notwithstanding there was "more than ample evidence" of guilt on seven similar wire fraud counts, J.A. 241, and "abundant evidence" that he lied in his trial testimony about his use of a state vehicle, J.A. 243. There can be little doubt, therefore, that the jurors carefully deliberated and "found the evidence to be insufficient in several instances." J.A. 286. Thus, the jury, including Juror A, fairly and impartially judged Loughry on the eleven counts on which they found him guilty.

Second, the court allowed extensive *voir dire* examination—nothing limited Loughry—during which Loughry himself distinguished between "this case" and the impeachment proceedings. *See, e.g.*, J.A. 718 (Loughry asked to question people who had "indicated their awareness of the *impeachment* proceedings, as well as *the criminal* proceeding"); J.A. 727-28 ("Could you tell us . . . in just a little bit more detail to the depth and scope of your knowledge about either the *impeachment proceedings* or *other criminal proceedings* involving the West Virginia Supreme Court?").[16] For trial strategy reasons, he chose not to bring up the JIC complaint. For trial strategy reasons, he chose not to call for further questioning of Juror A and other prospective jurors who alerted Loughry to their knowledge of the impeachment proceedings. He should not get a second bite of the apple because he now regrets those trial strategy decisions.

Finally, given the conditional nature of Loughry's request for a hearing, his argument in this appeal—that the court applied an incorrect legal standard—is akin to invited error. He as much as told the court he thought the record was sufficient to rule in his favor. He offered no legal standard for evaluating whether the record was

[16] Loughry's decision to differentiate "this case" from the impeachment proceedings was entirely reasonable. His attempt in this appeal to characterize the court's and Juror A's similar treatment of the two different proceedings as "hypertechnical" parsing, *see* Appellant's Brief at 17, 20, 44, 46, 48, 49, is not reasonable.

sufficient. Yet now he says the court erred by not allowing him to add to the record at a hearing. A defendant "cannot complain of error which he himself has invited." *United States v. Lespier*, 725 F.3d 437, 450-451 (4th Cir. 2013). If Loughry is caught in a predicament, it is one of his own making. He is not stuck in a "Catch-22" created by the district court.

Given these factors, the fairness, integrity, and public reputation of judicial proceedings have not been "seriously affect[ed]." *Olano*, 507 U.S. at 732. This Court should not exercise its discretion to return the case to the district court for a hearing.

II. The district court did not abuse its discretion in deciding not to hold an evidentiary hearing on Loughry's motion for a new trial based on alleged juror misconduct.

A. Standard of Review.

Ordinarily, this Court reviews a district court's decision not to hold an evidentiary hearing about alleged juror misconduct for abuse of discretion. *United States v. Gravely*, 840 F.2d 1156, 1159 (4th Cir. 1988). Here, however, Loughry never claimed a hearing was required on his assertion that Juror A improperly engaged in social media activity during trial; indeed he never argued Juror A's alleged mid-trial misconduct justified a new trial. Accordingly, his claim now that the district court should have held an evidentiary hearing is reviewed for plain error. *Furlow*, 2019 WL

2621773, at *9 (plain error review applies on appeal to argument not presented to district court).

B. The district court did not plainly err by not holding a hearing to consider Loughry's contention that Juror A had engaged in mid-trial misconduct, because Loughry offered only speculation that Juror A had read or even seen any tweet by a reporter about the trial.

In addition to guaranteeing to a criminal defendant the right to a trial by a panel of impartial, "indifferent" jurors, *Irvin*, 366 U.S. at 722, the Sixth Amendment "requires that the jury's verdict . . . be based upon the evidence developed at the trial." *Hurst v. Joyner*, 757 F.3d 389, 394 (4th Cir. 2014) (internal quotations and citations omitted). External influences arising from communications between a juror and an outside party are constitutionally suspect. *See, e.g., Barnes v. Joyner*, 751 F.3d 229, 240 (4th Cir. 2014).

A defendant attacking the verdict based on extrajudicial contacts with a juror during trial has the initial burden of introducing "competent evidence that there was an extrajudicial communication or contact, and that it was more than [an] innocuous intervention[ ]." *Hurst*, 757 F.3d at 395-96 n.3 (internal quotations and citations omitted). If the defendant meets this burden, a presumption of prejudice arises, following *Remmer v. United States*, 347 U.S. 227 (1954). The burden shifts to the

government to demonstrate "there exists no reasonable possibility that the jury's verdict was influenced by [the] improper communication." *Hurst*, 757 F.3d at 396 n.3 (citation omitted).

A defendant is not entitled to a hearing simply to allow him to fish for "competent evidence that there was an external communication or contact." *Id.* Rather, a defendant must present "a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury." *Barnes*, 751 F.3d at 242. That is, a defendant must at least make a "threshold showing of improper outside influence." *Gravely*, 840 F.2d at 1159.

