

# BIT BY BIT: BREAKING DOWN THE NINTH CIRCUIT’S FRAMEWORKS FOR JURY MISCONDUCT IN THE DIGITAL AGE

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## TABLE OF CONTENTS

INTRODUCTION .....	709
I. JURY TAMPERING, PROSAIC MISCONDUCT, AND THE <i>REMMER</i> PRESUMPTION IN THE NINTH CIRCUIT BEFORE <i>GODOY</i> .....	712
II. THE LEGAL FRAMEWORK FOR EXTRINSIC EVIDENCE CASES .....	715
III. KEY DIFFERENCES BETWEEN THE TWO FRAMEWORKS .....	721
A. <i>Constitutional Origins</i> .....	721
B. <i>Threshold Inquiry</i> .....	724
C. <i>Voir Dire of Jurors</i> .....	724
D. <i>Deference to the Trial Judge</i> .....	725
E. <i>The Reasonable Probability Standard</i> .....	725
IV. THE NINTH CIRCUIT’S ANSWER TO JURY MISCONDUCT IN THE DIGITAL AGE .....	726
CONCLUSION .....	733

## INTRODUCTION

Footnotes rarely change decades of jurisprudence.<sup>1</sup> However, through Footnote Six in *Godoy v. Spearman*<sup>2</sup> the Ninth Circuit subtly penned the first tide that may eventually wash away a jury misconduct precedent that has perplexed state and federal trial courts in the Ninth Circuit for decades. With *Godoy*, the Ninth Circuit joins two sister circuits,<sup>3</sup> thereby creating the fault line for an emerging circuit split.

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<sup>1</sup> *But see* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

<sup>2</sup> *Godoy v. Spearman*, 861 F.3d 956, 968 n.6 (9th Cir. 2017).

<sup>3</sup> *See* United States v. Lawson, 677 F.3d 629, 643–45 (4th Cir. 2012) (broadening the application of jury tampering framework to cases involving any “external influences on jurors” including information from Wikipedia that is material to the charged crime’s elements); United States v. Siegelman, 640 F.3d 1159, 1182 (11th Cir. 2011) (applying the *Remmer* presumption where jury pulled documents from court’s website and researched information about the foreperson’s obligations); *see also* Matthew Fredrickson, *Conformity in Confusion*:

Until *Godoy*, there were three categories of jury misconduct in the Ninth Circuit.<sup>4</sup> The first is jury tampering: “[A]n effort to influence the jury’s verdict by threatening or offering inducements to one or more of the jurors.”<sup>5</sup> Usually, jury tampering involves some sort of extraneous *human* contact with a juror *that affects the juror’s state of mind*.<sup>6</sup> The second is “prosaic” jury impropriety, where there is an intrusion into the sanctity of the jury, but that intrusion is relatively minor and does not involve the introduction of extrinsic evidence<sup>7</sup> to the jury.<sup>8</sup> These first two categories should be viewed as a range of *ex-parte-*

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*Applying a Common Analysis to Wikipedia-Based Jury Misconduct*, 9 WASH. J.L. TECH. & ARTS 19 (2013) (discussing *Lawson* and the application of the traditional jury tampering analysis to the introduction of information from the internet to the jury); *Trials*, 44 GEO. L.J. ANN. REV. CRIM. PROC. 565, 638–46 (2015) (combining the legal analyses for juror contact with other people and extrinsic materials).

<sup>4</sup> There are very few Ninth Circuit cases discussing the different categories of jury misconduct. In *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 907–08 (9th Cir. 2000), the Ninth Circuit noted the difference between *ex parte* contact (or prosaic), coercion (or jury tampering) and extrinsic evidence cases. Similarly and building on *Sea Hawk Seafoods*, in *United States v. Rosenthal*, 454 F.3d 943, 949 (9th Cir. 2006), the Ninth Circuit again focused on the difference between *ex parte* contact cases and extraneous information cases.

<sup>5</sup> *United States v. Dutkel*, 192 F.3d 893, 895 (9th Cir. 1999).

<sup>6</sup> *See, e.g., Tarango v. McDaniel*, 837 F.3d 936, 949 (9th Cir. 2016) (addressing jury misconduct where police officers who were victims, investigators, and witnesses in the case tailed a holdout juror on his drive to the courthouse); *United States v. Rutherford*, 371 F.3d 634, 639, 645 (9th Cir. 2004) (finding that seven to ten IRS agents sitting in first two rows behind the prosecution who “glared and stared” at the jurors could be jury tampering where jurors informed trial court that the jurors felt intimidated by the IRS); *United States v. Henley*, 238 F.3d 1111, 1116 (9th Cir. 2001) (finding that a bribery attempt was jury tampering where juror stated he was “extremely extremely scared.”); *United States v. Elias*, 269 F.3d 1003, 1021 (9th Cir. 2001) (finding that a defendant’s offhanded comment, which jurors interpreted as jokingly suggesting a bribe, was not jury tampering because jurors testified that the comment “did not preoccupy them at the time, frighten them, or distract them from focusing on the evidence.”); *United States v. Armstrong*, 654 F.2d 1328, 1331–33 (9th Cir. 1981) (finding that two calls to juror’s husband involving obscene language and telling juror to “stop hassling” defendant was insufficient for a finding of jury tampering where juror informed trial court “that she would not let the calls interfere with her duty as a juror.”).

<sup>7</sup> Throughout this Article, “extrinsic evidence” is used interchangeably with “extraneous information” because courts often use these terms synonymously.

<sup>8</sup> *See, e.g., United States v. Olano*, 507 U.S. 725, 729–30 (1993) (presence of alternate jurors during jury deliberations); *Rushen v. Spain*, 464 U.S. 114, 116 (1983) (juror’s recollection of unrelated crime committed by defendant’s associate); *Smith v. Phillips*, 455 U.S. 209, 212 (1982) (juror’s application for investigative position at District Attorney’s Office during trial); *United States v. Wilson*, No. 99-30278, 2000 WL 1028686, at \*3 (9th Cir. July 20, 2000) (juror asked two deputy Marshals “what their jobs were, and they told him they were there ‘to make sure no one got lost[,]’” which the juror interpreted as general courtroom security); *United States v. English*, 92 F.3d 909, 913–14 (9th Cir. 1996) (elevator encounter between juror and victims); *United States v. Maree*, 934 F.2d 196, 202 (9th Cir. 1991) (juror’s contact with friends who encouraged her to convict defendant); *United States v. Endicott*, 869 F.2d 452, 457 (9th Cir. 1989) (contact between juror and main defense witness where juror stated that he knows defendant is guilty); *United States v. Madrid*, 842 F.2d 1090, 1091–92 (9th Cir. 1988) (court clerk consoled juror after another juror swore at her); *United States v. Weiner*, 578 F.2d 757, 765 (9th Cir. 1978), *cert. denied*, 439 U.S. 981 (1978) (contact be-

contact misconduct, where a superficial contact at some point crosses the threshold into jury tampering.<sup>9</sup> The third category is the introduction of extrinsic evidence to the jury.<sup>10</sup> The Ninth Circuit has historically analyzed *ex parte* contacts differently from the introduction of extrinsic evidence.

The difficulty with the pre-*Godoy* misconduct categories is that categorizing the misconduct becomes messy when dealing with technological communications. For example, when there is a seemingly innocuous post from a juror to social media (whether it be a general post or a post to a friend or group of friends) that communication would most likely be considered prosaic.<sup>11</sup> If a “Facebook friend” responds to that communication—which is likely prosaic misconduct on its own—with some half-baked legal opinion, does the misconduct instantly become extraneous evidence misconduct? Or what happens if jurors “friend” each other on social media and suddenly each of the jurors’ non-juror friends are able to communicate with the jurors during a trial?<sup>12</sup> How is that misconduct to be categorized?

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tween juror and court bailiff); *United States v. Klee*, 494 F.2d 394, 396 (9th Cir. 1974) (premature discussion among the jurors themselves about the case in violation of court admonition).

<sup>9</sup> See, e.g., *Godoy v. Spearman*, 861 F.3d 956, 969–70 (9th Cir. 2017) (finding jury tampering where a juror “‘kept continuous communication’ with her ‘judge friend’ ‘about the case’ ‘[d]uring the course of the trial’ and ‘disclose[d] to the jury what he said,’” but there was no overt threat and it is unclear exactly what information was relayed to the jury).

<sup>10</sup> See, e.g., *Jeffries v. Wood*, 114 F.3d 1484, 1490–91 (9th Cir. 1997) (en banc), *overruled on other grounds by* *Gonzalez v. Arizona*, 677 F.3d 383, 390 (9th Cir. 2012) (one juror informed other jurors that defendant was convicted armed robber); *United States v. Harber*, 53 F.3d 236, 238 (9th Cir. 1995) (case agent’s report containing summary of investigation and agent’s opinion that defendants were guilty was present in jury room, despite not having been admitted into evidence); *Lawson v. Borg*, 60 F.3d 608, 610 (9th Cir. 1995) (one juror conveyed to other jurors information received out of court about defendant’s violent reputation); *Hughes v. Borg*, 898 F.2d 695, 697 (9th Cir. 1990) (police report not admitted into evidence was inadvertently given to jury); *Marino v. Vasquez*, 812 F.2d 499, 502–03 (9th Cir. 1987) (a juror conducted an out-of-court experiment with third party, and another juror made use of dictionary definition that differed from court’s instructions); *United States v. Caro-Quintero*, 769 F. Supp. 1564, 1568, 1575 (C.D. Cal. 1991) (local newspapers in jury room during deliberations).

<sup>11</sup> When there have been content-general posts, such as a juror posting on Facebook about having jury duty, *United States v. Williams*, No. 06-00079, 2014 WL 2893232, at \*3–4 (D. Haw. June 26, 2014) (“[T]he juror’s posts here give the court absolutely no reason to believe that any juror has been exposed to prejudicial or extraneous information, or otherwise violated the court’s admonitions.”), or even a more detailed “play-by-play” series of posts about a trial, *United States v. Fumo*, 655 F.3d 288, 306 (3d Cir. 2011) (finding that the defendant could not show “any prejudice, let alone substantial prejudice” from a juror posting on Twitter and Facebook over the course of months about trial), courts have generally refused to label the conduct as jury tampering.

