No. 19-4137

In The United States Court Of Appeals For The Fourth Circuit

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

ALLEN H. LOUGHRY, II,

Defendant–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

BRIEF OF APPELLANT ALLEN H. LOUGHRY, II

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

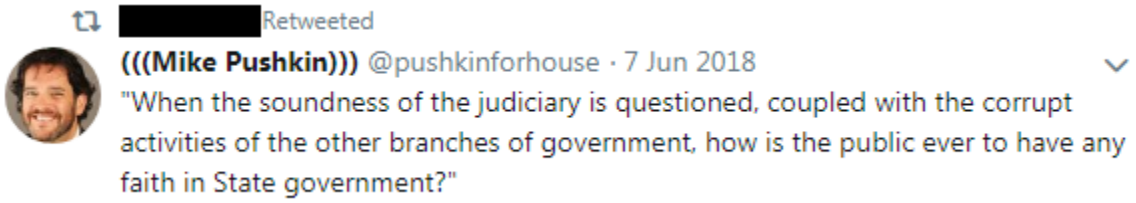
The United States District Court for the Southern District of West Virginia had jurisdiction over this matter under 18 U.S.C. § 3231. The district court entered a final judgment order on February 25, 2019. JA 307. Appellant Allen Loughry noticed his appeal on February 26, 2019. JA 315. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

In the fall of 2017, the West Virginia Supreme Court of Appeals came under intense media scrutiny for office renovations and spending. The story gained momentum and became one of the top news items in West Virginia—covered extensively for more than half a year on television, in newspapers, and on social media. JA 995 (Presentence Inv. Rept.). The media coverage was universally negative towards Justice Loughry and his fellow jurists. JA 63–65. While the media storm focused in significant part on memorable office renovations such as a $30,000 couch, the charges were much more modest when Justice Loughry eventually faced a judicial ethics investigation, impeachment, and federal criminal charges.

This appeal concerns one juror's Twitter use both before and during Loughry's criminal trial and, specifically, the district court's failure to give

Loughry an evidentiary hearing on jury bias and improper jury conduct. Twitter is a social media platform that allows users to publish short, 280-character statements called "tweets." Twitter users can "follow" other users, which creates a feed curated to their own special interests. Users can "like" others' posts, which "show[s] appreciation for a Tweet,"[1] and "retweet" posts, which republishes the posts to their own followers with the retweeter's Twitter name ("handle") noted above the original tweeter's handle:



JA 805. News spreads further and faster because each like or retweet reaches a new audience, and public debate about the news follows. As Twitter itself brags, "Twitter is the fastest way to find out what's happening right now."[2] "Millions of people check Twitter to find out what's happening in the world."[3]

One of those millions of people was Juror A, who followed three individuals central to the case. One of those individuals was Kennie Bass, a television reporter

[1] https://help.twitter.com/en/using-twitter/liking-tweets-and-moments.

[2] https://media.twitter.com/en_us/articles/best-practice/2018/how-to-cover-breaking-news-on-twitter.html.

[3] *Id*.

who prosecuted the media case against Loughry.[4] Bass's reporting became inextricably intertwined with the various legal proceedings. The West Virginia Judicial Investigation Commission charged Loughry with three counts of lying to Bass, and Bass's reporting on Loughry was discussed extensively at the criminal trial below, including at closing argument. JA 89, 91, 94–95, 97, 107–28, 137, 139–43, 151–54, 157, 160–62 (Trial Tr.). In fact, the interview in which Loughry allegedly lied to Bass was published to the jury. JA 129–31. Juror A also followed reporter Brad McElhinny, who published extensively on the various proceedings against Loughry,[5] and West Virginia Delegate Mike Pushkin, who filed the complaint with the Judicial Investigation Commission.

But Juror A did more on Twitter than just follow those individuals: Juror A had a special interest in the proceedings against Loughry. As the district court noted, more than a third of the tweets that Juror A liked in the four months before trial (four out of eleven) were negative tweets about Loughry and the West Virginia Supreme Court of Appeals. JA 276. Juror A both liked and retweeted a post by

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[4] Kennie Bass, *Waste Watch Exclusive Investigation: WV Supreme Court Spending Examined*, WCHS (Nov. 14, 2017), https://wchstv.com/news/waste-watch/waste-watch-investigation-wv-supreme-court-spending-examined [https://perma.cc/7PAS-H2ZL].

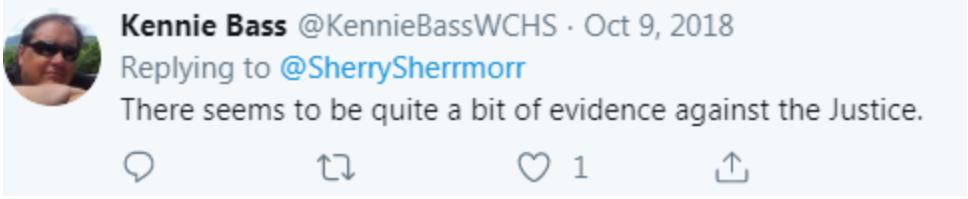
[5] Brad McElhinny, *Loughry Is Out as Chief Justice, Referencing Federal Investigation*, West Virginia MetroNews (Feb. 16, 2018), http://wvmetronews.com/2018/02/16/loughry-is-out-as-chief-justice-workman-takes-over-supreme-court-role/ [https://perma.cc/F4XR-Q4G2].

Delegate Pushkin that was highly critical of Loughry and that linked to a negative newspaper article. Juror A liked two separate posts by Delegate Pushkin and Delegate Rodney Miller expressly calling on Loughry to resign. And Juror A liked a tweet by another individual describing Loughry as having been "overcome with such an attitude of self importance." JA 816. Juror A disclosed none of this during voir dire.

Juror A was empaneled, and the Twitter use did not stop. The undisputed evidence shows that Juror A actively engaged with Twitter at least three times during the six days of trial—one original post, a retweet of another's post, and a like of a third post. While none of them had to do with the trial, they show that Juror A was on Twitter and support a credible allegation that Juror A would have encountered information about the case given whom Juror A followed.

Both Bass and McElhinny tweeted prolifically about the trial, including tweets very likely to be prejudicial if encountered by a juror. Bass tweeted about the case almost every day of the trial, sometimes twice, for a total of thirteen tweets in six trial days.[6] Among those tweets was one that commented on the evidence the day before deliberations began:

[6] *See* https://twitter.com/search?f=tweets&q=from%3Akenniebasswchs%20since%3A2018-10-2%20until%3A2018-10-11&src=typd.



Brad McElhinny tweeted and retweeted about the case sixty times in ten days,[7] including twelve times on October 3 *alone*, a day on which it is undisputed that Juror A accessed Twitter. McElhinny was also in court on many, if not all, of the trial days. JA 100–03, 133, 146–47 (Trial Tr.).

Loughry's counsel did not learn any of this until after trial. JA 792. He scrambled to make a record based on publicly available evidence, but the nature of Twitter makes this difficult. The district court erroneously held this difficulty against Loughry. The court found that Juror A may have failed to answer fully and honestly at least two voir dire questions, and it acknowledged that Juror A had been on Twitter during the trial. But the court faulted Loughry for failing to offer more to support his claims, including any evidence that Juror A had *actually seen* those reporters' many posts. The district court denied not only a new trial but even an evidentiary hearing, during which Loughry would have had the otherwise-unavailable opportunity to question Juror A directly about social media activities before and during trial.

[7] *See* https://twitter.com/search?q=from%3Abradmcelhinny%20since%3A2018-10-2%20until%3A2018-10-11&src=typd&f=live.

That decision should be reversed. Loughry presented a colorable claim of juror misconduct through evidence collected from publicly available data but could not reasonably have done more without an evidentiary hearing. The district court put him in exactly the catch-22 this Court recognized in *Porter v. Zook*, 898 F.3d 408 (4th Cir. 2018), requiring Loughry to submit evidence to justify an evidentiary hearing when he could not reasonably have secured such evidence without that very hearing.

The judge's refusal to hold an evidentiary hearing has prejudiced Loughry. Since trial, Juror A has given multiple media interviews (while maintaining anonymity). Given the passage of time and the nature of the issues, it might be that the prejudice resulting from the error below has subverted or destroyed the utility of an evidentiary hearing, necessitating a new trial. This should be taken one step at a time. The first step is the very modest relief sought herein. The results of the evidentiary hearing will inform the following steps.