A "credible allegation" or a "threshold showing" means something more than mere speculation. As explained by the Eleventh Circuit: "The duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality. In other words, there must be something more than mere speculation." *United States v. Barshov*, 733 F.2d 842, 851 (11th Cir. 1984) (citation omitted). A panel of this Court adopted the *Barshov* court's explanation in *United States v. Forde*, 407 Fed. App'x 740, 747 (4th Cir. 2011) (quoting *Barshov*).

Barshov and *Forde* are instructive. In *Barshov*, the defendants submitted affidavits asserting that a female juror's son had attended the trial every day, overheard discussions about the case, talked to the prosecutor and defense counsel about the case, went to lunch with his mother and other jurors, voiced an opinion about the case, and told defense counsel that his mother had difficulty hearing some of the testimony and counsel's questions. *Barshov*, 733 F.2d at 851. Nonetheless, the district court did not hold a hearing, stating that "[t]he fact that jurors were seen in conversation with a spectator over lunch does not give rise to the presumption that they were discussing the case." *Id.* at 852. The court added that jurors are presumed to follow the court's instructions not to discuss the case with anyone, and the defendants offered nothing indicating "improper conveyance of information to the jury." *Id.* (citation omitted). The Eleventh Circuit affirmed, finding no abuse of discretion. *Id.*

Similarly, in *Forde*, the defendant sought an evidentiary hearing due to alleged improper external contact or communication with a juror during trial. The defendant claimed that a friend of the husband of the jury foreperson had posted on Twitter an explanation of the difference between "assume" and "presume." *Forde*, 407 Fed. App'x at 747. The defendant argued that the jury foreperson could have seen the tweet,

because she could have talked to her husband about the case, who could have talked to his friend about the case. Based on this string of possibilities, the defendant asked for a hearing. The district court declined to conduct a hearing and a panel of this Court affirmed, stating the defendant's offering was "nothing but speculation and thus falls far short of establishing reasonable grounds for investigation." *Id.*

Other circuits agree—a defendant must produce competent evidence, not mere speculation, to get a hearing about improper external communications with a juror. For example, in *United States v. Wintermute*, 443 F.3d 993 (8th Cir. 2006), the defendant submitted jurors' affidavits about a comment by another juror expressing concern over investors, in a case involving bank fraud charges and a false statement to regulators. *Id.* at 1001-02. The Eighth Circuit decided that the defendant's claim the juror who made the comment "*probably* accessed the Internet to discover these facts," bolstered by defense counsel's own research of the Internet, did not require an evidentiary hearing. *Id.* at 1003 (emphasis in original). "Speculation and unsubstantiated allegations do not present a colorable claim of outside influence of a juror." *Id.*; *see also United States v. Robertson*, 473 F.3d 1289, 1294-95 (10th Cir. 2007) (no hearing required after juror talked with deputy clerk outside courthouse, even though deputy clerk had previously made disparaging remarks about defendant;

defendant offered nothing more than innuendo to suggest that the conversation was about the matter pending before the jury); *United States v. Frost*, 125 F.3d 346, 376-77 (6th Cir. 1997) (no hearing required after juror became ill and left jury room to lie down in clerk's office, where defendant offered no evidence juror had external contact during this time).

Similarly, a hearing is not required where the defendant offers no evidence that a juror saw an offending statement. *See, e.g., King v. Bowersox*, 291 F.3d 539, 540-41 (8th Cir. 2002) (in a murder case, where the family of the victim placed a large photo of the victim and a stack of "In Memory" leaflets in the hallway across from the entrance to the jury room, no hearing was required because of the absence of any showing that the jury saw or was even aware of the display); *Tunstall v. Hopkins*, 306 F.3d 601, 608 (8th Cir. 2002) (defense counsel did not provide ineffective assistance in not asking for a hearing about improper juror contact after a juror was seen reading a newspaper in the jury lounge; there was no evidence that the juror with the newspaper was a juror in Tunstall's trial, that the newspaper was the same newspaper that contained an article about the trial, or that any juror read the article).

In this case, Loughry presented minimal factual assertions to the district court and used them as a springboard for speculation. His factual assertions were:

1) Juror A has a Twitter account, J.A. 793, as do reporters Bass and McElhinny. J.A. 795. Juror A follows Bass and McElhinny on Twitter, and they reported on the "investigation of the Defendant." J.A. 795.

2) Juror A accessed Twitter twice during trial, on October 3 and October 6, 2018. J.A. 834. Juror A also accessed Instagram on October 7, 2018, and Facebook on October 8, 2018. J.A. 834.