<sup>12</sup> See Ben Holden, *Courts Must Be Prepared for Tech-Savvy Jurors*, *BALT. SUN* (June 23, 2011), [http://articles.baltimoresun.com/2011-06-23/news/bs-ed-courts-tech-20110623\\_1\\_judge-sweeney-jurors-medical-malpractice-trial](http://articles.baltimoresun.com/2011-06-23/news/bs-ed-courts-tech-20110623_1_judge-sweeney-jurors-medical-malpractice-trial) [<https://perma.cc/LQU6-73M9>] (five jurors friending each other on Facebook).

Jurors are curious and connected.<sup>13</sup> That is unlikely to change anytime soon.<sup>14</sup> These blurred lines render inconsistencies in the law, or worse, arbitrary distinctions between circumstances simply for the sake of keeping outdated frameworks alive. Footnote Six abandons the old, and recreates a framework better suited for the digital age. After all, it is within the jury box that technology has the greatest risk of disrupting trials.

Understanding the law before *Godoy* provides a critical backdrop to realizing the significance of Footnote Six. This Article begins with a review of the two types of *ex parte* misconduct—jury tampering and prosaic misconduct. Part II is a look into the extrinsic evidence framework. The third Part teases out the differences between the *ex parte* and extrinsic evidence frameworks. The final Part discusses the *Godoy* framework and aspects of the previous frameworks that are likely to be grafted onto the *Godoy* framework.

#### I. JURY TAMPERING, PROSAIC MISCONDUCT, AND THE *REMMER* PRESUMPTION IN THE NINTH CIRCUIT BEFORE *GODOY*

In a pair of cases from the 1950s, the Supreme Court established a simple framework for addressing jury tampering allegations:<sup>15</sup>

In a criminal case, any . . . tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless to the defendant.<sup>16</sup>

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<sup>13</sup> See Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1587–88 (2011) (citations omitted) (“[A] quick survey of recent cases shows instances where jurors have run Google searches on the defendant, the names of co-conspirators, and the defense lawyer. In other cases, jurors have discovered that a prosecution witness was in protective custody because of the defendant; looked up the Myspace profile of one of the teenage victims in a felony sexual abuse case; accessed the Facebook page of a defendant accused of aggravated burglary with a weapon, where he showed a picture of himself holding a gun; tried to look up the defendant’s prior criminal record on a police department website; looked up the driving record of a truck driver in a negligence action; looked up defendants’ ages and dates of birth; researched oppositional defiant disorder; researched alternative causes of death in a manslaughter case; researched the effect on blood alcohol of the drug Narcan in a vehicular homicide case; looked up a definition of ‘lividity’ and the role it might have had in fixing the time of a beating victim’s death; researched the injury of retinal detachment in a child-murder case; and determined whether a particular type of firearm could have damaged a bullet-proof vest.”).

<sup>14</sup> Daniel William Bell, Note, *Juror Misconduct and the Internet*, 38 AM. J. CRIM. L. 81, 83 (2010) (citations omitted) (“Jurors’ independent research is not a new problem. The Internet aside, jurors have looked up ambiguous terms in dictionaries, conducted substantive legal research, engaged in at-home experiments, visited accident scenes, and otherwise obtained specialized knowledge. The number of such incidents, however, seems to have dramatically increased since the advent of the Internet.”).

<sup>15</sup> See generally *Remmer v. United States*, 347 U.S. 227 (1954) (*Remmer I*); *Remmer v. United States*, 350 U.S. 377 (1956) (*Remmer II*).

<sup>16</sup> *Remmer I*, 347 U.S. at 229 (citing *Mattox v. United States*, 146 U.S. 140, 148–50 (1892)).

When originally conceived, the “*Remmer* presumption” (as the presumption has come to be known) was a “categorical directive” to lower courts to apply one approach to instances of jury tampering.<sup>17</sup> However, later Supreme Court decisions have muddied the waters.<sup>18</sup> Consequently, the federal circuit courts currently apply three different tests to juror tampering allegations: “(1) applying the *Remmer* presumption, (2) abandoning the *Remmer* presumption, and (3) determining whether or not to apply the *Remmer* presumption based on the severity of the contact.”<sup>19</sup> The Ninth Circuit follows the third approach.<sup>20</sup>

The Ninth Circuit’s severity-of-contact approach centers on the difference between “prosaic kinds of jury misconduct” and the “much more serious intrusion” of jury tampering.<sup>21</sup> Importantly, prosaic misconduct cases require the defendant to show actual prejudice, while jury tampering is presumed to be prejudicial, thereby shifting the burden to the government to rebut the presumption.<sup>22</sup> Until *Godoy*, the analytical framework underlying the presumption applied to all cases involving *ex parte* contacts, but only jury tampering triggered the presumption.<sup>23</sup>

There are two steps in the pre-*Godoy* framework. First, the defendant must make a *prima facie* showing that the intrusion into the jurors’ deliberations

<sup>17</sup> See *United States v. Dutkel*, 192 F.3d 893, 895 (9th Cir. 1999).

<sup>18</sup> See generally *United States v. Olano*, 507 U.S. 725, 741 (1993) (reversing the Ninth Circuit by finding that presence of alternate jurors during deliberations is not inherently prejudicial); *Rushen v. Spain*, 464 U.S. 114, 115, 116–21 (1983) (tersely worded per curiam decision vacating the Ninth Circuit’s holding that the *ex parte* communication between trial judge and juror at issue was not harmless error); *Smith v. Phillips*, 455 U.S. 209, 215 (1982) (stating that “allegations of juror partiality” should be addressed through a *Remmer* hearing where “the defendant has the opportunity to prove actual bias.”).

<sup>19</sup> *Fredrickson*, *supra* note 3, at 24. *But see* Anna H. Tison, *United States v. Lawson: Problems with Presumption in the Fourth Circuit*, 91 N.C. L. REV. 2244, 2251–54 (2013) (discussing different approaches taken by federal circuit courts); Eva Kerr, Note, *Prejudice, Procedure, and a Proper Presumption: Restoring the Remmer Presumption of Prejudice in Order to Protect Criminal Defendants’ Sixth Amendment Rights*, 93 IOWA L. REV. 1451, 1463–78 (2008) (opining that there is a “spectrum” of six differing approaches to the *Remmer* presumption).

<sup>20</sup> See *Dutkel*, 192 F.3d at 896 (“Having concluded that the *Remmer* presumption applies if the case involves jury tampering, we must still decide whether what occurred here amounted to tampering.”).

<sup>21</sup> *Id.* at 895; see also *United States v. Henley*, 238 F.3d 1111, 1116 (9th Cir. 2001); *United States v. Rutherford*, 371 F.3d 634, 643 (9th Cir. 2004).

<sup>22</sup> Compare *United States v. Madrid*, 842 F.2d 1090, 1093 (9th Cir. 1988) (where there is an *ex parte* contact short of jury tampering and not involving the “unauthorized submission of ‘extraneous information’ (e.g., a file or dictionary) to the jury,” “a defendant must demonstrate ‘actual prejudice’ resulting from an *ex parte* contact to receive a new trial.”), with *Dutkel*, 192 F.3d at 895 (limiting *Madrid* to a “prosaic kind[] of . . . misconduct” and requiring presumption of prejudice in jury tampering case). While there has been at least one Ninth Circuit case where conduct short of jury tampering required the *Remmer* presumption, this case was decided before *Olano* and the government rebutted the presumption of prejudice to the defendant. See *United States v. Goliday*, 468 F.2d 170, 172 (9th Cir. 1972) (government rebutted presumption where juror discussed a hypothetical with her son).

<sup>23</sup> See Kerr, *supra* note 19, at 1476.

could have “interfered with the jury’s exercise of its functions,” thereby requiring a hearing.<sup>24</sup> In determining whether a hearing should be held, the trial court must consider: (1) “the content of the allegations,” (2) “the seriousness of the alleged misconduct or bias,” and (3) “the credibility of the source.”<sup>25</sup>

The “appropriate inquiry” into the misconduct should not focus on the intent behind the misconduct, but “whether the unauthorized conduct raises a risk of influencing the verdict or had an adverse effect on the deliberations.”<sup>26</sup> “The ‘adverse effect’ standard is a low one: ‘Unless the district court finds that this showing is entirely frivolous or wholly implausible, it must order a *Remmer* hearing to explore the degree of the intrusion and likely prejudice suffered by the defendant.’”<sup>27</sup> Similarly, even in cases involving prosaic misconduct, “the district court, upon finding a reasonable possibility of prejudice, must hold a fair hearing.”<sup>28</sup> Accordingly, once a defendant makes a threshold showing of misconduct, the trial court must *sua sponte* hold an evidentiary hearing,<sup>29</sup> and a “specific request for a hearing” from the defendant is not necessary.<sup>30</sup> Therefore, most of the Ninth Circuit cases where a hearing was found to be unnecessary involved extraneous information.<sup>31</sup>

Once a defendant makes a *prima facie* showing of intrusion and a hearing is ordered, the court must obtain information from the jurors to determine the exact nature of the contact. During the hearing, the “[trial] court may not, under [Federal Rule of Evidence] 606(b), consider testimony regarding the affected juror’s mental processes in reaching the verdict.”<sup>32</sup> “However, a court can and should consider the effect of . . . improper contacts on a juror’s state of mind, a juror’s general fear and anxiety following such an incident, and any other thoughts a juror might have about the contacts or conduct at issue.”<sup>33</sup>

<sup>24</sup> *Dutkel*, 192 F.3d at 898.

<sup>25</sup> *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993); *United States v. Brande*, 329 F.3d 1173, 1176–77 (9th Cir. 2003).

<sup>26</sup> *Rutherford*, 371 F.3d at 644 (citation omitted) (internal quotation marks omitted).

<sup>27</sup> *United States v. Henley*, 238 F.3d 1111, 1115 (9th Cir. 2001).

<sup>28</sup> *United States v. Rosenthal*, 454 F.3d 943, 949 (9th Cir. 2006); *see also Brande*, 329 F.3d at 1178 (remanding for an evidentiary hearing where a court staff approached a juror and asked him whether he would be unable to find a defendant guilty of a crime). *But see United States v. Smith*, 424 F.3d 992, 1011–12 (9th Cir. 2005) (no abuse of discretion despite failure to conduct hearing though juror contacted prosecution witness because the court understood nature and scope of bias allegation).