STATEMENT OF ISSUES

1. This Circuit has adopted a minimal standard for triggering a presumption of prejudice and evidentiary hearing under *Remmer v. United States*, 347 U.S. 277, 278 (1954). The defendant need present only "a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury" to warrant a hearing.

Barnes v. Joyner, 751 F.3d 229, 244 (4th Cir. 2014). Loughry made a credible allegation that Juror A was exposed to negative coverage of the trial on Twitter. Did the district court err in denying him a *Remmer* hearing?

2. As the district court acknowledged, this Court has never articulated the standard to obtain an evidentiary hearing to evaluate allegations of juror bias or dishonesty during the voir dire. Most circuits that have decided the question impose a low threshold: the defendant must present a colorable, plausible, or nonfrivolous claim that a juror failed to honestly answer questions on voir dire and that honest answers would have provided a valid basis for a challenge for cause. The district court below instead adopted a severe test, requiring that a defendant present "clear, strong, substantial and incontrovertible evidence" of juror bias or dishonesty to justify an evidentiary hearing. Did the district court apply the wrong legal standard?

STATEMENT OF THE CASE

I. Factual Background

In late 2017, Justice Loughry called the United States Attorney for the Southern District of West Virginia to report concerns about excessive spending on office renovations by employees of the West Virginia Supreme Court of Appeals, and then published an editorial with similar allegations in a Charleston newspaper. JA 994 (Presentence Inv. Rep.). The scandal immediately became one of the top stories in West Virginia.[8] An investigation followed, quickly turning on Loughry himself.

Loughry became the subject of three well-publicized proceedings over the next year, all investigating the same alleged misbehavior. *First*, on June 6, 2018, the West Virginia Judicial Investigation Commission filed a complaint against Justice Loughry, including among its charges lying to television reporter Bass about the renovation of Loughry's office and improperly using government vehicles. JA 921 (Gov't Opp. to Mot. New Trial, Exh. C).

Second, a federal criminal indictment was returned two weeks later against Loughry, with charges based on many of the same factual allegations: a scheme to defraud by improperly using government vehicles, wire and mail fraud related to

[8] http://wvmetronews.com/2017/12/29/my-top-ten-west-virginia-news-stories-of-2017-5-1//.

"a valuable and historic desk that belonged to the Supreme Court" (the "Cass Gilbert desk"), and lying to federal investigators. JA 318 (original indictment). The indictment alleged that Loughry made trips not for court business but for travel to book signings for a book he wrote on West Virginia political history, to visit his parents, and for other personal reasons. JA 326.

Third, on August 7, the West Virginia House Judiciary Committee approved articles of impeachment against Justice Loughry and the three other sitting justices of the Supreme Court of Appeals after extensively reported public hearings.[9] As the complaint itself noted, the allegations overlapped with the federal indictment: allegedly using state vehicles and gasoline for personal use such as travel to book signings, taking the Cass Gilbert desk to his home, and lying under oath. JA 963–964 (Gov't Opp. Mot. New Trial, Exh. D).

The federal criminal trial against Justice Loughry began less than two months after the articles of impeachment were issued. JA 9 (Docket).

II. Trial Proceedings

Jury selection began on October 2, 2018. The extensive pretrial publicity necessitated a larger than normal venire of 69 potential jurors. JA 532 (Voir Dire Tr.).

[9] The fifth justice, Justice Menis Ketchum, had already resigned.

Juror A was among the potential jurors questioned during the afternoon session. The district judge asked a number of questions, including these eight (to which the district court assigned the following numbers in the decision below):

> Question 1: "Do any of you have any personal knowledge of the facts of this case?" JA 674.
>
> Question 2: "[H]ave you heard this case discussed at any time by anyone in your presence?" *Id*.
>
> Question 3: "Have any of you read or heard anything about this case in the news media or television or radio?" JA 676.
>
> Question 4: "Is 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?" JA 687.
>
> 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 this indictment in this case?" JA 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?" JA 693.
>
> Question 7: "[A]re 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?" JA 714–15.
>
> Question 8: "[R]eflecting 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?" JA 715.

Juror A did not answer any of these questions affirmatively, though ten potential jurors answered "yes" to Question 3, acknowledging that they had read or heard about the case in the media. The ten were all individually questioned by the court, and none indicated more than having read or seen a story about the case on the news, in print, or on social media. JA 676–83. Of these ten, only one was impaneled. JA 681.

Juror A did respond affirmatively, however, to a question similar to Question 3: whether the jurors had "heard [] about the impeachment proceedings in the state legislature." JA 685. Juror A and the others who answered this question affirmatively were not questioned individually. Rather, they were simply collectively asked the following question:

> And so, do I understand, then, to put it another way, that all of you who have answered with respect to impeachment—and this is going to be a 'Yes' answer—can set that aside and listen to the evidence and base a verdict solely upon the evidence received here in this courtroom? Can you do that?

JA 687. They all responded affirmatively. Juror A was never questioned individually.

III. Verdict

After a six-day trial, Justice Loughry was convicted on eleven counts and acquitted on ten. The convictions included seven counts of wire fraud for using a government credit card to make seven purchases of gasoline totaling $341.14 over a period of almost two years, (JA 43–44 (Second Superseding Indictment, Counts 5, 6, 10, 11, 12, 15, 18)), one count of mail fraud for obtaining $402.60 in mileage reimbursement for a trip when he used a government vehicle (JA 42 (Second Superseding Indictment, Count 3)), and two counts of making false statements to the Federal Bureau of Investigation about the use of state vehicles and about his knowledge that the desk was a Cass Gilbert desk. The remaining count was for witness tampering, but the district court later granted acquittal on that count, as discussed below. JA 229 (Decision on Second Mot. New Tr.).

The jury acquitted Loughry of nine counts of wire fraud and one count of mail fraud. Those ten counts alleged improper gasoline use, personal use of government vehicles, and wire fraud related to the Cass Gilbert desk. The jury hung on one count of wire fraud for receiving approximately $64 to cover personal use of a government vehicle.[10] JA 206 (Verdict).

[10] Justice Loughry was convicted on Counts 3, 5, 6, 10, 11, 12, 15, 18, 20, 23, and 25. He was acquitted on Counts 1, 2, 4, 7, 9, 13, 14, 16, 17, and 21. The jury was hung on Count 8. The government dismissed Counts 19, 22, and 24. JA 206 (Verdict).

IV. Post-Trial Motions

Justice Loughry filed two post-trial motions, one based on the right to an impartial jury under the Sixth Amendment and the other contesting the sufficiency of the evidence on nine counts.

A. The Sixth Amendment Motion

After trial, an individual approached Loughry's trial counsel and told him to look at Juror A's Twitter account. JA 792 (Def.'s Mem. Suppt. Mot. New Tr.). Publicly available sources indicated that Juror A failed to answer several important voir dire questions accurately and took a keen interest in the investigations into Loughry's behavior just as they were reaching a peak in the summer of 2018. The government did not dispute any of these facts.

Juror A did not just passively review Twitter posts about Loughry. When Delegate Pushkin posted a message on June 7 that was highly critical of Loughry, Juror A read it, liked it, *and* republished it to Juror A's own followers by retweeting it. JA 805, 818–19. The post was made the day after the Judicial Investigation Commission's complaint against Loughry issued and consisted of a quotation from Loughry's book—obviously intended to be sarcastic: "When the soundness of the judiciary is questioned, coupled with the corrupt activities of the other branches of government, how is the public ever to have any faith in State government?" JA 805, 818–19.

Delegate Pushkin's tweet also contained a link to an article in the Charleston Gazette-Mail relaying allegations that Loughry had "perpetrated his own abuses of power" and had been under federal investigation since at least December 2017. JA 807. The article quoted the general counsel for the Judicial Investigation Commission as alleging that Loughry had "'clearly lied three times' to Kennie Bass," violated the West Virginia Ethics Act, and misled the public. JA 808. It also reported the general counsel's allegation that Loughry had misused a state-owned vehicle for personal use, including for book-signing trips and trips to his parents' house and to accompany his father to a court hearing—all of which were central allegations of the federal indictment released two weeks later. JA 811. By liking and republishing this anti-Loughry material, Juror A suggested approval of it.

