# OPENING PANDORA'S JURY BOX

*B. Samantha Helgason**

*More than sixty years ago, the U.S. Supreme Court decided* Remmer v. United States*, thereby defining what procedural steps restore a defendant's Sixth Amendment right to a fair trial in the face of a contaminated or partial jury.* Remmer*, a case replete with evidence of jury tampering and covert investigations, fashioned the remedy for future courts to redress allegations of jury taint. Upon making out a prima facie case, a defendant is entitled to an evidentiary hearing, at which the evidence is presumed to prejudice the defendant, and the government bears the burden of rebutting. In* Remmer*'s wake, however, the Court issued two subsequent opinions that some circuits have interpreted to obviate the presumption of prejudice and restrict* Remmer*'s rule.*

*This Note observes the inconsistent effects of the current circuit split on defendants' rights at trial, and it contends that the disparity will increase as technology dissolves access barriers between jurors and outside information. This Note examines where Supreme Court jurisprudence, circuit procedure, and habeas corpus doctrine have shaped the current circuit split. It then proposes that circuits can mend the split and pave a unified path forward by reframing their analyses to include three additional considerations. Further, by separating allegations of jury taint into three subcategories, circuits can renew* Remmer*'s pretechnology rule to properly address jury taint in a digital age.*



* J.D. Candidate, 2021, Fordham University School of Law; B.A., 2014, Bucknell University. I owe enormous thanks to Professor Ian Weinstein for his guidance and encouragement, to my colleagues on the *Fordham Law Review* for their invaluable aid, and to my friends and family for their unconditional support.

## INTRODUCTION

Insulating juries from outside influence has long challenged courts.[1] Judges rely on procedural safeguards, and they trust jurors to uphold the oath sworn upon induction into the jury box. Yet, despite agreement on the various procedural tools that protect jurors from outside influence, courts frequently disagree over what procedures properly sanitize a jury once it has been contaminated.

Over the last fifteen years, courts have noted the rise of the "Google mistrial"—a result of jurors conducting outside research during trials they

1. "Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere." Frank v. Mangum, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting).

observe.[2] In 2009, a juror in a federal drug trial[3] caused the judge to declare a mistrial after he admitted to having researched the ongoing case online.[4] The defendant stood trial for eight weeks, fighting charges for the sale of prescription drugs through internet pharmacies.[5] Both the federal prosecutors and the defense attorneys had poured countless hours and costs into preparing, trying, and defending the case.[6] After the parties had concluded their arguments and sent the jury to begin its deliberations, one of the jurors approached the judge and informed him that another juror had both conducted online research during the trial and shared the results with the other jurors.[7]

While questioning the juror, the judge learned the juror had uncovered evidence that the court had specifically excluded from the proceedings.[8] In questioning the jury as a whole, the judge then learned that eight additional jurors had also conducted outside research online.[9] They admitted to combing through Google for coverage about the case, searching for the lawyers and the defendant, looking for outside evidence, and using Wikipedia to define legal terms.[10] When asked why, one juror responded, "Well, I was curious."[11] One of the defense attorneys was admittedly stunned, describing it as a heartbreak and noting this as the "first time modern technology [had] struck us in that fashion."[12]

While this case depicts an obvious waste of time, money, and court resources, the judge was able to cure a potential miscarriage of justice by declaring a mistrial.[13] But what happens when jurors are less candid or forthcoming with the judge? In a separate case around the same time, the media reported on a different defendant's trial in another part of the country.[14] A juror admitted to fellow juror Seth McDowell that she had run a Google search on the defendant despite the court's explicit instructions not to.[15] McDowell said he considered informing the judge, but he then dismissed the thought and wrapped up the remainder of his jury duty.[16] The

2. John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES (Mar. 17, 2009), https://www.nytimes.com/2009/03/18/us/18juries.html [https://perma.cc/RA38-UU43].