<sup>29</sup> *Angulo*, 4 F.3d at 848.

<sup>30</sup> *United States v. Dutkel*, 192 F.3d 893, 899 (9th Cir. 1999).

<sup>31</sup> While an evidentiary hearing is not mandated every time there is an allegation of jury misconduct or bias, cases where a trial court’s decision not to hold a hearing has been upheld involve extrinsic evidence, *Smith*, 424 F.3d at 1011–12; *United States v. Saya*, 247 F.3d 929, 935 (9th Cir. 2001); *United States v. Langford*, 802 F.2d 1176, 1180 (9th Cir. 1986); *United States v. Halbert*, 712 F.2d 388, 389 (9th Cir. 1983), and not *ex parte* contacts.

<sup>32</sup> *United States v. Rutherford*, 371 F.3d 634, 644 (9th Cir. 2006) (citation omitted) (internal quotation marks omitted).

<sup>33</sup> *Id.*; *see also United States v. Henley*, 238 F.3d 1111, 1118 (9th Cir. 2001) (citation omitted) (internal quotation marks omitted) (“Similarly, the Fourth Circuit, in a well-reasoned

If the court finds that the contact rises to the level of jury tampering, i.e., the *ex parte* contact had an adverse effect on any juror, then the *Remmer* presumption requires the government to show that there is “no reasonable possibility that [any juror] was affected in his freedom of action as a juror as to [the defendant].”<sup>34</sup> Even where the contact may not rise to the level of jury tampering, if the contact was initiated by a witness or an interested party, then the *Remmer* presumption applies.<sup>35</sup> Most importantly, the standard for rebutting the presumption places “the focus on the jury’s deliberative process rather than on its verdict.”<sup>36</sup> Accordingly, the weight of the evidence at trial is not an important factor in rebutting the presumption. Where the government cannot carry its burden, the conviction must be vacated or a mistrial declared.<sup>37</sup> However, where the contact falls short of jury tampering—and should therefore be categorized as a prosaic contact—the defendant must show that the contact *actually* prejudiced him or her.<sup>38</sup> At least that was the requirement prior to *Godoy*.

## II. THE LEGAL FRAMEWORK FOR EXTRINSIC EVIDENCE CASES

In the digital age, jury misconduct is more likely to come in the form of extrinsic evidence that is posted to or obtained from the internet rather than through direct human contact.<sup>39</sup> When extraneous information is *produced by* the jury, such as a juror posting on a social media website, the misconduct is more likely to be categorized as a prosaic impropriety.<sup>40</sup> Conversely, when the

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opinion that more squarely confronts the interplay between the *Remmer* presumption and Rule 606(b), has distinguished between testimony regarding the affected juror’s mental processes in reaching the verdict—which is barred by Rule 606(b)—and testimony regarding the juror’s more general fear and anxiety following a tampering incident, which is admissible for purposes of determining whether there is a reasonable possibility that the extraneous contact affected the verdict.”).

<sup>34</sup> *Dutkel*, 192 F.3d at 899.

<sup>35</sup> *Caliendo v. Warden of Cal. Men’s Colony*, 365 F.3d 691, 696–98 (9th Cir. 2004) (citation omitted) (stating in a case where a detective who provided crucial testimony had a twenty-minute conversation, factually unrelated to the trial, with three jurors during a recess, “[w]e and other circuits have held that *Mattox* established a bright-line rule: Any unauthorized communication between a juror and a witness or interested party is presumptively prejudicial.”).

<sup>36</sup> *Henley*, 238 F.3d at 1118.

<sup>37</sup> *Id.* at 1117.

<sup>38</sup> *United States v. Rosenthal*, 454 F.3d 943, 949 (9th Cir. 2006) (citing *United States v. Madrid*, 842 F.2d 1090, 1093 (9th Cir. 1988)).

<sup>39</sup> See Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 2 (2012) (“The explosive growth of social [media] has placed enormous pressure on one of the most fundamental of American institutions—the impartial jury.”).

<sup>40</sup> See, e.g., *United States v. Williams*, No. 06-00079, 2014 WL 2893232, at \*3–4 (D. Haw. June 26, 2014) (juror posting on Facebook that juror had jury duty gives “the court absolutely no reason to believe that any juror has been exposed to prejudicial or extraneous information, or otherwise violated the court’s admonitions.”).

extraneous information is *introduced to* the jury, Ninth Circuit jurisprudence requires a legal framework that is wholly distinct from the *Remmer* framework.

There has been understandable confusion concerning when to apply the different Ninth Circuit frameworks. Early Ninth Circuit jurisprudence cited and relied on *Remmer* when addressing extraneous information misconduct,<sup>41</sup> and the Ninth Circuit has applied *Remmer* to an extrinsic evidence case as recently as 2012.<sup>42</sup> Early and outlying Ninth Circuit cases aside, for many decades, until *Godoy*, there has been an unmistakable divergence between the legal frameworks applied to *ex parte* contact cases and extrinsic evidence cases.

In the Ninth Circuit, when a court is informed that a juror or jurors are exposed to extrinsic evidence, the first step for a trial court is to determine whether to hold an evidentiary hearing to investigate the nature and scope of the jury's exposure to extrinsic evidence.<sup>43</sup> Extraneous evidence is defined as information that enters "the jury room through an external, prohibited route," and therefore is not "part of the trial."<sup>44</sup> Information derived from a juror's intrinsic human experience is not considered extraneous evidence.<sup>45</sup> While at one point an evidentiary hearing was mandated "upon learning of a possible incident of juror misconduct,"<sup>46</sup> and "although it is usually preferable to hold an

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<sup>41</sup> *United States v. Littlefield*, 752 F.2d 1429, 1431–32 (9th Cir. 1985) (recognizing the continued vitality of *Remmer* in a case involving extraneous information); *United States v. Bagnariol*, 665 F.2d 877, 883–86 (9th Cir. 1981) (per curiam) (citing *Remmer I* in a case where a juror researched extrinsic material from a library). Confusingly, while not expressly applying *Remmer*, another Ninth Circuit decision in an "improper influence" case involving a conversation between a juror and the juror's attorney-friend states that a new trial is warranted in that case because "[n]ot only is there a 'reasonable possibility of prejudice,' but the government has not succeeded in rebutting the presumption that a new trial is warranted." *Rosenthal*, 454 F.3d at 950.

<sup>42</sup> *Tong Xiong v. Felker*, 681 F.3d 1067, 1075–78 (9th Cir. 2012).

<sup>43</sup> *United States v. Lopez-Martinez*, 543 F.3d 509, 517 (9th Cir. 2008) ("The threshold question . . . is a factual one: whether the jury obtained or used evidence that was not introduced at the trial."); *United States v. Langford*, 802 F.2d 1176, 1180 (9th Cir. 1986) (citation omitted) (internal quotation marks omitted) (stating that "where a trial court learns of a possible incident of jury misconduct, it is preferable to hold an evidentiary hearing to determine the precise nature of the extraneous information, not every allegation that extraneous information has reached the jury requires a full-dress hearing.").

<sup>44</sup> *United States v. Bussell*, 414 F.3d 1048, 1055 (9th Cir. 2005) (citation omitted) (internal quotation marks omitted). In *Bussell*, a supplemental jury instruction about the absence of a co-defendant who had died gave rise to jury speculation about the reason for his absence. *Id.* at 1053. The speculation was not considered extraneous information. *Id.* at 1055. In *United States v. Gomez-Gomez*, No. 93-10150, 1994 WL 168255, at \*3 (9th Cir. May 4, 1994), the Ninth Circuit held that the jury's use of a magnifying glass to look at fingerprints "is clearly not extrinsic evidence."

<sup>45</sup> *Fields v. Brown*, 503 F.3d 755, 779 (9th Cir. 2007) (internal quotation marks omitted) (inquiry "requires a reviewing court to determine whether the particular materials that a juror brought into the jury room are extraneous materials, or are merely the kind of common knowledge which most jurors are presumed to possess.").

<sup>46</sup> *Bagnariol*, 665 F.2d at 885.

evidentiary hearing,”<sup>47</sup> the trial court ultimately has discretion to decide whether to grant a hearing.<sup>48</sup> Similar to *ex parte* contact/coercion cases, trial courts must consider: (1) “the content of the allegations,” (2) “the seriousness of the alleged misconduct or bias,” and (3) “the credibility of the source”<sup>49</sup> in making this determination. A hearing is not necessary where the court “knows the exact scope and nature of the extraneous information,”<sup>50</sup> finds the information to be completely without credibility,<sup>51</sup> or finds the information to be *de minimis*.<sup>52</sup>

Once the court decides to hold an evidentiary hearing, the next step is to answer the threshold question of whether the jury “used evidence that was not introduced at the trial.”<sup>53</sup> If there is no proof that any juror used the extraneous

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<sup>47</sup> *United States v. Saya*, 247 F.3d 929, 935 (9th Cir. 2001) (citation omitted) (internal quotation marks omitted) (alteration omitted); *United States v. McChesney*, 613 F. App’x 556, 560 (9th Cir. 2015) (per curiam) (internal quotation marks omitted) (alteration omitted) (reversing decision not to hold an evidentiary hearing where defendant submitted an “affidavit from a woman who asserted that, as she was leaving the courthouse and turning in her badge . . . she heard the ex-girlfriend state in a loud manner in front of at least three jurors in the lobby that McChesney had a criminal past and that he would do anything he had to do for money.”).

<sup>48</sup> *United States v. Halbert*, 712 F.2d 388, 389 (9th Cir. 1983).

<sup>49</sup> *United States v. Montes*, 628 F.3d 1183, 1187–88 (9th Cir. 2011) (citation omitted) (internal quotation marks omitted).