Several weeks later, on June 26, just as impeachment proceedings were beginning, Juror A liked two tweets. The first was a tweet by Delegate Rodney Miller, appointed as a House impeachment manager, referring to the proceedings. JA 817–18. Juror A then liked another tweet by Delegate Pushkin that called on Loughry to resign and that incorporated and linked to a newspaper opinion piece titled "WV Justices Who Take Advantage of Public Funds Should Resign." JA 817. The piece called on Justice Loughry and Justice Menis E. Ketchum "to resign immediately," citing lying about his activities and "stealing from the people of West Virginia." JA 822.

When the articles of impeachment were adopted, Juror A liked another tweet by an individual:

> 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 become overcome with such an attitude of self importance that they thought the lavish spending was appropriate!

JA 816. Juror A then refrained from any further public contributions to the discussion and debate on Twitter until the day trial ended. Immediately after the verdict was returned, Juror A appears to have contacted a local television station and given a telephone interview (the government did not dispute this). JA 834 (Def.'s Mem. Supp. Supp. Mot. New Tr.). Then, the day after trial, Juror A tweeted this about service on the jury:

> Grateful to have had a chance to serve as a juror for a Criminal trial this week. It was emotionally draining & I'm glad it's Over. #Juror #ThisisAmerica #Justiceserved #Loughry.

JA 831. The hashtag "#Loughry" served to index the tweet so that it would be found among other similarly tagged tweets about Justice Loughry. Reporter McElhinny indexed his tweets using this hashtag.[11]

[11] https://twitter.com/search?q=from%3Abradmcelhinny%20since%3A2018-10-2%20until%3A2018-10-11&src=typd&f=live.

Juror A was not a prolific writer on Twitter, and republished or liked others' publications even less. Yet of the 11 posts that Juror A liked in the four months before trial, four were related to Loughry. JA 276 (Decision on Mot. New Tr.).

Loughry's investigation also revealed (and the government did not dispute) that Juror A accessed social media throughout the trial (October 2 through 12). Based on likes, tweets, and retweets, Juror A was *at a minimum* active on Twitter on October 3 and 6. But Juror A could have been active in other ways on other days. Simply scrolling through one's Twitter feed, reading the tweets of those one follows, or clicking on articles posted in others' tweets is not activity visible to third parties or otherwise knowable through publicly accessible data. Because Juror A followed two of the most prolific journalists reporting on the trial, however, McElhinny's and Bass's near-constant tweets during the trial would have appeared on Juror A's Twitter feed. The only question is whether Juror A saw them while on Twitter—something Loughry could not determine without a hearing. *See* S.D. W. Va. R. Cr. P. 31.1 (barring post-trial communication "with any member of the jury" absent "an order allowing such communication").

Loughry sought relief in the form of a new trial or, at minimum, a hearing on juror contact during trial, juror dishonesty during the voir dire, and juror bias. JA 796, 840, 975. The district court denied the motion in its entirety. Regarding juror contact during trial, the district court denied a hearing under *Remmer v. United*

States, 347 U.S. 227 (1954), despite the court's acknowledgment that Juror A had been on Twitter during the trial and followed reporters who actively commented on the case. The district court faulted Loughry for having failed to show that Juror A had specifically seen a tweet about the case. JA 294. But that is something he could not prove without an evidentiary hearing at which he could question Juror A or some first-hand witness to Juror A's Twitter activity. *Id*.

The district court also denied a new trial, or even an evidentiary hearing, with respect to juror dishonesty during the voir dire or juror bias. The district court first concluded that Loughry's arguments failed on the merits. The court determined that Juror A may have failed to answer fully and honestly at least two voir dire questions (Questions 1 and 6). But it determined that Juror A answered the other questions honestly based on the court's supposition that Juror A would have parsed the voir dire questions hypertechnically, distinguishing between those questions asking about knowledge of "this case" from those asking about the impeachment and judicial ethics investigations. The district court also concluded that even had Juror A answered the questions differently, it is "doubtful" that such answers would have warranted a dismissal for cause. JA 283.

The district court then denied an evidentiary hearing on the ground that Loughry had not presented "clear, strong, substantial and incontrovertible evidence" of dishonesty or bias. JA 299–300. This high threshold is far more

difficult to meet than the standard applied by any other circuit. In other circuits, a defendant is entitled to an evidentiary hearing on showing evidence sufficient to show a colorable, plausible, or nonfrivolous claim of dishonesty or bias. As the district court acknowledged, this Court has yet to articulate the applicable standard.

B. The Motion for Acquittal or to Vacate Convictions

Loughry's other post-trial motion sought a judgment of acquittal on the mail fraud, wire fraud, and witness tampering counts. JA 230 (Decision on Second Mot. New Tr.). The district court denied the motion as to the mail and wire fraud counts, but granted acquittal on the witness tampering count. The evidence relating to the alleged witness tampering showed "only one conversation, conducted in the presence of others," in which "one statement, possibly two, could conceivably be construed as inviting Ms. Ellis to lie." JA 258. Moreover, Loughry expressly told the employee that she could be honest about whether she remembered the incident being discussed. JA 261.

SUMMARY OF THE ARGUMENT

I. The district court erred in denying Loughry an evidentiary hearing under *Remmer v. United States*, 347 U.S. 227, 229 (1954), to determine whether Juror A's outside contacts during the trial warranted a new trial. In a criminal case, any communication with a juror about the matter pending before the jury "is, for obvious reasons, deemed presumptively prejudicial." *Id.* This Court and others have held that various Internet contacts—whether reviewing a Wikipedia entry or a defendant's LinkedIn or Facebook page—triggers the presumption of prejudice and requires a hearing. *See United States v. Lawson*, 677 F.3d 629, 651 (4th Cir. 2012) (Wikipedia); *see also Ewing v. Horton*, 914 F.3d 1027, 1029 (6th Cir. 2019) (Facebook); *United States v. Harris*, 881 F.3d 945, 952 (6th Cir. 2018) (LinkedIn). The district court recognized that Loughry's trial and investigation were highly publicized in the news media and on Twitter, that Juror A followed on Twitter some of the reporters most involved in the case, and that Juror A was active on Twitter during the trial. Yet it failed to grant a hearing as required under this Court's cases.

II.A.1. The district court also erred in denying an evidentiary hearing to evaluate the juror bias allegations under *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984), and related cases. Loughry presented a colorable, plausible, and nonfrivolous *McDonough* claim. In the majority of circuits, such a claim would warrant an evidentiary hearing. Instead, the district

court imposed an exceedingly difficult standard that it purported to adopt from the Second Circuit—requiring Loughry to present clear, strong, and *incontrovertible* evidence of a *McDonough* violation to obtain an evidentiary hearing. But even the Second Circuit has effectively repudiated that standard as being too onerous because a defendant who had "incontrovertible evidence" would have no need for an evidentiary hearing.

2. Under the proper standard, the district court should have granted Loughry a hearing. Even the district court recognized that Juror A may have answered certain voir dire questions dishonestly. That should have prompted an evidentiary hearing. The district court was wrong in sweeping aside these and other questionable answers based on both the court's own speculation as to Juror A's motivations and a hypertechnical parsing of the voir dire questions.

B. For similar reasons, Loughry should have been granted an evidentiary hearing on his claim of actual juror bias. Loughry is entitled to an evidentiary hearing to explore these questions, as well as the reasons that Juror A failed to answer the voir dire questions honestly.

STANDARD OF REVIEW

The district court's denial of an evidentiary hearing on the *Remmer* claim is reviewed for an abuse of discretion. *United States v. Gravely*, 840 F.2d 1156, 1159 (4th Cir. 1988). The denial of an evidentiary hearing on the *McDonough* and

actual-bias claims was based on an error of law and is therefore reviewed de novo. *United States v. Green*, 436 F.3d 449, 456 (4th Cir. 2006).

ARGUMENT

"The Supreme Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Porter v. Zook*, 898 F.3d 408, 425 (4th Cir. 2018) (quoting *Smith v. Phillips*, 455 U.S. 209, 215 (1982)) (internal quotations omitted). The right to an impartial jury, guaranteed by the Sixth Amendment, is only protected if the defendant is given "the *opportunity* to prove actual bias." *Id*. (quoting *Dennis v. United States*, 339 U.S. 162, 171–72 (1950) (emphasis supplied by *Porter*)). That opportunity was denied here.