Based on these assertions, Loughry concluded that Juror A would have seen "near constant" tweets by reporters McElhinny and Bass concerning the trial. J.A. 834. However, although he has access to Juror A's Twitter activity, Loughry did not provide any examples from Juror A's Twitter account indicating Juror A saw any of the reporters' tweets. Even more significantly, he did not provide an example of *any* tweet by either reporter, much less a tweet about the trial. *See* J.A. 834-35 (Loughry's supplemental memorandum), J.A. 294 (district court, in discussing tweets regarding the defendant's trial, noting "if any should ever be shown to exist"). Consequently, the court found, as *facts*, that Loughry "speculates . . . that Juror A may have seen information related to the case when accessing Twitter during the trial," J.A. 300 (emphasis in original), and that "[t]he defendant has not shown that any such unauthorized contact was made." J.A. 294.

Now, in this appeal, Loughry includes in his brief two tweets by reporters during trial—one by Bass, Appellant's Brief at 5, 29, and one by McElhinny, *id.* at 34—neither

of which he gave to the district court (and neither of which occurred on a date that Loughry stated Juror A was on Twitter). Loughry invites this Court to take judicial notice of the tweets, *see* Appellant's Brief at 30 n.16, and a host of other tweets available via the links he provided in other footnotes. Appellant's Brief at 4 n.6 & 5 n.7. But his asking *this* Court to take judicial notice of evidence simply highlights his failure to present that same evidence to the *district court*. This Court should not consider evidence presented initially on appeal. *See United States v. Ramos-Cruz*, 667 F.3d 487, 500 (4th Cir. 2012) ("To the extent Ramos-Cruz attempts to introduce new evidence before us, we will not consider it for the first time on appeal."). Thus, this Court should not fault the district court based on evidence not given to the district court.

Because Loughry marshals only speculation, he is forced to argue "merely *potential* juror contact with social media during trial triggers the *Remmer* presumption." Appellant's Brief at 25 (emphasis in original). This is not the law. And the cases he discusses do not support this broad notion. In *United States v. Harris*, 881 F.3d 945 (6th Cir. 2018), the defendant received a notification from LinkedIn that a person who turned out to be a juror's live-in girlfriend had viewed the defendant's profile on LinkedIn during or about the time of trial. The defendant's LinkedIn profile appeared

on the first page of a Google search, which also contained prejudicial information about the defendant. *Id.* at 952. Thus, there was credible evidence that someone who was very close to a juror openly and actively searched for information about the defendant by looking at his profile. In contrast, Loughry's case did not involve evidence that Juror A, or anyone close to Juror A, actively searched for information about Loughry, and no evidence indicating any overt contact by Juror A with external information.

In *Ewing v. Horton*, 914 F.3d 1027 (6th Cir. 2019), the defendant, who had been convicted of murder, submitted an affidavit from a juror that stated two other jurors had conducted internet research during the trial. The affidavit added that the jury learned of and discussed outside information about the defendant, the murder victim, the activities and internal power-dynamics of gangs, and the defendant's position at the top of the gang. *Id.* at 1029-30. Again, Loughry's case has nothing remotely similar to the evidence in *Ewing*—credible evidence, from another juror, of affirmative internet searches about the defendant and the crime.

In *United States v. Lawson*, 677 F.3d 629, 640-41 (4th Cir. 2012), a juror informed the court that another juror had consulted the internet during trial, by searching Wikipedia for the meaning of an element of the crime. *Id.* at 639. He had

even printed the definition, shared it with the jury foreperson and tried to show the printout to other jurors. *Id.* at 639-40. The district court held a hearing based on that information. Unlike Loughry's case, *Lawson* involves a credible allegation, supplied by a juror, of another juror's searching the internet for outside information pertinent to the trial.

In *State v. Smith*, 418 S.W.3d 38 (Tenn. 2013), an expert witness for the government sent an email to the trial judge, informing the court about a Facebook message the witness received from a juror, after the witness testified. *Id.* at 43. The email to the trial judge was reliable and admissible evidence of an external communication by a juror. *Id.* at 48. Once again, unlike Loughry's case, there was no need to speculate about whether an external communication had occurred. A witness with first-hand knowledge of the communication told the court about it. *Id.* at 43.[17]

[17] *State v. Smith* is noteworthy for another reason. Loughry states that juror exposure to the internet presents unique challenges, Appellant's Brief at 26, and he advocates that a juror's exposure to social media should be treated differently from exposure to traditional media. *See id.* at 25-27. *State v. Smith*, however, says the opposite. The Tennessee Supreme Court held, "[O]ur pre-internet precedents provide appropriate principles and procedures to address extra-judicial communications, even when they occur on social media websites and applications such as Facebook." *Smith*, 418 S.W.3d at 47.

Hence, Loughry's cases do not undermine the requirement that a defendant produce something beyond mere speculation. They reinforce it. Each of his cases involves clear and competent evidence of a deliberate search for extraneous information by a juror or someone close to a juror, or convincing evidence of a third party contact during trial with a juror. They are not analogous at all to Loughry's case.