<sup>50</sup> *Saya*, 247 F.3d at 934–35 (citation omitted) (internal quotation marks omitted) (alteration omitted); *United States v. Langford*, 802 F.2d 1176, 1180 (9th Cir. 1986) (“[N]ot every allegation that extraneous information has reached the jury requires a full-dress hearing.”); *Halbert*, 712 F.2d at 389 (“Although it is usually preferable to hold such a hearing, in this instance, the court knew the exact scope and nature of the newspaper article and the extraneous information.”); *see also, e.g., United States v. Grullon*, 545 F.3d 93, 97–98 (1st Cir. 2008) (no evidentiary hearing necessary after joke printed from website disparaging lawyers was found in jury room).

<sup>51</sup> *United States v. Gomez-Gomez*, No. 93-10150, 1994 WL 168255, at \*3 (9th Cir. May 4, 1994) (citation omitted) (internal quotation marks omitted) (“If the court is able to determine without a hearing that the allegations are without credibility or that the allegations if true would not warrant a new trial, an evidentiary hearing is not necessary.”); *United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991) (“An evidentiary hearing must be granted unless the alleged misconduct could not have affected the verdict or the district court can determine from the record before it that the allegations are without credibility.”).

<sup>52</sup> *United States v. Christensen*, 624 F. App’x 466, 483 (9th Cir. 2015) (“[A] single comment overheard in leaving the courtroom or a passing mention of a website report containing information the jurors can observe themselves in open court, does not persuade us that the decision not to hold an evidentiary hearing was reversible error.”). While the Ninth Circuit has not precisely defined *de minimis* information, “[a] communication is . . . not *de minimis*, if it raises a risk of influencing the verdict.” *Caliendo v. Warden of Cal. Men’s Colony*, 365 F.3d 691, 697 (9th Cir. 2004).

<sup>53</sup> *United States v. Lopez-Martinez*, 543 F.3d 509, 517 (9th Cir. 2008) (“The threshold question we must address, then, is a factual one: whether the jury obtained or used evidence that was not introduced at the trial. If, as the deliberating jurors all testified, none of them even saw the paper with the alternative jury instructions on it, it is logically impossible that this extrinsic evidence affected their verdict.”); *United States v. Plunk*, 153 F.3d 1011, 1025 n.12 (9th Cir. 1998) (“At the risk of belaboring the obvious, we pause to emphasize that when a defendant challenges a juror’s reception of extrinsic information, he must, as a threshold matter, make a showing that the juror actually received—*i.e.*, either saw or heard—the in-

material, then the inquiry ends.<sup>54</sup> During questioning, pursuant to Federal Rule of Evidence 606(b):

[A] juror may testify as to “whether extraneous prejudicial information was improperly brought to the jury’s attention,” but not as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror’s mental processes in connection therewith.<sup>55</sup>

If the court finds that extraneous information has reached *any* juror, “the inquiry must then focus on whether there is a reasonable possibility that the extraneous information could have affected the verdict.”<sup>56</sup> “This inquiry is an objective one: [the court] need not ascertain whether the extraneous information actually influenced any specific juror.”<sup>57</sup> This is the third step in the framework.

The crux of the “reasonable possibility” standard in this framework is the government’s burden of persuasion. In place of a presumption of prejudice to the defendant, “[t]he government has the burden of showing beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.”<sup>58</sup> Based on

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formation.”), *abrogated on other grounds by* United States v. Hankey, 203 F.3d 1160, 1169 n.7 (9th Cir. 2000).

<sup>54</sup> *Plunk*, 153 F.3d at 1025 (citations omitted) (internal quotation marks omitted) (“Because none of the jurors in the instant case ever actually viewed the definition of the word organizer, the extrinsic evidence . . . was never actually considered, or obtained or used by the jury. Consequently, by definition, there could be no reasonable possibility that the evidence affected the jury’s deliberations.”). *But see* Dickson v. Sullivan, 849 F.2d 403, 406 (9th Cir. 1988) (“In *Vasquez*, . . . [w]e held that the *possibility* that at least one juror had been exposed to some of the more prejudicial information in [a court file], such as evidence that the appellant had been previously prosecuted for a similar offense, was too great for the court to conclude that the verdict had not been affected by the extraneous information.”); United States v. Vasquez, 597 F.2d 192, 194 (9th Cir. 1979) (although no jurors remembered reading about the defendant’s prior conviction, because “[t]he possibilities are too great that at least one juror realized that the [defendant] had been previously prosecuted,” other jurors discovered the defendant was denied a motion to dismiss and one juror discovered that the court had refused defendant’s proposed jury instructions, the defendant was granted a new trial). Later Ninth Circuit cases have backed away from *Vasquez* and *Dickson* on this point, therefore outside of extrinsic evidence of a defendant’s prior conviction, unless the information actually reaches a juror, the inquiry should end.

<sup>55</sup> United States v. Montes, 628 F.3d 1183, 1188 (9th Cir. 2011) (emphasis omitted) (citation omitted); Sassounian v. Roe, 230 F.3d 1097, 1109 (9th Cir. 2000) (“Therefore, although [the court] may consider testimony concerning whether the improper evidence was considered, we may not consider the jurors’ testimony about the subjective impact of the improperly admitted evidence.”).

<sup>56</sup> *Montes*, 628 F.3d at 1187 (citation omitted) (internal quotation marks omitted); United States v. Keating, 147 F.3d 895, 901 (9th Cir. 1998) (citation omitted) (internal quotation marks omitted) (“The fact that at least one juror . . . received extrinsic evidence is sufficient to trigger the reasonable possibility standard of *Dickson* and *Vasquez*.”).

<sup>57</sup> *Montes*, 628 F.3d at 1187 (citation omitted) (internal quotation marks omitted).

<sup>58</sup> *Keating*, 147 F.3d at 902 (citation omitted).

*Dickson v. Sullivan*,<sup>59</sup> and *Jeffries v. Wood*,<sup>60</sup> there are multiple factors that the court must consider when determining whether the government has met this burden.<sup>61</sup> Courts must consider: (1) “whether the prejudicial statement was ambiguously phrased”; (2) “whether the extraneous information was otherwise admissible or merely cumulative of other evidence adduced at trial”; (3) “whether a curative instruction was given or some other step taken to ameliorate the prejudice”; (4) “the trial context”; and (5) “whether the statement was insufficiently prejudicial given the issues and evidence in the case.”<sup>62</sup> When considering the “trial context,” courts must take into account:

[W]hether the material was actually received, and if so, how; the length of time it was available to the jury; the extent to which the juror discussed and considered it; [and] whether the material was introduced before a verdict was reached, and if so at what point in the deliberations.<sup>63</sup>

Courts may also consider “any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict.”<sup>64</sup> After applying the factors to the totality of the circumstances, a mistrial or new trial must be declared where there is a reasonable “possibility that the extrinsic material could have affected the verdict.”<sup>65</sup>

While no single factor is dispositive,<sup>66</sup> the focus of the inquiry is on the *nature and materiality* of the extraneous information in relation to the key issues in the case,<sup>67</sup> and *not the source* of the information.<sup>68</sup> For this reason, extraneous information that has led to new trials includes the following: prior convictions

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<sup>59</sup> *Dickson*, 849 F.2d at 406.

<sup>60</sup> *Jeffries v. Wood*, 114 F.3d 1484, 1491–92 (9th Cir. 1997), *overruled on other grounds by* *Gonzalez v. Arizona*, 677 F.3d 383, 389 (9th Cir. 2012).

<sup>61</sup> *Jeffries*, 114 F.3d at 1491–92; *Dickson*, 849 F.2d at 406.

<sup>62</sup> *Jeffries*, 114 F.3d at 1491–92 (citation omitted).

<sup>63</sup> *Dickson*, 849 F.2d at 406 (citation omitted) (internal numbering omitted).

<sup>64</sup> *Id.* (internal numbering omitted).

<sup>65</sup> *United States v. Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981) (citation omitted).

<sup>66</sup> *Dickson*, 849 F.2d at 406.

<sup>67</sup> *United States v. Montes*, 628 F.3d 1183, 1189 (9th Cir. 2011) (internal quotation marks omitted) (“Our cases have stressed the nature of the extraneous information when determining the possibility that the information affected the verdict.”); *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995) (citation omitted) (“When assessing prejudice claims in juror misconduct cases, this court also places great weight on the nature of the extrinsic evidence introduced.”); *Dickson*, 849 F.2d at 406–07 (stressing the importance of the nature of the extraneous information).

<sup>68</sup> *Jeffries v. Wood*, 114 F.3d 1484, 1490 (9th Cir. 1997) (finding “no defensible distinction to be made based solely on the *source* of the information,” and stating that the “appropriate focus should be on the nature of the information itself.”).

of the defendant;<sup>69</sup> new criminal activity by the defendant against a witness;<sup>70</sup> medical, dictionary, or encyclopedia definitions that are materially contrary to the jury instructions;<sup>71</sup> a cover magazine article describing the very scheme charged as a growing national concern and deploring the light sentences frequently associated with the schemes;<sup>72</sup> information about a phone call taking credit for killing the victim that directly relates to motive;<sup>73</sup> information from an attorney-friend of a juror about the law of the case;<sup>74</sup> a juror's experiment testing whether she could fire a gun in a particular position,<sup>75</sup> and jurors hearing that the defendant "was very violent" and "had a violent temper" in a violent crime case.<sup>76</sup>

In contrast, extraneous information that has *not* led to a new trial includes the following: information that the government's witnesses did not receive immunity;<sup>77</sup> information that a fictional company created by the government was not listed in business publications;<sup>78</sup> immaterial or non-contrary dictionary definitions;<sup>79</sup> a prior incident where the defendant and his girlfriend were victims of a shooting;<sup>80</sup> in a marijuana possession case, an opinion by a juror who witnessed the defendant around the time of the crime that he looked like a fat old hippie who probably smoked marijuana;<sup>81</sup> jurors seeing a key defense witnesses look and speak in a "clear and coherent manner," which was contrary to his in-court testimony;<sup>82</sup> potential juror's remark that the defendant pleaded guilty at one time but then withdrew the guilty plea;<sup>83</sup> disclosure by one juror to several other members of the jury that the juror had just discovered that the defense's expert witness had misdiagnosed his wife with cancer and performed an unnec-

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<sup>69</sup> *United States v. Keating*, 147 F.3d 895, 903–04 (9th Cir. 1998); *Jeffries*, 114 F.3d at 1484, 1488; *United States v. Vasquez*, 597 F.2d 192, 194 (9th Cir. 1979). *But see* *United States v. Mills*, 280 F.3d 915, 922 (9th Cir. 2002) (no reasonable probability of affecting the verdict where prior conviction of defendant cumulative of information already produced and speculative as to whether the information reached the jury).