I. Loughry Met the "Minimal Standard" for a *Remmer* Hearing

A. The *Remmer* presumption

The Supreme Court announced in *Remmer v. United States*, 347 U.S. 227, 229 (1954), that any communication or contact with a juror—either direct or indirect—is "presumptively prejudicial" in a criminal case. In *Remmer*, the trial court learned after the verdict that a third party had told the jury foreperson that a guilty verdict could be financially lucrative. The trial court decided the statement was made in jest and denied a hearing. *Id.* at 228–29. The Supreme Court reversed, applying the presumption and remanding for a hearing. "The trial court should not

decide and take final action ex parte on information such as was received in this case," but should determine what happened "in a hearing with all interested parties permitted to participate." *Id.* at 229–30.

This Court has said that a party need only meet "a minimal standard" to trigger the *Remmer* presumption and require a hearing. *Barnes*, 751 F.3d at 245. The defendant need show only that the "communications or contacts . . . were more than innocuous interventions." *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996). A communication is "more than innocuous" if it is "about the matter before the jury." *Barnes*, 751 F.3d at 245. Importantly, it is error for a trial court to require proof that the defendant was actually biased by the external contact: "Such a requirement is directly at odds with *Remmer*." *Id.* at 248. That is the purpose of the presumption and the hearing. The presumption would be "utterly meaningless" if the defendant had to prove prejudice before getting a hearing. *Id.*; *see Cheek*, 94 F.3d at 141.

In *Hurst v. Joyner*, 757 F.3d 389, 398 (4th Cir. 2014), for example, a defendant was granted a hearing based on allegations that a juror asked her father what the Bible says about the death penalty. There were no allegations that the juror and her father discussed the facts or evidence at trial, or that the father attempted to influence the deliberation. Nonetheless, the defendant "presented a credible allegation of a private communication about the matter pending before the

jury, entitling Hurst to the presumption of prejudice and an evidentiary hearing." *Id.* The court need not know "whether the incidents that may have occurred were harmful or harmless." *Id.* at 395. That question would be considered at the hearing on remand.

In *Mattox*, the foundation for the *Remmer* presumption, a bailiff talked to the jurors and read them newspaper articles about the trial. *Mattox v. United States*, 146 U.S. 140, 151 (1892). The jurors notified the judge, but did not state what influence the contact had on them. *Id.* at 147. The evidence reflected that the newspaper said something similar to Kennie Bass's comment on the strength of the evidence: "the evidence against [the defendant] was claimed to be very strong by those who had heard all the testimony." *Id.* at 151. That was presumptively prejudicial, and the trial court had erred by not accepting evidence on the subject.

Time and again, this Court has reversed district courts for denying a hearing on improper juror communications during trial, and it should do so again here. *See, e.g.*, *United States v. Herndon*, 156 F.3d 629, 635 (6th Cir. 1998); *Hurst*, 757 F.3d at 398; *Fullwood v. Lee*, 290 F.3d 663, 682 (4th Cir. 2002). If the allegations are credible, a *Remmer* presumption is triggered and a hearing must be held. *Cheek*, 94 F.3d at 141; *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535 (4th Cir. 1986) (describing *Remmer* presumption and explaining that "*Remmer* also established the requirement of a post-trial evidentiary hearing in which the prevailing party has the

opportunity and burden of rebutting the presumption of juror prejudice"); *see also United States v. Malloy*, 758 F.2d 979, 982 (4th Cir. 1985) (referring to the post-trial evidentiary hearing concerning potential juror bias as a "required" hearing); *Stouffer v. Trammell*, 738 F.3d 1205, 1214 (10th Cir. 2013) (explaining that "[t]he trial court's duty to conduct a *Remmer* hearing when genuine concerns of improper juror contact arise is clearly established by the Supreme Court"). At the hearing, the government bears "a heavy burden to establish the harmlessness of an unauthorized jury communication." *Haley*, 802 F.2d at 1537. A new trial must be granted unless "the proof [establishes] that there is no reasonable possibility that the verdict was affected by the contact." *Cheek*, 94 F.3d at 142.

"[T]he problem of proof created by Rule 606(b)" makes the *Remmer* presumption and hearing necessary. *Haley*, 802 F.2d at 1537 n.10. Rule 606 prohibits a juror from testifying 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." Fed. R. Evid. 606(b). "The rule makes it extremely difficult to offer direct proof that deliberations were not influenced by a stranger's communication, and renders it unlikely that a trial court can determine with any exactness the impact an improper contact has had on the jury." *Haley*, 802 F.2d at 1537 n.10. The burden is thus on the government to prove lack of prejudice. *Mayhue v. St. Francis*

Hosp. of Wichita, Inc., 969 F.2d 919, 923–24 (10th Cir. 1992); *United States v. Bassler*, 651 F.2d 600, 603 (8th Cir. 1981).

B. Social media use is an external communication that triggers the presumption

Though social media is a relatively new phenomenon, courts have held that merely *potential* juror contact with social media during trial triggers the *Remmer* presumption. In *United States v. Harris*, 881 F.3d 945, 952 (6th Cir. 2018), the Sixth Circuit reversed and remanded for a *Remmer* hearing upon evidence that a juror's roommate had viewed the defendant's LinkedIn page during trial. The court noted that the roommate "likely" found the LinkedIn page by Googling the defendant, which would have led to information about the investigation on the first page of the search results. *Id.* at 953. And the court noted that the roommate "potentially" told the juror what she had found. *Id.* at 954. The court was clear that the communication was only a potentiality: "Harris did not establish that Juror 12 was exposed to unauthorized communication." *Id.* But this "colorable claim" was enough to warrant a *Remmer* hearing. *Id.*; *see also Ewing v. Horton*, 914 F.3d 1027, 1029 (6th Cir. 2019) (remanding for a *Remmer* hearing upon evidence that a juror looked up the defendant on Facebook).

The Sixth Circuit decision reflects some of the unique dangers of juror contact with social media and the Internet during trial. A juror's use of social media and the Internet—where the content is ever-changing and can be accessed by

phone almost anywhere and anytime—is more difficult to document than telephone calls, meetings, or other traditional examples of extrajudicial communication. It can be essentially impossible to document without a hearing. At the same time, access to social media can be even more prejudicial to a fair trial than traditional media. Unlike a single newspaper article or television report, social media and the Internet consistently blur fact with opinion, include content created by anyone with virtually no accountability, and can be (and usually are) self-curated to amplify only those voices and opinions that a user wants to see or hear. A juror can very easily—either intentionally or inadvertently—be exposed to "information that is speculative, incorrect, or inappropriate for jurors to consider." Nancy S. Marder, *Jurors and Social Media: Is A Fair Trial Still Possible?*, 67 SMU L. Rev. 617, 627 (2014).

Indeed, this Court has recognized the unique problems with juror exposure to the Internet and held that "it is the prosecution" that must "bear[] the risk of uncertainty." *United States v. Lawson*, 677 F.3d 629, 651 (4th Cir. 2012). There, a juror had used Wikipedia—a crowd-sourced online encyclopedia—during the trial. Wikipedia pages are constantly edited by users from potentially anywhere, so it was impossible to determine exactly what the juror read on the page. "We do not know what the Wikipedia entry actually said, how it may have differed from a traditional legal definition of the [term used in the charge], whether Juror 177 used

the entry in arriving at his decision, and under what theory of liability the jury convicted the defendants." *Id.* The district court had held a hearing but denied a new trial because the juror testified that the Wikipedia entry had not influenced his decision. This Court reversed, holding that the government failed to carry its burden at the hearing to rebut the *Remmer* presumption of prejudice. *Id.* at 651. The unique dangers of the Internet required not simply a *Remmer* hearing but a new trial to protect the defendant's right to an impartial jury. *Id.* at 646, 651.