3. United States v. Hernandez, No. 07-60027-CR (S.D. Fla. defendant's motion for mistrial granted Mar. 10, 2009).

4. Schwartz, *supra* note 2.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

trial concluded after only two days, and McDowell later confessed that it may have lasted much longer had "everybody d[one] the right thing."[17]

Courts have long sought to protect jurors from third-party interference.[18] And while this threat surely exists, courts largely agree on how to address tampering.[19] Now, advancements in technology introduce new threats to jury impartiality.[20] The immediacy with which jurors may examine a wealth of information at their fingertips makes them prone to misconduct.[21] Jurors are already accustomed to researching and verifying information before committing to decisions in their private lives.[22] Then, as jurors, they want to feel especially informed given the life-altering impacts of their decisions.[23] Consequently, this tendency permits smart devices to infiltrate proceedings as Trojan horses—silent sources of outside information resting within each juror's pocket.[24]

In an atmosphere where courts require full control over the type and quantity of information their jurors consume, such quick and easy access to the outside world creates a rampant problem.[25] This threat becomes even more apparent as courts contemplate how to rely on technology. For instance, in 2020, many courts have had to consider whether to conduct virtual criminal proceedings during the COVID-19 pandemic.[26] Without an ability to gather jurors in person, courts now question what mechanisms, if any, can properly insulate and monitor a jury.[27]

This Note[28] explores the myriad of ways in which federal circuit courts have identified and redressed evolving instances of taint since the U.S. Supreme Court's initial decision in *Remmer v. United States*.[29] Circuits have interpreted Supreme Court precedent to create procedure for situations in which outside influences may prejudice a verdict. Part I defines the role of

17. *Id.*

18. *See, e.g.*, Mattox v. United States, 146 U.S. 140, 149–50 (1892) (describing potential prejudice from a jury's exposure to third parties), *abrogated by* Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017); Wheaton v. United States, 133 F.2d 522, 527 (8th Cir. 1943) ("The law is that communications, relative to a case on trial, between jurors and third persons, or witnesses, or the officer in charge of the jury, are absolutely forbidden . . . .").

19. *See infra* Parts II.A, II.B.2 (discussing *Remmer*'s progeny).

20. Claire C. Kates, *Protecting the Impartial Jury: A Solution of Questions*, 35 ST. LOUIS U. PUB. L. REV. 415, 423 (2016).

21. *Id.* at 423–26.

22. Roy Futterman, Perspective, *Are We Driving Jurors to the Internet?*, BLOOMBERG L. (Aug. 10, 2016, 1:51 PM), https://news.bloomberglaw.com/business-and-practice/are-we-driving-jurors-to-the-internet-perspective [https://perma.cc/G74L-9S3K].

23. *Id.*

24. *See* AM. BAR ASS'N JUD. DIV. NAT'L CONF. OF STATE TRIAL JUDGES, A FAIR TRIAL: JURORS USE OF DEVICES AND THE INTERNET 4 (2010), https://www.ncsc.org/__data/assets/pdf_file/0026/13769/fairtrialhandbookauthcheckdam.pdf [https://perma.cc/3AMU-MPEP].

25. *See id.*; Futterman, *supra* note 22.

26. *See infra* Part III.D (discussing the impact of the COVID-19 pandemic on jury trials).

27. *See infra* Part III.D.

28. This Note addresses cases at different stages of the appeals process. To maintain consistency throughout, this Note refers to the accused as "defendant" or "habeas petitioner."

29. 347 U.S. 227 (1954).

the jury, discusses its importance in preserving the constitutionality of trials, and assesses the varying degrees to which presumptions may define procedure. Part I also examines the seminal Supreme Court cases that have delineated such procedures. Part II then reviews how circuits have interpreted those holdings to allocate procedural entitlements and burdens to litigants, further noting where habeas procedure complicates courts' analyses and exacerbates the underlying disagreement. Part III argues that circuits evaluate allegations of jury taint through narrow lenses, ignoring three important considerations that would otherwise harmonize Supreme Court case law. It offers alternate subcategories for how courts should consider jury taint in the face of advancing technology. This Note concludes that reading the Supreme Court cases together best equips courts to confront jury taint in the digital era.

## I. DEFINING THE RIGHT TO AN IMPARTIAL JURY

This part first explores Sixth Amendment jurisprudence, focusing in turn on the establishment of an impartial jury and the use of presumptions. It then reviews how Supreme Court case law laid the foundation for redressing extraneous influence on juries.