<sup>70</sup> *United States v. Rasmussen*, No. 99-30008, 1999 WL 1206842, at \*2 (9th Cir. Dec. 15, 1999).

<sup>71</sup> *Gibson v. Clanon*, 633 F.2d 851, 853 (9th Cir. 1980); *Marino v. Vasquez*, 812 F.2d 499, 505–06 (9th Cir. 1987).

<sup>72</sup> *United States v. Littlefield*, 752 F.2d 1429, 1430 (9th Cir. 1985).

<sup>73</sup> *Sassounian v. Roe*, 230 F.3d 1097, 1109 (9th Cir. 2000).

<sup>74</sup> *United States v. Rosenthal*, 454 F.3d 943, 950 (9th Cir. 2006).

<sup>75</sup> *Marino*, 812 F.2d at 503.

<sup>76</sup> *Lawson v. Borg*, 60 F.3d 608, 613 (9th Cir. 1995).

<sup>77</sup> *United States v. Bagley*, 641 F.2d 1235, 1241 (9th Cir. 1981).

<sup>78</sup> *United States v. Bagnariol*, 665 F.2d 877, 883 (9th Cir. 1981) (per curiam).

<sup>79</sup> *United States v. Kupau*, 781 F.2d 740, 744–45 (9th Cir. 1986); *United States v. Steele*, 785 F.2d 743, 747 (9th Cir. 1986).

<sup>80</sup> *United States v. Saya*, 247 F.3d 929, 938 (9th Cir. 2001).

<sup>81</sup> *United States v. Mills*, 280 F.3d 915, 916 (9th Cir. 2002).

<sup>82</sup> *Tong Xiong v. Felker*, 681 F.3d 1067, 1072 (9th Cir. 2012).

<sup>83</sup> *Thompson v. Borg*, 74 F.3d 1571, 1573 (9th Cir. 1996) *cert. denied*, 519 U.S. 889 (1996).

essary hysterectomy;<sup>84</sup> and jurors seeing a defendant emerge from the office of a parole officer who had testified at trial, thereby leading to the inference that defendant was under supervision.<sup>85</sup>

### III. KEY DIFFERENCES BETWEEN THE TWO FRAMEWORKS

#### A. *Constitutional Origins*

Based on the difference in their constitutional origins, tampering and extraneous information cases come from two distinct jurisprudential lines. What has at times confused scholars and courts is that these lines intersected in *Remmer I*.<sup>86</sup> Long before *Remmer I* was decided, the Supreme Court took up the issue of the introduction of extraneous information to the jury. In *Mattox v. United States*, a bailiff relayed extraneous information to the jury about the defendant killing other victims not discussed in the court proceedings.<sup>87</sup> Although no prejudice was shown, the Supreme Court presumed prejudice and reversed the conviction.<sup>88</sup> *Remmer I* relied heavily on *Mattox* in crafting the presumption of prejudice, but not in applying the presumption.<sup>89</sup> The *Remmer I* and *Mattox* decisions were squarely based on the right to an impartial jury.<sup>90</sup>

Less than ten years after *Remmer I* and *II*, the Supreme Court granted *certiorari* in a case involving extraneous information and *ex parte* contacts. In *Turner v. Louisiana*, a sequestered jury was continually in the presence of deputy sheriffs, two of whom had testified at trial about the defendant's confession to murder.<sup>91</sup> While there was no actual showing of extraneous information concerning the trial being produced to the jurors by the deputies, the deputies nonetheless conversed with the jurors, ate with jurors, did errands for them, and

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<sup>84</sup> *United States v. Namihias*, No. 96-50615, 1997 WL 801450, at \*1 (9th Cir. Dec. 19, 1997).

<sup>85</sup> *United States v. Langford*, 802 F.2d 1176, 1180 (9th Cir. 1986).

<sup>86</sup> The Supreme Court created the legal presumption in *Remmer v. United States (Remmer I)*, 347 U.S. 227, 229–30 (1954) and remanded to the lower courts for a hearing and application of the presumption. After a hearing in the trial court, the case ended up back in the Supreme Court where the Court held that the hearing was too limited in scope and remanded for a new trial. *Remmer v. United States (Remmer II)*, 350 U.S. 377, 382 (1956).

<sup>87</sup> *Mattox v. United States*, 146 U.S. 140, 151 (1892).

<sup>88</sup> *Id.* Similarly, the next year in *Bates v. Preble*, 151 U.S. 149, 157–58 (1893), the Supreme Court held it to be reversible error where the trial judge allowed an entire book to go into the jury room without sealing off the pages not admitted into evidence, even though it was not shown that any of the jurors had actually read the inadmissible pages.

<sup>89</sup> Compare *Remmer I*, 347 U.S. at 229 (citing *Mattox*, 146 U.S. 140, for the proposition that the “presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.”), with *Remmer II*, 350 U.S. at 381 (not citing *Mattox*, 146 U.S. 140, when applying the presumption to the facts).

<sup>90</sup> *Mattox*, 146 U.S. at 149–50; *Remmer II*, 350 U.S. at 382.

<sup>91</sup> *Turner v. Louisiana*, 379 U.S. 466, 467–68 (1965).

drove them to restaurants for meals and to their lodgings each night.<sup>92</sup> After being convicted and sentenced to death, Turner challenged his conviction to the Louisiana Supreme Court, where he lost, on the ground that the conduct of the trial had violated the Fourteenth Amendment.<sup>93</sup> Turner's claim recited in detail the deputies' "fraternization with the jurors throughout the trial" and argued that the presence of the state's witnesses with the jury, "whether they be deputies or not," was "prejudicial to the constitutional rights of Defendant and violative of due process of law."<sup>94</sup> The Supreme Court reversed the conviction in light of "the extreme prejudice inherent in this continual association," and, while the Court initially framed the constitutional underpinning of the decision within the contours of the right to an impartial jury, the reasoning unequivocally revolved around the right of confrontation.<sup>95</sup>

A year later, in *Parker v. Gladden*, the Supreme Court again addressed the issue of extraneous information being delivered to a jury.<sup>96</sup> In *Parker*, the defendant was tried and convicted for second degree murder.<sup>97</sup> After Parker's direct appeals were denied, his wife was able to get tape recordings from jurors about a bailiff who remarked to a juror that the defendant was guilty and that if there was an error in finding the defendant guilty, the Supreme Court would correct it.<sup>98</sup> Based on these tape recordings, Parker filed a post-conviction petition in the trial court and the trial court held that the comments were "prejudicial" and "materially affected" Parker's rights.<sup>99</sup> The Supreme Court of Oregon reversed finding that "the bailiff's misconduct did not deprive [Parker] of a constitutionally correct trial."<sup>100</sup> The Supreme Court reversed the conviction, with the bulk of its reasoning relying and expanding on the confrontation language from *Turner*.<sup>101</sup>

Of note, neither of the *Remmer* cases nor *Mattox* are mentioned in *Turner* or *Parker*. More importantly, the constitutional fulcrum for extraneous information cases derives not from the Sixth Amendment right to an impartial jury, but from the Sixth Amendment right of confrontation. This titanic constitution-

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<sup>92</sup> *Id.* at 468.

<sup>93</sup> *Id.* at 471.

<sup>94</sup> *Id.* at 471 n.7.

<sup>95</sup> *Id.* at 472–73. ("In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.")

<sup>96</sup> *Parker v. Gladden*, 385 U.S. 363, 363–64 (1966).

<sup>97</sup> *Id.* at 363.

<sup>98</sup> *Id.* at 363–64.

<sup>99</sup> *Id.* at 364.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 364–65 (citation omitted) ("We have followed the 'undeviating rule,' that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial.").

al difference is well settled in Ninth Circuit jurisprudence<sup>102</sup> and represents a key distinction between jury tampering/prosaic misconduct cases and extraneous information cases.<sup>103</sup> Indeed, the reasoning of extraneous information cases often focuses on confrontation.<sup>104</sup>

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<sup>102</sup> *Fields v. Brown*, 503 F.3d 755, 779 (9th Cir. 2007) (“The core principle is well-settled: evidence developed against a defendant must come from the witness stand.”); *Sassounian v. Roe*, 230 F.3d 1097, 1108 (9th Cir. 2000) (“A juror’s communication of extrinsic facts implicates the Confrontation Clause.”).

<sup>103</sup> *Compare* *United States v. Dutkel*, 192 F.3d 893, 894 (9th Cir. 1999) (“Because jury tampering cuts to the heart of the Sixth Amendment’s promise of a fair trial, we treat jury tampering cases very differently from other cases of jury misconduct.”), *with* *Gibson v. Clanon*, 633 F.2d 851, 854 (9th Cir. 1980) (“[D]ecisions have noted that when a jury considers facts that have not been introduced in evidence, a defendant has effectively lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to jury consideration of the extraneous evidence. In one sense the violation may be more serious than where these rights are denied at some other stage of the proceedings because the defendant may have no idea what new evidence has been considered. It is impossible to offer evidence to rebut it, to offer a curative instruction, to discuss its significance in argument to the jury, or to take other tactical steps that might ameliorate its impact.”), *and* *United States v. Keating*, 147 F.3d 895, 900 (9th Cir. 1998) (citation omitted) (internal quotation marks omitted) (stating that the standard for extrinsic evidence cases is “well-established” and “derives from one of the most fundamental tenets of our justice system: that a defendant’s conviction may be based only on the evidence presented during the trial.”).