The Supreme Court has specifically recognized that a juror's Twitter use is prejudicial. In *Dietz v. Bouldin*, 136 S. Ct. 1885, 1895 (2016), the jury was discharged after rendering a legally impermissible verdict. The question on appeal was whether the jury could be recalled; the Court held that they could be but recognized the "extraordinarily high" risk of the jurors having been tainted by using Twitter after the discharge, warning that district courts must ensure such use did not occur. *Id.*

Commentators have observed that Twitter "combines three dangerous elements of the Internet together: social networks, live searching, and link sharing." Laura Whitney Lee, *Silencing the "Twittering Juror": The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age*, 60 DePaul L. Rev. 181, 194 (2010). Even if the juror does not actively search for information about the case, he or she can stumble upon it.

Ebony Nicolas, *A Practical Framework for Preventing "Mistrial by Twitter,"* 28 Cardozo Arts & Ent. L.J. 385, 396–97 (2010).

C. Loughry should have been granted a *Remmer* hearing

The evidence here was plainly enough to trigger the *Remmer* presumption of prejudice and require a hearing. There is no question that Juror A was on Twitter during the trial. Trial began with voir dire on October 2, and continued for six days of evidence and argument until the verdict was read on October 12. The undisputed evidence shows that Juror A was on Twitter at least three times during those six days: twice on October 6, posting one Tweet and retweeting another, JA 801, and once on October 3, when Juror A liked a Tweet, JA 814.[12]

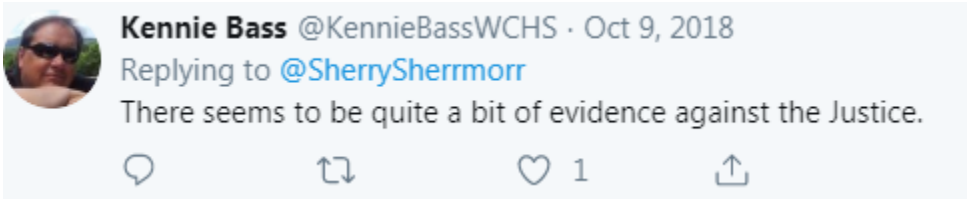
Loughry's trial counsel had limited time and was forbidden from questioning the jurors about their deliberations or their verdict. S.D. W. Va. R. Cr. P. 31.1.[13] But he was still able to confirm that Juror A used social media three times

[12] The court below seems to have inadvertently missed the two October 6 instances, citing only the October 3rd "like." JA 275 ("Aside from a single Twitter like by Juror A on October 3, wholly unrelated to this case, the defendant does not state the source of his knowledge of Juror A's contact with social media during trial, nor does he set forth the extent or nature of any such contact."). But Loughry had attached evidence of the October 6 Tweets to his motion for new trial, and the government did not dispute the evidence.

[13] "After conclusion of a trial, no party, nor his or her agent or attorney, shall communicate or attempt to communicate with any member of the jury, including alternate jurors who were dismissed prior to deliberations, about the jury's

during the six days of evidence.[14] The trial court abused its discretion in denying a hearing.

Meanwhile, this case received intense media attention on Twitter. Juror A followed two prolific local reporters, Kennie Bass of WCHS-TV and Brad McElhinny of West Virginia MetroNews, both of whom the court below recognized as having "reported on the evidence admitted at trial."[15] Bass's posts include the following, posted the day before deliberations began, which undoubtedly could have prejudiced a juror who came across it:



Indeed, Bass was not a neutral observer: Loughry was charged by the West Virginia Judicial Investigation Commission with three counts of lying to him. What Juror A might have seen in her curated Twitter feed was plainly "about the matter

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deliberations or verdict without first applying for (with notice to all other parties) and obtaining, for good cause, an order allowing such communication."

[14] The government also did not dispute Loughry's claims below that Juror A was on Facebook and Instagram on two other trial days as well. It is very likely that Juror A browsed Twitter on those days too, just without any engagement that is publicly visible.

[15] *See* https://twitter.com/search?q=from%3Akenniebasswchs%20since%3A2018-10-2%20until%3A2018-10-11&src=typd&f=live.

before the jury" and, thus, "more than innocuous." *Barnes*, 751 F.3d at 245 (quoting *Cheek*, 94 F.3d at 141).

The posts make out "a credible allegation" of an improper contact sufficient to have required a *Remmer* hearing. *See Hurst*, 757 F.3d at 398. Loughry's allegation is at least as strong as the alleged contact with LinkedIn that led the Sixth Circuit to reverse and remand for a *Remmer* hearing in *Harris*. There is no doubt that Juror A was on Twitter during trial, and there is equally no doubt that posts about the trial would have appeared in Juror A's Twitter feed. The existence of Bass's and McElhinny's tweets has not been and cannot plausibly be disputed.[16] The district court faulted Loughry for failing to prove that Juror A saw those tweets while on Twitter, but it is the government that must "bear[] the risk of [that] uncertainty." *Lawson*, 677 F.3d at 651 (quoting *United States v. Vasquez-Ruiz*, 502 F.3d 700, 705 (7th Cir. 2007)); *see State v. Smith*, 418 S.W.3d 38, 47 (Tenn. 2013) (recognizing the difficulty of documenting jurors' social media use and reversing for failure to hold a hearing). At the hearing, the government will have the burden of showing that the posts did not prejudice Juror A.

[16] Because the truth of the tweets is not at issue, this Court can take judicial notice of the reporters' tweets. "When courts have taken judicial notice of contents of news articles, they have done so for proof that something is publically known, not for the truth of the article's other assertions." *The Estate of Lockett by & through Lockett v. Fallin*, 841 F.3d 1098, 1111 (10th Cir. 2016).

D. The trial court did not properly apply the presumption

The district court ultimately denied a *Remmer* hearing for two reasons. *First*, it determined that its instructions to the jury did not completely ban social media use but rather directed the jury "to avoid[] social media contacts regarding *this case*." JA 294 (emphasis in original). *Second*, it held that Loughry had not shown that "accidental glimpses of a tweet regarding the defendant's trial . . . would reasonably call into question the integrity of the verdict." JA 294.

1. The district court's instructions to the jury do not support its denial of a *Remmer* hearing

The district court largely based its analysis on *Barnes*, 751 F.3d at 244. *Barnes*, an AEDPA case, held that clearly established federal law requires a *Remmer* hearing when a defendant "presents a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury." *Id.* Put another way, "to be entitled to the *Remmer* presumption and a *Remmer* hearing, a 'defendant must first establish both that an unauthorized contact was made and that it was of such a character as to reasonably draw into question the integrity of the verdict.'" *Id.* at 248.

Pointing to the requirement of an "unauthorized" contact, the district court mandated that Loughry prove that the contact was forbidden by the district court's instructions. But that is not what *Barnes* requires. This Court in *Barnes* did not

recount how the trial court had instructed the jury, much less evaluate whether the juror's conversation with her pastor violated the instructions.

Remmer protects against extrajudicial contacts, whether expressly prohibited or not. Its purpose is not to enforce the trial court's instructions to the jury, but rather to protect a defendant's right of confrontation by requiring the jury to base its verdict only on information presented at trial. *Robinson v. Polk*, 438 F.3d 350, 359 (4th Cir. 2006) (citing *Turner v. Louisiana*, 379 U.S. 466, 472 (1965)). If a trial court expressly allowed jurors to consult with outsiders about their deliberations and verdict, that would nevertheless be error. Nor would it be reasonable to expect a court to explicitly forbid every type of improper contact. *See, e.g.*, *Stouffer v. Trammell*, 738 F.3d 1205, 1217 (10th Cir. 2013) (holding that the trial court erred in not holding a hearing after juror's husband reportedly winked, nodded, and rolled his eyes at her during trial).

The district court's reliance on *United States v. Feng Li*, 630 F. App'x 29, 33 (2d Cir. 2015), is no more persuasive. *See* JA 235. There, the court instructed the jury to stay off of social media related to "the facts or circumstances of the case." *Feng Li*, *supra.* A juror then posted on social media about "the duration of the trial, courtroom temperature, future creative writing projects, and whether it would be appropriate to speak to certain trial participants about her career as a crime fiction

writer when the trial concluded." *Id.* The Second Circuit held that the juror's postings did not warrant a new trial.