### *A. The Sixth Amendment and the Role of a Jury*

The Sixth Amendment guarantees each criminal defendant in a federal proceeding the constitutional right to trial "by an impartial jury."[30] The Fourteenth Amendment's due process clause incorporated the Sixth Amendment's protections against the states, giving both state and federal criminal defendants the same right to fair proceedings before an impartial jury.[31] As such, the jury is a cornerstone of the American legal system.[32]

Since this country's founding, the judiciary has entrusted juries to find facts and come to conclusions by applying the appropriate law to those facts.[33] Jurors must remain impartial, valuing their life experiences on one hand and acting as "blank slates" on which litigants paint the case's facts and

30. U.S. CONST. amend. VI. However, the Sixth Amendment right to a jury trial does not extend to petty criminal offenses. James L. Buchwalter, Annotation, *Construction and Application of Sixth Amendment Right to Trial by Jury—Supreme Court Cases*, 6 A.L.R. Fed. 2d 213 § 5 (2005).

31. Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

32. *See* JUD. CONF. OF THE U.S., HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS 15 (2019) http://www.vaed.uscourts.gov/jury/jurortrialhandbook.pdf [https://perma.cc/D3JT-UGQX] ("The effectiveness of the democratic system itself is largely measured by the integrity, the intelligence, and the general quality of citizenship of the jurors who serve in our courts.").

33. United States v. Gaudin, 515 U.S. 506, 514 (1995) ("[T]he jury, aided by the court must judge . . . . [And] hav[ing] now heard the opinion of the court on the *law* of the case[,] [t]hey *will apply that law to the facts*, and will find a verdict of guilty or not guilty as their own consciences may direct." (alternation in original) (quoting Sparf v. United States, 156 U.S. 51, 67 (1895))).

law on the other.[34] Because the jury is integral to the legal system, courts go to great lengths to protect the privacy, even the sanctity, of the jury box.[35]

During the initial stages of their duty,[36] jurors swear or affirm an oath to decide a case based solely upon the law and evidence presented at trial.[37] The jurors are purposefully insulated through this process to position a presiding judge as the only permissible source of information.[38] A court both supplies a jury with the applicable law and selects what evidence the jury may consider.[39]

Further, jurors swear to disregard their personal prejudices and to return verdicts according to their best judgment.[40] They may draw upon experience, common sense, and common knowledge, but they may not rely on outside sources of information.[41] Jurors who do learn outside information or who are approached by third parties seeking to influence the proceedings must inform the court.[42] Jurors may also not communicate in person or electronically about the case,[43] prematurely deliberate,[44] or read[45] or listen to information regarding the case.[46]

Even still, outside influence occasionally pierces the procedural walls designed to shield the jury box.[47] Jurors may taint the proceedings through their own actions.[48] These actions include reaching out to third parties, conducting outside research, testing the evidence, defining legal terms through outside means, making untruthful statements during voir dire, broadcasting confidential information from the proceedings to the general

34. Richard Lorren Jolly, *The New Impartial Jury Mandate*, 117 MICH. L. REV. 713, 715 (2019); *see also* JUD. CONF. OF THE U.S., *supra* note 32, at 12 ("The words of Supreme Court Justice Oliver Wendell Holmes from over a century ago apply with equal force to jurors serving in this advanced technological age: 'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.'" (quoting Patterson v. Colorado, 205 U.S. 454, 462 (1907))).

35. *See infra* Parts II.A–B (discussing each circuit's procedure for redressing threats of extraneous influence); *see also* Gray v. Mississippi, 481 U.S. 648, 668 (1987) ("[T]he impartiality of the adjudicator goes to the very integrity of the legal system.").

36. This Note will not discuss the creation of grand jury panels, decisions to indict, arraignments, or other procedural steps preceding criminal trials. It further assumes familiarity with initial voir dire examinations and jury selection.

37. JUD. CONF. OF THE U.S., *supra* note 32, at 8.

38. *Id.*

39. *Id.*

40. *Id.* at 11.

41. *Id.*; *see also* Patterson v. Colorado, 205 U.S. 454, 462 (1907).

42. JUD. CONF. OF THE U.S., *supra* note 32, at 11, 13.

43. *Id.* at 11–12 (explicitly listing communications and social networking "on computers, netbooks, tablets, and smart phones" and "any" internet service or "instant messaging service, RSS feed, or other automatic alert that may transmit information regarding the case to the juror; or any Internet chat room, blog, or website").

44. *Id.* at 11.

45. *Id.* (prohibiting newspapers, dictionaries, and reference materials both electronic and paper).

46. *Id.* (instructing jurors to "avoid radio, television, and Internet broadcasts").