Loughry's inability to point to competent evidence of an improper external communication with Juror A could explain why he never even argued to the district court that Juror A's alleged misconduct *during trial* justified a new trial. In his "Request for Relief," Loughry only discussed Juror A's allegedly dishonest answers during *voir dire*. J.A. 795 (¶¶ 23-24); *see also* J.A. 840 (Supplemental Memo. ¶¶ 15-16, reciting same language). In addition, in his Reply, Loughry talked about Juror A's during-trial social media activity merely as "further evidence of [Juror A's] disregard for the Court's instructions and dishonesty in responding to questioning. The evidence supports only one conclusion—Juror [A] consciously and deliberately concealed . . . considerable knowledge of the investigations against the Defendant (and other Justices) and . . . previously adopted statements that he was guilty." J.A. 975.

Thus, Loughry treated Juror A's social media activity during trial as propensity evidence, offered to show that because Juror A supposedly disobeyed the court's

instructions, Juror A must have lied during *voir dire*. In his view, Juror A's alleged mid-trial misconduct was relevant to, and helped to demonstrate, "dishonesty in responding to questioning" *before* trial; it was not an independent basis for a new trial. In light of Loughry's own treatment of the issue, one cannot reasonably fault the district court for not holding a hearing.

Loughry's attempt to paint the court's instructions to the jury as barring *all* social media also fails. *See* Appellant's Brief at 34. He picks out bits and pieces from the instructions, *see id.*, but does not address the numerous instances where the court instructed the jury not to use social media to learn about "the case." J.A. 290-94. The court found, as a fact, that its instructions "were limited to avoiding social media contacts concerning this case." J.A. 294 (emphasis in original). The only other evidence Loughry offers about the instructions is a tweet by reporter McElhinny. Appellant's Brief at 34 (the tweet: "A lot of jury instructions about avoiding media or social media — like this"). But that tweet was about "this case," so of course the court's instructions applied to it. McElhinny's tweet can hardly serve as evidence that the court's instructions barred *all* social media. (And the tweet was not in the record below, appearing only now, in Loughry's brief.) In short, Loughry fails to show that the court's factual finding about its own instructions was clearly erroneous.

In the end, Loughry presented no "competent evidence" that Juror A ever saw a tweet about the trial, during trial. *Hurst*, 757 F.3d at 395-96 n.3. Speculation that Juror A might have seen something is not enough, following *Barshov, Forde*, and the other cases cited above on pages 43-44. To mandate a hearing in Loughry's case would require abandoning the longstanding principle that jurors are presumed to follow their instructions. *See, e.g., Robertson*, 473 F.3d at 1295 (in denying hearing on alleged external communications by juror during trial, "We presume jurors will remain true to their oath and conscientiously follow the trial court's instructions") (quotation and citation omitted). And it would create powerful disincentives for people to perform a civic duty and serve as jurors, lest they be hauled into court after trial to respond to unsupported allegations that they *might have* seen or read something about the trial, in violation of their oaths and the court's instructions.

The district court simply did not err by not holding a hearing to consider Loughry's unsubstantiated assertions that Juror A improperly viewed posts on Twitter during trial.

Finally, as discussed above on pages 33-34 and 37, the jury acquitted Loughry on 10 of 22 counts, demonstrating that Juror A decided the case on the evidence, and not on a speculative external influence. These factors further demonstrate that this

Court should not exercise its discretion to notice any asserted error. The fairness, integrity, and public reputation of judicial proceedings have not been "seriously affect[ed]." *Olano*, 507 U.S. at 732.

CONCLUSION

This Court should reject Loughry's beguiling request for what he deems "modest relief." Appellant's Brief at 6. His request is not modest at all. The judicial system values the importance of finality and protecting jurors from potentially adversarial post-trial hearings about their conduct or biases. *See Birchette*, 908 F.3d at 56. A defendant seeking a post-trial hearing into juror misconduct must first make a credible allegation based on competent evidence.

Loughry did not make a credible allegation of juror misconduct or actual bias by Juror A. He made no threshold showing of improper external communications or contacts with Juror A during trial. He decided not to question Juror A during *voir dire* even though he knew Juror A possessed some knowledge of the impeachment proceedings. He did not argue for a hearing; he merely asked the court to evaluate the record and determine if it was insufficient. In light of all these factors, the district court properly decided not to haul in a juror after the jury's service ended and expend court resources on a hearing.

The court committed no error, much less plain error. Loughry received a fair trial by impartial jurors who did their duty. This Court should deny Loughry's request for an evidentiary hearing and affirm the judgment.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 12,441 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments).

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Date: June 28, 2019

CERTIFICATE OF SERVICE

I certify that on June 28, 2019, I electronically filed the foregoing "Brief of Appellee the United States of America" 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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