<sup>104</sup> *See, e.g., Keating*, 147 F.3d at 899–900 (alteration omitted) (citation omitted) (internal quotation marks omitted) (“[J]uror exposure to extrinsic evidence during trial implicates wholly different concerns than those at issue in pretrial knowledge cases.” Thus “[e]ven if the defendants tacitly approved jurors with pretrial knowledge, they did not waive their Sixth Amendment rights to confront those who testify against them and to conduct cross-examination.”); *Jeffries v. Wood*, 114 F.3d 1484, 1490 (9th Cir. 1997) (en banc) (citation omitted) (stating that the source of extraneous information was irrelevant because “[w]hen a juror communicates objective extrinsic facts regarding the defendant or the alleged crimes to other jurors, the juror becomes an unsworn witness within the meaning of the Confrontation Clause. That the unsworn testimony comes from a juror rather than a court official does not diminish the scope of a defendant’s rights under the Sixth Amendment.”); *Dickson v. Sullivan*, 849 F.2d 403, 408 (9th Cir. 1988) (concluding that the jury instruction was insufficient to rebut prejudice stemming from extraneous information where “the defendant was deprived of the opportunity to rebut the evidence.”); *Marino v. Vasquez*, 812 F.2d 499, 506 (9th Cir. 1987) (“Nor do we find merit in the State’s argument that the out-of-court experiment could not have prejudiced the petitioner as any conclusions drawn from that experiment could not have differed materially from conclusions drawn from the authorized experiment performed in the jury room at the behest of the parties and the court. The State’s argument ignores the participation in the out-of-court experiment of a nonjuror, whom the defense could neither confront nor cross-examine.”); *United States v. Bagley*, 641 F.2d 1235, 1241 (9th Cir. 1980) (citation omitted) (“The dangers generally posed by consideration of extrajudicial information, which the *Gibson* court emphasized, are not present here. First, it was noted that because a defendant has no idea what information the jury may have considered, he has no opportunity to offer evidence in rebuttal or to discuss its significance in argument to the jury. In this case the defendant knew precisely what evidence the jury had considered before it rendered its verdict, for his trial counsel had concurred in presenting the information to the jury.”).

What will be intriguing in cases after *Godoy* is whether the testimonial nature of any outside contact will become an established factor in determining whether the *Remmer* presumption is triggered.<sup>105</sup>

### B. Threshold Inquiry

Before *Godoy*, in both contact and extrinsic evidence cases, to determine whether a hearing should be held, courts had to consider “the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source.”<sup>106</sup> However, the threshold inquiry differs between the two categories of misconduct. In extraneous information cases, the threshold question is whether the jury “used evidence that was not introduced at the trial.”<sup>107</sup> If the evidence was not processed by any members of the jury, then the inquiry is over.<sup>108</sup> In contrast, where an *ex parte* contact is brought to the court’s attention, the threshold inquiry is whether the contact *could* have affected a juror or jurors’ mental state.<sup>109</sup> The burden is squarely on the defendant to make this *prima facie* showing.<sup>110</sup> There is no such *prima facie* showing requirement with extrinsic evidence cases. If the contact is *de minimis*—meaning that the contact could have little to no effect on a juror’s mental state—then the defendant cannot make the requisite showing and the inquiry is over.<sup>111</sup>

### C. Voir Dire of Jurors

The *voir dire* of jurors—the process by which the court questions the jury about the contact—is distinct between the frameworks. Where *ex parte* contacts are implicated, the inquiry centers on the effect of the contact on a juror or ju-

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<sup>105</sup> See *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (Sixth Amendment forbids admission of testimonial evidence without an opportunity for the defendant to confront the witness).

<sup>106</sup> *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993); see also *United States v. Montes*, 628 F.3d 1183, 1188–89 (9th Cir. 2011); *United States v. Brande*, 329 F.3d 1173, 1176–77 (9th Cir. 2003).

<sup>107</sup> *United States v. Lopez-Martinez*, 543 F.3d 509, 517 (9th Cir. 2008) (“The threshold question we must address, then, is a factual one: whether the jury obtained or used evidence that was not introduced at the trial. If, as the deliberating jurors all testified, none of them even saw the paper with the alternative jury instructions on it, it is logically impossible that this extrinsic evidence affected their verdict.”).

<sup>108</sup> *Id.* at 519.

<sup>109</sup> *United States v. Dutkel*, 192 F.3d 893, 898 (9th Cir. 1999) (“The first question the district court should have resolved is whether Dutkel made a *prima facie* showing that Ellis and Mumphrey’s interactions with Johnson could have interfered with the jury’s exercise of its functions vis-a-vis Dutkel.”).

<sup>110</sup> *Id.* at 897.

<sup>111</sup> *Caliendo v. Warden of Cal. Men’s Colony*, 365 F.3d 691, 696 (9th Cir. 2004) (“Given this reality, if an unauthorized communication with a juror is *de minimis*, the defendant must show that the communication could have influenced the verdict before the burden of proof shifts to the prosecution.”).

rors' mental state.<sup>112</sup> The objective nature of the contact is less important than how the contact subjectively affects the jury.<sup>113</sup> On the other hand, in extrinsic evidence cases, the *voir dire* should focus on ascertaining the nature of the information to determine the information's materiality in light of the circumstances of the case.<sup>114</sup> Thus, "[a] trial judge should not investigate the subjective effects of any extrinsic evidence upon the jurors."<sup>115</sup>

#### D. Deference to the Trial Judge

In extrinsic evidence cases, the Ninth Circuit has described the deference owed to a trial judge's impression about the impact of the extraneous evidence as a "special deference,"<sup>116</sup> which "deserves substantial weight."<sup>117</sup> Where *ex parte* contacts are involved, however, the Ninth Circuit has been less vocal about the discretion afforded a trial court.<sup>118</sup>

#### E. The Reasonable Probability Standard

At the core of both *ex parte* contact and extrinsic evidence misconduct cases is the reasonable probability standard. However, the standard operates very differently in each framework. With contact cases, due to the presumption of prejudice, the government must convince the court of a negative, that "there is no reasonable possibility that the deliberations . . . were affected by the tampering."<sup>119</sup> Importantly, the weight of the evidence is not a factor for consideration.<sup>120</sup> Conversely, in extraneous information cases, "if there is a reasonable possibility that the extrinsic material *could* have affected the verdict," then a

<sup>112</sup> *Dutkel*, 192 F.3d at 899.

<sup>113</sup> *Id.* at 897.

<sup>114</sup> *Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir. 1980) (presenting as a key part of the inquiry a "review [of] the record to determine the effect, if any, of the extrinsic evidence considered by the jury."); *see also* *Marino v. Vasquez*, 812 F.2d 499, 506 (9th Cir. 1987) (citation omitted) (stating that "reversible error commonly occurs where there is a direct and rational connection between the extrinsic material and a prejudicial jury conclusion, and where the misconduct relates directly to a material aspect of the case.").

<sup>115</sup> *Dickson v. Sullivan*, 849 F.2d 403, 406 (9th Cir. 1988) (citation omitted) (internal quotation marks omitted) (alteration omitted).

<sup>116</sup> *United States v. Mills*, 280 F.3d 915, 922 (9th Cir. 2002).

<sup>117</sup> *Dickson*, 849 F.2d at 405.

<sup>118</sup> *United States v. Simtob*, 485 F.3d 1058, 1064 (9th Cir. 2007) (stating that "[a] court has 'considerable discretion' in determining" the nature of the *ex parte* contact, but not mentioning deference to the trial court's conclusions); *United States v. Armstrong*, 654 F.2d 1328, 1332 (9th Cir. 1981) (describing the deference as "some deference.").

<sup>119</sup> *United States v. Dutkel*, 192 F.3d 893, 899 (9th Cir. 1999) ("A *Remmer* hearing must begin with a strong presumption that the jury tampering affected the jury's decision-making as to *Dutkel*. The 'burden rests heavily upon the Government' to prove otherwise.").

<sup>120</sup> *Id.* ("In order to grant relief, the court need not conclude that the verdict as to *Dutkel* would have been different but for the jury tampering, but rather that the course of deliberations was materially affected by the intrusion.").

new trial is warranted.<sup>121</sup> Accordingly, the defendant must convince the court of a positive, namely that there *could* have been an effect on the verdict. The prosecution then has the opportunity to show harmlessness beyond a reasonable doubt through application of the *Dickson/Jeffries* factors.<sup>122</sup> Herein lies the government's burden of persuasion.

#### IV. THE NINTH CIRCUIT'S ANSWER TO JURY MISCONDUCT IN THE DIGITAL AGE

Enrique Anthony Godoy was tried and convicted for second degree murder.<sup>123</sup> After conviction, an alternate juror signed a declaration attesting:

During the course of the trial, juror number ten kept continuous communication with a gentleman up north, who she referred to as her "judge friend." Juror number ten explained to us, the jury as a whole, that she had a friend that was a judge up north. From the time of jury selection until the time of verdict, juror number ten would communicate with her "judge friend" about the case via her T-Mobile Blackberry, a two way text paging system. When the jury was not sure what was going on or what procedurally would happen next, juror number ten would communicate with her friend and disclose to the jury what he said.<sup>124</sup>

Godoy moved for a new trial based on jury misconduct.<sup>125</sup> The trial court refused to order an evidentiary hearing to investigate the allegation and denied Godoy's motion.<sup>126</sup> The California Court of Appeal affirmed "and the California Supreme Court summarily denied review."<sup>127</sup> Godoy filed a federal *habeas* petition, which the district court denied and a divided three-judge Ninth Circuit panel affirmed.<sup>128</sup> The Ninth Circuit then heard the case *en banc* and reversed.<sup>129</sup>

The mystery in *Godoy* is in what the "judge friend" said and how much of that information was relayed to the jury. The *Godoy* court impliedly categorizes the conduct as an *ex parte* contact.<sup>130</sup> Most intriguing about the misconduct in *Godoy* is that the suspect action could have been classified as extraneous information because the judge friend was imparting information to the juror. However, it is unclear from the record exactly what information was given by the judge friend and how much of that information was relayed to the rest of

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<sup>121</sup> *Dickson*, 849 F.2d at 405 (internal quotation marks omitted).

<sup>122</sup> *United States v. Littlefield*, 752 F.2d 1429, 1432 (9th Cir. 1985).

<sup>123</sup> *Godoy v. Spearman*, 861 F.3d 956, 958 (9th Cir. 2017) (*en banc*).

<sup>124</sup> *Id.* at 965.

<sup>125</sup> *Id.* at 960.

<sup>126</sup> *Id.* at 961.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 960–62.