Feng Li is inapposite for many reasons. *First*, and most significant, the court in *Feng Li* did not hold that a *Remmer* hearing is required *only* where a juror has violated a trial court's express instructions. *Second*, the juror in *Feng Li* did not receive an external communication. A juror's post about her own impression of what it is like to be a juror is far different from a juror reading an interested outsider's impression of the evidence. As the Second Circuit itself said, "[w]hen the alleged prejudice results from statements made by the jurors themselves, and not from media publicity or other outside influences, the trial court has especially broad flexibility in handling the matter." *Id.* at 32 (quoting *United States v. Thai*, 29 F.3d 785, 803 (2d Cir. 1994).

Third, the juror's posts in *Feng Li* did not relate to the matter before the jury. The verdict would not have been influenced by a comment to non-jurors about whether it was hot or cold in the courtroom.

In all events, the district court's parsing of its instructions was wrong. If this Court determines that it must evaluate the district court's instructions, Juror A's activity on Twitter contravened several of those instructions. To begin, the district court instructed the jury that it must decide the case solely upon the evidence in the courtroom:

> I want to mention to you one thing that is so very important at the outset, and that is, of course, as jurors, you must decide this case solely upon the evidence that you hear from the witness stand and the exhibits as they're offered and introduced into evidence in the case.

JA 784. The district court then instructed the jury more specifically to "*avoid all social media*": "You're going to hear me say this more than once, but, continue to be guarded, that is, do not expose yourself to any media coverage of any kind; avoid all social media, as well, and avoid discussing this or letting anyone draw you into discussion about the case." JA 84. The court further instructed, "Continue to avoid all news media and social networking exposure of any kind . . . ." JA 200. Reporting on these instructions, McElhinny tweeted on the first day of trial that the jury was instructed to avoid media or social media:[17]

The undisputed evidence showed that Juror A ignored those instructions to stay off of social media.

[17] https://twitter.com/search?q=from%3Abradmcelhinny%20since%3A2018-10-2%20until%3A2018-10-11&src=typd&f=live.

2. The district court failed to recognize the "minimal standard" required for a *Remmer* hearing

The district court also held that Loughry had 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." JA 294 (citing *Barnes*, 751 F.3d at 244). This holding fails scrutiny.

Barnes described this requirement as "a minimal standard," necessitating only that the external communications were "more than innocuous." 751 F.3d at 248. There, the external communication was that "a juror communicated with her pastor about the death penalty" during the jury's capital sentencing. *Id.* at 240. Because "the matter before the jury was the appropriateness of the death penalty for the[] defendants," a communication about the moral implications of that decision was sufficient to "reasonably draw into question the integrity of the verdict." *Id.* at 248–49. This was a "minimal showing" sufficient "to demonstrate an entitlement to a hearing," which did not require proof that "a juror was actually biased." *Id.* at 248.

Nothing in the district court's limited reasoning here supports the conclusion that Bass's and McElhinny's tweets were so insignificant as to be "innocuous." *Id.* 248. Those tweets were plainly "about the matter before the jury," which is enough under *Barnes* to "reasonably draw into question the integrity of the verdict." *Id.* at

244. As noted above, Bass's tweets went so far as to opine that "[t]here seems to be quite a bit of evidence against the justice."

The linchpin of the district court's reasoning appears to be its speculation that any tweet viewed by Juror A must have been seen "accidental[ly]." JA 235. But the *Remmer* analysis does not turn on whether an external communication was accidentally encountered by the juror or intentionally sought out. In *Mattox*, 146 U.S. at 151, the Supreme Court never mentioned whether the bailiff had read the prejudicial newspaper article to the jurors at their request or on his own. All that is required to trigger the *Remmer* presumption and hearing is "a credible allegation of a private communication about the matter pending before the jury." *Hurst*, 757 F.3d at 398. To the extent a juror's intent regarding an external communication has any bearing on prejudice, that can be explored at the hearing.

II. Loughry Should Be Granted an Evidentiary Hearing on His *McDonough* and Actual-Bias Claims

The district court also should have granted Loughry an evidentiary hearing to determine whether Juror A was improperly seated on the jury in the first place. Loughry presented a colorable, plausible, and nonfrivolous claim that Juror A failed to honestly answer questions on voir dire and that, had Juror A answered those questions fully and honestly, the answers would have provided a valid basis for a challenge for cause. Those very same credible allegations, if sustained, would also establish that Juror A was actually biased against him. In these circumstances,

an evidentiary hearing was required to enable Loughry to further explore his case for a new trial.

A. Loughry should receive an evidentiary hearing on his *McDonough* claim

Loughry is entitled to an evidentiary because he has made a sufficient showing of a claim of jury dishonesty under *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984).

1. The district court applied the wrong standard to decide whether to hold an evidentiary hearing under *McDonough*

The *McDonough* framework is well established. To ultimately succeed on the merits of a *McDonough* claim and be granted a new trial, a defendant must show: (1) that "a juror failed to answer honestly a material question on voir dire"; and (2) that "a correct response would have provided a valid basis for a challenge for cause." *Porter*, 898 F.3d at 430 (quoting *McDonough*, 464 U.S. at 556). In addition, the juror's motives for concealing the information or the reasons that affect the juror's impartiality could have affected the fairness of the trial. *Conaway v. Polk*, 453 F.3d 567, 588 (4th Cir. 2006). The first prong encompasses "not just straight lies, but also failures to disclose." *Id*. It "applies equally to deliberate concealment and to innocent non-disclosure." *Jones v. Cooper*, 311 F.3d 306, 310 (4th Cir. 2002).

As the district court acknowledged, however, 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. Logic dictates that the standard should be lower than that required to succeed on *McDonough* claim. Were it the same or higher, any claim to a hearing would be illusory and futile.

Granting a hearing only when a defendant already has enough to prevail on a *McDonough* claim would put a defendant in a "classic catch-22," as this Court recognized in *Porter v. Zook*. There, jurors were asked whether they or any close family member or close personal friend had worked for law enforcement. *Porter*, 898 F.3d at 420. One juror answered the question truthfully but incompletely, saying that his nephew was a police officer but omitting that his brother was a sheriff's officer. *Id*. The state trial court faulted defense counsel for not following up with individual voir dire, and it declined to order an evidentiary hearing under *McDonough* because counsel had failed to show that the juror deliberately omitted material information. *Id*. at 427.

On federal habeas review, this Court held that the state court had erred. "How could Appellant meet this standard without discovery or a hearing?" *Id*. It would place a defendant in "a classic catch-22" if he were obliged to "submit admissible evidence to the [district] court in order to be accorded an evidentiary hearing, when the defendant is seeking the hearing because he cannot, without

subpoena power or mechanisms of discovery, otherwise secure such evidence." *Id*. (quoting *Conaway*, 453 F.3d at 584); *see Williams v. Taylor*, 529 U.S. 420, 442 (2000) (juror's omissions on voir dire as a whole "disclose the need for an evidentiary hearing").

Consistent with this logic, most courts have concluded that a defendant should receive an evidentiary hearing upon making a plausible, colorable, or nonfrivolous claim of juror misconduct. The hearing would then permit the defendant to attempt to prove up his claim of juror bias. *See United States v. Zimny*, 846 F.3d 458, 464 (1st Cir. 2017) ("where a defendant makes a colorable or plausible claim of juror misconduct, the district court must investigate it"; judge does not have discretion to conduct no inquiry at all); *Dyer v. Calderon*, 151 F.3d 970, 974 (9th Cir. 1998) ("A court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and circumstances."); *United States v. Easter*, 981 F.2d 1549, 1553 (10th Cir. 1992) (noting that "the ordinary course is to require a hearing or inquiry into nonfrivolous allegations of juror misconduct" but not when only "thin allegations" of misconduct are present).

For example, in *United States v. French*, 904 F.3d 111 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 949 (2019), the defendant learned shortly after sentencing that a juror had failed to disclose that her son had been convicted of drug offenses. *Id*. at 115. The government did not contest the accuracy of this information. *Id*. The juror

had written "n/a" on the questionnaire prompt asking for a description of any court matter that she or a close family member was involved in as a party, witness, or victim, and she failed to complete the second side of the form or sign it under penalty of perjury. *Id*. She also failed to respond to voir dire questions asking whether she or a close family member had experiences involving controlled substances. *Id*.