<sup>130</sup> *Id.* at 959 (emphasis added) ("when faced with allegations of *improper contact between a juror and an outside party*, courts apply a settled two-step framework.").

the jury. Nevertheless, the Ninth Circuit did not toil in categorizing the misconduct.

The decision reaffirmed in no uncertain terms the two-step *ex parte* contact framework with the right to an impartial jury as the constitutional underpinning.<sup>131</sup> *Godoy* is silent about the right to confrontation. When discussing the standard for step one—which triggers the presumption—the Ninth Circuit references Footnote Six, which pronounces:

Some of our cases have suggested the presumption attaches under only more limited circumstances. For example, in *United States v. Dutkel*, we said in dictum that the presumption of prejudice arises only in the context of jury tampering (i.e., threats or bribes intended to influence the jury’s decision). Although tampering is among the types of contacts that may raise a presumption, nothing in *Mattox* or *Remmer* suggests this is the *only* circumstance where the presumption arises. We have also suggested that the presumption applies only to the introduction of extraneous information—not to *ex parte* contacts that do not impart information “pertaining to any fact in controversy or any law applicable to the case.” Although, as noted, it is certainly relevant whether the contact was “about the matter pending before the jury,” neither *Remmer* nor *Mattox* suggests that the outside party must actually “submit extraneous information (e.g., a file or dictionary) to the jury” before the presumption arises. In *Tarango*, for example, the police officers who tailed the holdout juror on his drive into the courthouse imparted no specific information about any fact or point of law in the case. This contact was nonetheless “possibly prejudicial” within the meaning of *Mattox* and *Remmer*. Accordingly, we reiterate that any outside contact raising a credible risk of influencing the verdict triggers the presumption of prejudice. To the extent cases such as *Dutkel* and *Rosenthal* suggested otherwise, they are **disapproved**.<sup>132</sup>

While subtly worded, Footnote Six reveals two monumental shifts in Ninth Circuit jury misconduct jurisprudence: (1) the categories of prosaic contacts, *ex parte* contacts and extraneous information meld into a single spectrum, and (2) the standard for triggering the *Remmer* presumption is lowered to a “credible risk” of influencing the jury standard.

Footnote Six glides through the three categories of contacts, connecting them into one spectrum. The footnote recognizes that past Ninth Circuit case law has been unclear about which categories of misconduct trigger the *Remmer* presumption. The footnote then combines the three categories by opining that “any outside contact” could “trigger[] the presumption of prejudice.”<sup>133</sup>

At the conclusion of the footnote, the Ninth Circuit expressly disapproved portions of two Ninth Circuit cases, *Dutkel* and *Rosenthal*. The dicta in these cases marked for disapproval squarely addresses categorizing jury misconduct as a process for attaching the presumption. By disapproving *Dutkel* and *Rosenthal*, the Ninth Circuit signaled to lower courts that misconduct should no long-

<sup>131</sup> *Id.* at 959, 962–64.

<sup>132</sup> *Id.* at 968 n.6 (citations omitted) (alterations omitted).

<sup>133</sup> *Id.*

er be viewed categorically, but along a single spectrum with the dividing line being the point at which the presumption is triggered.

The other major change is lowering the trigger standard for the *Remmer* presumption to a point where any outside contact has “credible risk” of influencing the verdict.<sup>134</sup> Interestingly, this standard seemingly comes out of nowhere. The Circuit cited *Tarango* for the credible risk standard,<sup>135</sup> but *Tarango* did not pronounce a new standard or provide a citation to support its “credible risk” language.<sup>136</sup> This dicta in *Tarango* is gloss on statements made in *Mattox* about an external contact having a “tendency” to be “injurious to the defendant.”<sup>137</sup> *Mattox*, in turn, when commenting that “[i]t is not open to reasonable doubt that the tendency of” the newspaper article at issue in the case “was injurious to the defendant,”<sup>138</sup> was merely stating the obvious. After all, the newspaper article stated, *inter alia*, “[i]f [Mattox] is not found guilty of murder he will be a lucky man, for the evidence against him was very strong, or, at least, appeared to be to an outsider.”<sup>139</sup> This language should be considered a superfluous comment about the obvious nature of the newspaper’s prejudice to *Mattox*. *Godoy* therefore created a new standard for attaching the *Remmer* presumption based on a Ninth Circuit panel’s gloss on 125-year-old dicta.

After *Godoy*, any outside contact with the jury, be it a prosaic contact, jury tampering, or extraneous information, should be evaluated under a two-step framework similar to the prosaic/jury-tampering framework. The first step is determining whether the defendant presents “evidence of a contact sufficiently improper as to raise a credible risk of affecting the outcome of the case.”<sup>140</sup> Defendants will have the burden of proving something more than “threadbare or speculative allegations” of misconduct or “prosaic” contacts with the jury.<sup>141</sup> Courts should continue to consider the content of the allegations, seriousness of the alleged misconduct or bias, and the credibility of the source. In these considerations, the identity of the outside party and nature of the contact are particularly relevant.<sup>142</sup> Undue contact between government officials, like bailiffs or law enforcement agents involved in the case, and jurors “will almost categorically trigger the presumption.”<sup>143</sup>

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<sup>134</sup> *Id.* at 967–68, 968 n.6.

<sup>135</sup> *Id.* at 967.

<sup>136</sup> See generally *Tarango v. McDaniel*, 815 F.3d 1211 (9th Cir. 2016).

<sup>137</sup> *Id.* at 1222 (citation omitted) (“*Mattox* requires a trial court to examine possible prejudice when it is confronted with evidence of an external contact that has a ‘tendency’ to be ‘injurious to the defendant.’ Thus, an external contact with a juror need only raise a risk of influencing the verdict to be deemed possibly prejudicial.”).

<sup>138</sup> *Mattox v. United States*, 146 U.S. 140, 150 (1892).

<sup>139</sup> *Id.* at 143.

<sup>140</sup> *Godoy*, 861 F.3d at 967.

<sup>141</sup> *Id.* (citation omitted) (internal quotation marks omitted) (alteration omitted).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (citation omitted) (internal quotation marks omitted).

In sum, at step one, trial courts should evaluate the full context of the allegations and determine whether the contact was improper and whether the contact raises a credible risk of influencing the jury. If the contact was proper or does not have a credible risk of influencing the jury, then the inquiry ceases. Conversely, if the contact was improper and raises a credible risk of influencing the jury, then the court continues to step two.

At step two, “the presumption of prejudice attaches, and the burden shifts to the [government] to prove the contact was harmless.”<sup>144</sup> “Harmlessness in this context means that there is no reasonable possibility that the communication influenced the verdict.”<sup>145</sup> Accordingly, the reasonable possibility standard survives *Godoy*, but there is no question that the burden of proof and persuasion lies squarely with the prosecution. Trial courts should still consider employing the *Dickson/Jeffries* factors to evaluate whether the government has reached its burden.

As for jury *voir dire* and the *Remmer* hearing, *Godoy* mandates that “once the presumption attaches, the trial court must hold a hearing on prejudice if there is any remaining uncertainty about what actually transpired, or whether the incidents that may have occurred were harmful or harmless.”<sup>146</sup> The form of the hearing will depend on “what is necessary to determine the circumstances of the contact, the impact thereof upon the juror, and whether or not it was prejudicial,” but the investigation must be “reasonably calculated to resolve the doubts raised about the juror’s impartiality.”<sup>147</sup>

If Footnote Six is a sea change in Ninth Circuit law, then the question becomes, why a footnote? One possibility is the nature of the case. In *habeas* proceedings, in order to hear a claim *de novo*, a reasoned decision of the last state court to hear the matter must be contrary to clearly established Supreme Court law.<sup>148</sup> Pronouncing major shifts in jurisprudence is contradictory to finding that Supreme Court law is clearly established and there would be no reversal without *de novo* review.

Still a second reason could be that the Circuit was refraining from acknowledging just how confusing jury misconduct jurisprudence has become. After all, the trial court’s error in relying on a single statement to simultaneously raise and rebut a presumption was obvious, as “a ‘presumption’ can be rebutted only by contrary evidence.”<sup>149</sup> Yet, the *en banc* Ninth Circuit was the first tribunal to recognize the necessity of a *Remmer* hearing.<sup>150</sup>

<sup>144</sup> *Id.* at 968 (citation omitted) (internal quotation marks omitted).

<sup>145</sup> *Id.* (citation omitted) (internal quotation marks omitted) (alteration omitted).

<sup>146</sup> *Id.* at 969 (citation omitted) (internal quotation marks omitted).

<sup>147</sup> *Id.* (citation omitted) (internal quotation marks omitted) (alteration omitted).

<sup>148</sup> 28 U.S.C. § 2254(d)(1) (2012).

<sup>149</sup> *Godoy*, 861 F.3d at 965.

<sup>150</sup> *See id.* at 969–70 (illustrating the tension in the jurisprudence, which disapproves of a portion of *Rosenthal* in fashioning the new framework and then relies on *Rosenthal* in applying said framework).

A third possibility is that the Ninth Circuit did not wish to acknowledge, or wade into, a deep and continually fracturing circuit split that is difficult to define. The Supreme Court's decisions in *Smith v. Phillips*<sup>151</sup> and *United States v. Olano*<sup>152</sup> "created a great deal of uncertainty with respect to the continuing viability of the *Remmer* presumption, leading to a split among the federal Circuit Courts nationally."<sup>153</sup> *Phillips* and *Olano* are not jury misconduct cases that should have led to a circuit split, but given the state of confusion over applying the *Remmer* presumption, it is unsurprising that these Supreme Court cases provided enough dicta to splinter the circuits on the *Remmer* presumption.

*Phillips* was a *habeas corpus* appeal from a petitioner convicted of two counts of murder and one count of attempted murder.<sup>154</sup> The juror misconduct stemmed from a juror's job application during trial for employment as a major felony investigator with the same prosecutor's office that was prosecuting the petitioner.<sup>155</sup> Shortly after conviction, the trial court held a hearing on the juror misconduct and denied a request for a new trial.<sup>156</sup> The trial court's denial of the petition was affirmed on direct appeal.<sup>157</sup> On collateral review, the federal district court granted the *habeas* petition and the Second Circuit affirmed.<sup>158</sup> The Supreme Court reversed finding that the state trial court's hearing was constitutionally sufficient.<sup>159</sup> Using *Remmer I* as an example, but without directly citing to the decision, the Supreme Court stated: "This 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."<sup>160</sup>

In *Olano*, at the close of a complex criminal fraud trial, alternate jurors were allowed to attend deliberations without objection from defense counsel.<sup>161</sup> After conviction, the Ninth Circuit reversed under a plain error standard finding that the alternate jurors' presence violated Federal Rule of Criminal Procedure 24(c), which controls impaneling and discharge of alternate jurors.<sup>162</sup> In a footnote, the Circuit briefly glossed over the plain error standard merely stating that "the violation is inherently prejudicial" and that "it infringes upon a substantial

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<sup>151</sup> See generally *Smith v. Phillips*, 455 U.S. 209 (1982).

<sup>152</sup> See generally *United States v. Olano*, 507 U.S. 725 (1993).

<sup>153</sup> *State v. Berrios*, 129 A.3d 696, 706 (Conn. 2016); see also *United States v. Lawson*, 677 F.3d 629, 642 (4th Cir. 2012) ("While the Supreme Court has not departed explicitly from its holding in *Remmer*, there is a split among the circuits regarding the issue whether the *Remmer* presumption has survived intact following certain later Court decisions.").

<sup>154</sup> *Smith*, 455 U.S. at 210–11.

<sup>155</sup> *Id.* at 212.

<sup>156</sup> *Id.* at 213–14.

<sup>157</sup> *Phillips v. Smith*, 485 F. Supp. 1365, 1369 (S.D.N.Y. 1980).

<sup>158</sup> *Smith*, 455 U.S. at 214.

<sup>159</sup> *Id.* at 221.

<sup>160</sup> *Id.* at 215.

<sup>161</sup> *United States v. Olano*, 507 U.S. 725, 727–29 (1993).

<sup>162</sup> *Id.* at 730.

right of the defendants.”<sup>163</sup> The Supreme Court “granted certiorari to clarify the standard for ‘plain error’ review by the courts of appeals under [Federal] Rule [of Criminal Procedure] 52(b).”<sup>164</sup> Evaluating the juror “intrusion” jurisprudence within the plain error rubric, the *Olano* Court summarized heavily from *Phillips* and then citing *Turner* recognized that “[t]here may be cases where an intrusion should be presumed prejudicial, . . . but a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury’s deliberations and thereby its verdict?”<sup>165</sup> The Supreme Court went on to narrow the holding stating, “Of course, the issue here is whether the alternates’ presence sufficed to establish remedial authority under Rule 52(b), not whether it violated the Sixth Amendment or Due Process Clause . . .” so the question “is whether the instant violation of Rule 24(c) prejudiced respondents, either specifically or presumptively.”<sup>166</sup> The Supreme Court was “not persuaded that the instant violation of Rule 24(c) was actually prejudicial.”<sup>167</sup> And because there was there was “no specific showing that the alternate jurors . . . either participated in the jury’s deliberations or ‘chilled’ deliberation by the regular jurors,” and the defendants never requested a hearing, the issue could be decided against the defendants without a “*Remmer*-like hearing.”<sup>168</sup>

*Phillips* and *Olano* are jury misconduct outliers and should never have shattered the circuits. The misconduct in each case falls squarely outside the contact and extraneous information spectrum. The juror in *Phillips* who applied for a job with the prosecutor’s office while serving as a juror was *internally* biased as opposed to *externally* influenced by some contact or extraneous information. In *Olano*, the intrusion came from the mere presence of alternate jurors, not from some extra-judicial source. Moreover, the intrusion’s extent was never hashed out because there was no hearing in the trial court. The cases are also set apart in their standards of appellate review in that *Phillips* was a *habeas* case that accorded special deference to the state courts and *Olano* was decided within the stricture of plain error review. Indeed, *Olano* has become the seminal decision for plain error review.<sup>169</sup> Both decisions were penned by conservative jurists, *Phillips* by then Justice William Rehnquist, and *Olano* by Justice Sandra Day O’Connor, who took umbrage with broad applications of presumptive or conclusive implied juror bias.<sup>170</sup> Finally, *Phillips* and *Olano* involved

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<sup>163</sup> *Id.* at 731.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 739 (citation omitted).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 740.

<sup>168</sup> *Id.* at 739–40.

<sup>169</sup> *Virgin Islands v. Vanterpool*, 767 F.3d 157, 162 (3d Cir. 2014) (describing *Olano* as “seminal.”); *United States v. Roberson*, 46 M.J. 826, 828 (A.F. Ct. Crim. App. 1997) (recognizing *Olano* as the “seminal case explaining the doctrine of plain error.”).

<sup>170</sup> *Smith v. Phillips*, 455 U.S. 209, 221–22 (1982) (O’Connor, J., concurring) (writing separately to express her view that *Phillips* “does not foreclose the use of ‘implied bias’” in

extraordinarily lengthy criminal trial proceedings involving serious crimes, double homicide in *Phillips*,<sup>171</sup> and a seven-defendant elaborate loan kickback scheme in *Olano*,<sup>172</sup> that the conservative members of the Supreme Court were presumably not readily willing to disturb.<sup>173</sup> Without expressly stating so, the majority in each case may have weighed the policies of reserving judicial resources and finality against the severity of the jury misconduct.

Courts and scholars have recognized the circuit split, yet there is wide disagreement about the split's nature. The Fourth Circuit recognizes a three-way circuit split with the Second, Fourth, Seventh, Ninth, Tenth and Eleventh Circuits applying the *Remmer* presumption "in cases involving external influences on jurors," the Fifth, Sixth, Eighth and District of Columbia Circuits "depart[ing] from use of the presumption," and the First and Third Circuits conditionally apply the *Remmer* presumption in egregious cases.<sup>174</sup>

On the other hand, the Supreme Court of Connecticut opines that the Second Circuit applies the presumption to cases where "any extra-record information" has been imparted to a juror, the Fourth Circuit triggers the presumption where the "extrajudicial communication" is "more than innocuous," the First, Third, Seventh, Eighth, Ninth and Tenth Circuits apply the presumption to "serious, or not 'innocuous' claims of external influence," the Eleventh Circuit continues to apply *Remmer* "while acknowledging, but declining to resolve, questions concerning its continued viability," the Fifth and District of Columbia Circuits "significantly modified or overruled" the *Remmer* presumption, and the Sixth Circuit has concluded that the *Remmer* presumption is "a completely dead letter."<sup>175</sup>

Outside of the courts, one writer describes the circuit split as the Eleventh Circuit having "no articulated standard," the Seventh and Fourth Circuits ap-

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"some extreme situations" such as when a "juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction."); see also *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 552–56 (1984) (reversing a finding of implied juror bias where the juror failed to disclose material information in *voir dire* and setting forth a new standard that removes implying juror bias from the analysis).

<sup>171</sup> *Phillips v. Smith*, 485 F. Supp. 1365, 1366 (S.D.N.Y. 1980).

<sup>172</sup> *Olano*, 507 U.S. at 727.

<sup>173</sup> The first trial in *Phillips* lasted forty-two days and ended in a mistrial, and the second trial lasted sixty-six days. 485 F. Supp. at 1366–67. The trial in *Olano* lasted three months. 507 U.S. at 727. In another juror misconduct case, Justice Rehnquist explained that "a litigant is entitled to a fair trial but not a perfect one, for there are no perfect trials," and that "[t]rials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials." *Greenwood*, 464 U.S. at 553 (alterations, citation, and internal quotation marks omitted). The jurist then noted that "We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered citadels of technicality." *Id.* (citation omitted) (internal quotation marks omitted).

<sup>174</sup> *United States v. Lawson*, 677 F.3d 629, 643 (4th Cir. 2012).

<sup>175</sup> *State v. Berrios*, 129 A.3d 696, 707, 709–10, 710 n.21 (Conn. 2016).

plying the presumption with “an exception for innocuous interventions,” the Tenth and Eighth Circuits using the presumption but having a carve out for federal *habeas* cases, “[t]he Second and Third Circuits applying a variation of the hypothetical-average-jury test,” the Fifth and District of Columbia Circuits granting discretion to the trial court as to whether to apply the presumption or not, the First and Ninth Circuits applying the presumption only in “egregious circumstances,” and the Sixth Circuit having discarded the presumption.<sup>176</sup>

The dizzying array of views on circuit approaches and alignments is the product of decades of categorizing conduct that is best viewed on a spectrum. While the Ninth Circuit chose not to opine on the circuit split or recognize its application of the *Remmer* presumption as an issue of first impression, the Fourth Circuit addressed the split head-on and stated that “the question whether a rebuttable presumption of prejudice arises in” extraneous information cases “is an issue of first impression in this Court.”<sup>177</sup> While there are many ways to parse the circuit split, only three circuits have expressly applied a defined *Remmer* presumption to extraneous information cases: the Fourth, Ninth, and Eleventh Circuits. That is where these circuits split off from the rest.

In sum, the Fourth, Ninth, and Eleventh Circuits have chosen to pare down the *Remmer* presumption framework and apply that framework to extraneous information cases. This framework turns the categories of misconduct into a single spectrum. By doing so, the framework is designed for handling the untold variations of misconduct in the future.

#### CONCLUSION

While federal appellate courts traditionally shy away from sweeping changes in constitutional law, the digital age is quite the opposite. The law sustains on stability while the digital age feasts on disruption. Every day across the nation jurors are called upon to disrupt their lives to fulfill their civic duty. Citizens do not stop being their digitally connected selves when they become jurors, and so it is poetic that the jury box is where technology exerts the greatest potential to disrupt trials. As new conduits of communication carry ever increasing depths of content to jurors, trial courts should expect jury misconduct to skyrocket. No matter how novel the misconduct, the Ninth Circuit’s *Godoy* framework is the blueprint for jury misconduct in the digital age.

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<sup>176</sup> Kerr, *supra* note 19, at 1463–76 (alteration omitted).

<sup>177</sup> *Lawson*, 677 F.3d at 644.

734

*JURY MISCONDUCT IN THE DIGITAL AGE*

[Vol. 18:709

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