The district court denied a motion for a new trial. The court concluded, without an evidentiary hearing, that the juror's response in the questionnaire was "likely mistaken" and that her failure to respond during voir dire was also a "mere mistake, and not dishonesty." *Id*. at 116. The court also faulted defense counsel for failing to make further inquiry about the incomplete questionnaire, and it reasoned that the non-answers to voir dire questions were inconsequential because the questions were aimed at discerning the juror's ability to be impartial and she might well have thought that she could be impartial. *Id*.

The First Circuit reversed. The defendant had satisfied his initial burden of coming forward with a "colorable or plausible" claim, triggering the "unflagging duty" of the district court to investigate that claim. *Id*. at 117. The district court was required to "fashion a responsible procedure for ascertaining whether misconduct actually occurred and if so, whether it was prejudicial." *Id*. (quoting *Zimny*, 846 F.3d at 465). The district court's speculation that the juror was simply mistaken was

not appropriate. While this conclusion was "plausible," it was insufficiently likely to warrant rejecting the defendant's claim as *im*plausible. *Id*. The defendant was not required to show that his claim was "so strong as to render contrary conclusions implausible." *Id*. Nor was he required to support his claim with testimony from the juror, especially given that counsel could not question the juror without court permission. *Id*. "So a court-supervised investigation aimed at confirming and then exploring further the apparent dishonesty was called for." *Id*. The First Circuit also rejected the government's argument that defense counsel should have asked more questions or objected to the failure to complete the questionnaire; given the juror's answers, there was no reason for follow-up. *Id*. at 118.

The district court instead adopted a standard stated in *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989), requiring Loughry to present "clear, strong, substantial and incontrovertible evidence" of a *McDonough* violation. JA 240–41. But as the Second Circuit itself recognized, this standard is not to be applied literally. As *Ianniello* said, this standard "do[es] not demand that the allegations be irrebuttable" because "if the allegations were conclusive, there would be no need for a hearing." 866 F.2d at 543. And *Ianniello* adopted this language from *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983), which described its standard in less extreme terms: "a trial court is required to hold a post-trial jury hearing only when reasonable grounds for investigation exist." The

Moon court explained that "[r]easonable grounds are present when there is clear, strong, substantial and incontrovertible evidence" of juror dishonesty, but it did not say that is the *only* circumstance where a hearing is required. Understood correctly, the Second Circuit's standard is really not so different from that applied by other circuits, and certainly not as strict as the literal language, on which the district court here relied, might suggest.

Nor do the decisions of the Tenth and Eighth Circuits, cited by the district court, support the rigorous standard it applied. JA 298–99. While the Tenth Circuit has noted that district courts have wide discretion, it has expressly held that "the ordinary course is to *require* a hearing or inquiry into nonfrivolous allegations of juror misconduct." *United States v. Easter*, 981 F.2d 1549, 1553 (10th Cir. 1992) (emphasis added).

As for the Eighth Circuit, the decision cited by the district court *reversed* a decision not to hold an evidentiary hearing into *McDonough* allegations that a juror failed to honestly answer general questions about sources of bias and whether any family member had been charged with a crime. *United States v. Tucker*, 137 F.3d 1016, 1027 (8th Cir. 1998). In holding that an evidentiary hearing was required, the Eighth Circuit did not set any specific standard but simply noted noting that a district court's "discretion is not unlimited" and that the defendant had "made enough of a showing to entitle him to a hearing and findings of fact on this issue."

Id. at 1026–27. The court rejected the government's argument that the defendant had waived the issue by failing to ask specific voir dire questions. *Id*. at 1029. Far from supporting the denial of a hearing, *Tucker* underscores the need for one here.

2. Loughry presented sufficient evidence to warrant a hearing.

Under the correct standard, Loughry should have been granted a hearing to prove his *McDonough* claim. Loughry presented a colorable, plausible, nonfrivolous claim that Juror A failed to honestly answer multiple material voir dire questions, that honest answers would have provided a valid basis for a challenge for cause, and that the juror's motives for concealing the information could have affected the fairness of the trial.

a. As to the voir dire responses, the district court itself noted that Juror A may have failed to answer at least two questions fully and truthfully. In Questions 1 and 6, the court asked whether Juror A had heard about the facts of the case on social media or had personal knowledge of the facts of the case. As the district court acknowledged: "Assuming Juror A read and remembered the detailed contents of this article, Juror A may have failed to answer fully when responding that Juror A had no personal knowledge of 'the facts of this case' and had not heard anything on any social media platform about 'the facts of this case.'" JA 283.

It is also plausible that Juror A's negative answers to the other questions were dishonest. Juror A indicated that he or she had *not* "heard anything about this

case in the news media or television or radio," though Juror A had followed and engaged on Twitter the two reporters with some of the most extensive reporting and posting on the subject. Juror A denied expressing an opinion on the guilt or innocence of Loughry, when Juror A's likes and retweet showed the opposite. In short, the Loughry matter had been discussed extensively in Juror A's online presence, and Juror A participated in that discussion, yet denied ever hearing the case discussed.

Aside from Questions 1 and 6, the district court found Juror A's answers to the voir dire questions to be accurate, but it did so only by hypertechnically parsing the questions. In the court's view, it was not inaccurate for Juror A to say that he or she had not heard the case discussed (Question 2), heard anything about the case in the media (Question 3), or expressed an opinion about Loughry's guilt or innocence (Question 5) because these questions asked only about "this case." JA 281. The district court determined that Juror A, who had indisputably been exposed to tweets about the judicial ethics investigation and the impeachment, could have interpreted "this case" to relate only to the federal indictment, *id.*, even though the impeachment proceedings discussed the indictment incessantly.

This Court has cautioned against such a hypertechnical view of voir dire. Answers that are technically true but "misleading, disingenuously technical, or otherwise indicative of an unwillingness to be forthcoming" may satisfy the first

prong of *McDonough*. *Billings v. Polk*, 441 F.3d 238, 245 n.2 (4th Cir. 2006). A legalistic construction of language cannot excuse a juror's answer to (or failure to answer) a question whose thrust should have been apparent to the juror at the time of questioning.

It is certainly *plausible*—all that is required for a hearing—that a reasonable person with Juror A's history on social media would have thought Juror A should have disclosed that history in response to Questions 3, 4, 5, and 7. Those questions probed specifically about media exposure, generally about concepts of "bias" or "prejudice" and "guilt" or "innocence," and even more broadly about anything else the Court should know "beyond what we've already covered."

> Question 3: "Have any of you read or heard anything about this case in the news media or television or radio?" JA 676.
>
> Question 4: "Is 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?" JA 687.
>
> 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 this indictment in this case?" JA 688.
>
> Question 7: "[A]re 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?" JA 714–15.

Juror A had participated in the public debate on Twitter, sided decisively against Loughry, and had specifically chosen to follow the media representatives—Bass in particular—who were heavily involved in prosecuting Loughry in the press. While it is possible that Juror A viewed the questions hypertechnically as the district court speculated, it is also plausible and nonfrivolous that Juror A understood the broad thrust of those questions but intentionally remained silent.

This is not a case where a hearing should be denied, as the district court suggested, because more questions could hypothetically have been asked during voir dire. In *Billings v. Polk*, 441 F.3d 238 (4th Cir. 2006), this Court held that "[n]othing in federal law requires a state court to hold a post-trial evidentiary hearing about matters that the defendant could have explored on *voir dire* but, whether by reason of neglect or strategy, did not." *Id.* at 245. But the juror in *Billings* was never asked for the information she failed to disclose. *Id*. at 245. Here, even the district court agreed that Juror A may have failed to answer fully at least two voir dire questions. JA 283. And despite questions asking specifically about media exposure, Juror A never affirmatively disclosed participation in the public debate on Twitter about the appropriateness of Loughry's conduct. *See Porter*, 898 F.3d at 427 ("Counsel is entitled to expect that when venire panel members take an oath to answer truthfully all questions put to them in voir dire, they will indeed tell the whole truth."); *Sluss v. Commonwealth*, 381 S.W.3d 215, 223 (Ky. 2012) (given

juror's misstatement during voir dire, counsel had no reason to explore social media use). Viewed as a whole, Juror A's voir dire answers simply failed to provide the information that they were intended to elicit and that any reasonable juror would have understood them to seek.

b. As to the second prong of *McDonough*, it is also plausible and nonfrivolous that "a correct response would have provided a valid basis for a challenge for cause." *Porter*, 898 F.3d at 430 (quoting *McDonough*, 464 U.S. at 556). The district court concluded that "[i]t is doubtful … that positive answers to th[e] questions would have warranted a dismissal for cause." JA 283. But this analysis was flawed in several respects.

First, the district court's analysis was not made under the standard for determining whether a hearing is required. The district court determined that Loughry's *McDonough* claim failed on the *merits* because "[i]t is *doubtful* … that positive answers to th[e] questions would have warranted a dismissal for cause." JA 283 (emphasis added). But that does not answer, for purposes of granting an evidentiary *hearing*, whether it is *plausible* that positive answers would have warranted for-cause dismissal.

Second, the district court's analysis did not take into account that it is plausible Juror A answered Questions 3, 4, 5, and 7 dishonestly. As the district court acknowledged, it granted a for-cause challenge to a prospective juror

"because the court found his responses to the questions posed at the bench 'indicative that he is one who comes in with an opinion that in this case [the court] believe[s] is deleterious to the defendant.'" JA 269. If Juror A had answered Questions 3, 4, 5, and 7 in the affirmative, as well as Questions 1 and 6, it is more than plausible (and certainly nonfrivolous) to believe that district court would have sustained a for-cause challenge to Juror A.

c. Finally, it is also plausible that the juror's motives for concealing pre-trial social media activity could have affected the fairness of the trial. *Conaway v. Polk*, 453 F.3d 567, 588 (4th Cir. 2006). The district court speculated, without an evidentiary hearing, that Juror A might have failed to provide honest answers because Juror A simply forgot about the social media activity. This is possible but unlikely given that more than a third of tweets that Juror A liked in the four months before trial (four out of eleven) were negative tweets about Loughry and the Supreme Court of Appeals. JA 276.

It is equally plausible, if not more so, that Juror A deliberately lied to get onto the jury. In *Williams v. Taylor*, 529 U.S. 420 (2000), the juror in question had apparently chosen to interpret a question (whether she was related to any of the witnesses) narrowly and hypertechnically, so as not to disclose that she was the former wife of a deputy sheriff on the witness list and that they had four children together. *Id*. at 440. She reasoned to herself that since they were divorced, they

were no longer "related." *Id*. She also failed to disclose that one of the prosecutors had represented her in the divorce, reasoning that because the divorce had been uncontested he did not truly "represent" her. *Id*. at 441. The Supreme Court rejected such a hypertechnical interpretation of the question and observed that the mere fact she had engaged in such a linguistic exercise suggested an intent to mislead:

> Even if [the juror] had been correct in her technical or literal interpretation of the question relating to [the deputy], her silence after the first question was asked could suggest to the finder of fact an unwillingness to be forthcoming; this in turn could bear on the veracity of her explanation for not disclosing that [the prosecutor] had been her attorney.

Id. Here, as well, it is at least plausible that Juror A's failure to affirmatively answer several voir dire questions suggests an intent to mislead either by concealing information or engaging in hypertechnical interpretation of questions so as to keep the information quiet.

There is no doubt that such an intent could affect the fairness of the trial. *See Conaway*, 453 F.3d at 588. Courts have observed time and again the dangers of a juror who lies during voir dire for the purpose of being selected for a jury.

> If the answers to the questions are willfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham. What was sought to be attained was the choice of an impartial arbiter. What happened was the intrusion of a partisan defender. If a kinsman of one of the litigants had gone into the jury room disguised as the complaisant

> juror, the effect would have been no different. The doom of mere sterility was on the trial from the beginning.

Clark v. United States, 289 U.S. 1, 11 (1933); *see Dyer v. Calderon*, 151 F.3d 970, 982 (9th Cir. 1998) ("The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent."); *United States v. Colombo*, 869 F.2d 149, 151–52 (2d Cir. 1989) (noting that juror who lies "precisely to prevent defense counsel or the magistrate from acting on information the juror believed might lead to her dismissal from the case" would exhibit personal interest "so powerful as to cause the juror to commit a serious crime" and an interest "strongly suggesting partiality"); *United States v. Scott*, 854 F.2d 697, 699 (5th Cir. 1988) (juror who lied to get on jury deprived defendant of right to fair trial); *see* 6 Wayne R. LaFave et al., Criminal Procedure § 24.9(f) (4th ed. Nov. 2018) ("Where the juror purposely lied so as to avoid being excluded from the jury, that motivation is seen as providing a foundation for establishing actual bias.").

In sum, Loughry presented a colorable, plausible, nonfrivolous claim of juror misconduct under *McDonough*, and this triggered the district court's "unflagging" duty to investigate. As in *French*, court-supervised factual investigation was both warranted and required. *Cf. Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) (noting, in context of proving intellectual disability, "[i]t is critical to remember" that petitioner was not required to prove merits of claim in order to obtain an evidentiary hearing). Whether Loughry can currently or will

ultimately prevail on his *McDonough* claim is not the question. He has put forward sufficient evidence to earn the right to sustain his allegations at an evidentiary hearing. Loughry offered the publicly available evidence of Juror A's pretrial involvement in the public debate over Loughry, and that evidence at least plausibly suggests that the answers to voir dire questions were deficient and that Juror A's actions affected the fairness of Loughry's trial. The district court's faulting of Loughry for failing to offer more evidence required him to prove too much. *See Williams*, 529 U.S. at 443 ("We should be surprised, to say the least, if a district court familiar with the standards of trial practice were to hold that in all cases diligent counsel must check public records containing personal information pertaining to each and every juror.").

B. Loughry should receive an evidentiary hearing on his actual-bias claim

Similar arguments warrant a hearing on Loughry's actual-bias claim. Actual bias "stems from a preset disposition not to decide an issue impartially." *Fields v. Brown*, 503 F.3d 755, 766 (9th Cir. 2007); *see Smith v. Phillips*, 455 U.S. 209, 215 (1982). To ultimately prevail on the merits of an actual-bias claim, and thereby obtain a new trial, the defendant "must prove that a juror, because of his or her partiality or bias, was not 'capable and willing to decide the case solely on the evidence before it.'" *Porter*, 898 F.3d at 423 (quoting *Phillips*, 455 U.S. at 217). While an actual-bias claim is distinct from a *McDonough* claim, courts have

applied the same standard to determine whether an *evidentiary hearing* is required—*i.e.*, whether the defendant has presented a plausible and nonfrivolous claim. *See Porter*, 898 F.3d at 425.

Loughry has presented a colorable, plausible, nonfrivolous claim of actual misconduct. The district court stressed that "mere knowledge of a case is insufficient itself to support a finding of actual prejudice." JA 283. But if, as appears, Juror A failed to answer numerous voir dire questions honestly, this is evidence of bias against the defendant, particularly if Juror A acted deliberately for the purpose of getting onto the jury. *Conaway*, 453 F.3d at 588; *see McDonough*, 464 U.S. at 556 (Blackmun, J., concurring) ("[I]n most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial."); *United States v. Colombo*, 869 F.2d 149, 152 (2d Cir. 1989); *Dyer v. Calderon*, 151 F.3d 970, 983 (9th Cir. 1998) (en banc); *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991); *United States v. Boney*, 977 F.2d 624, 634 (D.C. Cir. 1992) ("[F]ailing to disclose relevant information during voir dire itself raises substantial questions about the juror's possible bias.").

The district court thus erred when it denied a hearing to establish that Juror A was actually biased against the defendant. As with the *McDonough* claim, the defendant has presented sufficient evidence to warrant an evidentiary hearing.

CONCLUSION

The district court was wrong to deny Loughry a hearing. The decision on the defendant's motion for a new trial (ECF No. 134) should be reversed and the matter remanded with instructions to hold an evidentiary hearing on the juror issues.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Mr. Loughry respectfully requests oral argument because oral argument would be helpful to the Court in resolving the novel questions of law raised in this appeal.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the portions of the brief subject to that rule contains 12,395 words and therefore do not exceed the 13,000-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.

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CERTIFICATE OF SERVICE

I certify that on June 10, 2019, I electronically filed the foregoing with the Clerk of Court through the Court's CM/ECF system. The participants in the case are registered CM/ECF users, and service will be accomplished through the CM/ECF system. The sealed brief and sealed Joint Appendix–Volume II were overnighted via UPS to the following:

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