47. *See infra* Parts II.A–B (giving case examples).

48. *E.g.*, *supra* notes 2–17 and accompanying text.

public, or deliberating with other jurors prematurely.[49] Alternatively, they may fall victim to third-party interference. These actions include outside efforts to tamper with the jury by threat, suggestion, or bribery, and they encompass accidental forms of influence like media coverage or newspaper headlines that bleed into jurors' daily routines.[50] Regardless of the form, extraneous information has the potential to infect a jury and infringe on a defendant's Sixth Amendment right to a fair trial.[51]

Where it does, the question becomes: To what extent has outside contact violated that defendant's rights?[52] Has the transgression stepped on the defendant's right to due process?[53] Did it strike the heart of the Sixth Amendment?[54] To answer these questions, courts pivot to identify the source of intrusion and to understand its impact on jurors and their verdicts.[55]

### *B. Balance Through Presumptions*

One way courts may counteract the potential impact of outside information is to implement a presumption.[56] A rebuttable presumption is an assumption of fact that courts accept as true until an opposing party contests it.[57] Rather than proving a fact outright, litigants presume a fact by relying on circumstantial evidence that creates a reasonable belief that a probable chain of events occurred.[58] Where a court grants one party a presumption, the opposing party bears the burden of producing evidence to rebut.[59] In the absence of such evidence, the opposing party fails to carry its burden of production, and the presumption stands.[60] However, where that party satisfies its burden of production, it overcomes and voids the presumption.[61]

---

49. Timothy J. Fallon, *Mistrial in 140 Characters or Less?: How the Internet and Social Networking Are Undermining the American Jury System and What Can Be Done to Fix It*, 38 HOFSTRA L. REV. 935, 938–43 (2010); Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 324 (2005).

50. *See* Gershman, *supra* note 49, at 328–39.

51. *See* United States v. Blagojevich, 743 F. Supp. 2d 794, 801 (N.D. Ill. 2010) (discussing how attempts to communicate with jurors endanger a defendant's right to a fair trial).

52. *See infra* Part I.C (explaining the creation of a *Remmer* hearing, by which courts may explore the impact of outside influence on the verdict).

53. *See generally* Smith v. Phillips, 455 U.S. 209 (1982) (differentiating between the remedies for due process and for Sixth Amendment violations).

54. *Id.*

55. *Id.*

56. *Cf.* Skilling v. United States, 561 U.S. 358, 378–79 (2010) (positing that the point at which media coverage and publicity influence jurors' ability to remain impartial is a case-by-case determination).

57. *Rebuttable Presumption Law and Legal Definition*, U.S. LEGAL, https://definitions.uslegal.com/r/rebuttable-presumption [https://perma.cc/M8E4-4HV4] (last visited June 22, 2020).

58. Paul F. Rothstein, Demystifying Burdens of Proof and the Effect of Rebuttable Evidentiary Presumptions in Civil and Criminal Trials 3 (Oct. 11, 2017) (unpublished manuscript), http://ssrn.com/abstract=3050687 [https://perma.cc/83MR-44DA].

59. *Id.* at 65.

60. *Id.*

61. *Id.*

Jurisdictions rely on underlying policies, rationale, and judicial discretion to develop a presumption's ultimate force.[62] As presumptions come from a society's shared assumptions about how the world works, the extent to which a society accepts something as true influences that presumption's force.[63] A court then molds the rigor of a presumption's legal effect by assigning different evidentiary burdens to the litigants.[64]

In the criminal context, presumptions already shape how the law attributes rights to the accused and how to conduct trials. Perhaps most commonly recognized, defendants are presumed innocent until proven guilty.[65] The government bears the burden of putting forth evidence sufficient to prove guilt beyond a reasonable doubt, and only a showing of that caliber can overcome the presumption of innocence.[66] Similarly, juries are presumed to be impartial.[67] The challenger—usually the accused—bears the initial burden of demonstrating partiality to overcome a presumption of impartiality.[68]

The presumption of prejudice, which this Note examines in detail, arises once outside influence is alleged to have reached the jury.[69] As a jury may strip the accused of life or liberty, ensuring juror impartiality is paramount.[70] In response, instating a presumption of prejudice acts to restore balance to potentially partial proceedings.[71] It serves to safeguard a defendant's fundamental right to a fair trial.[72]

### *C. Supreme Court History*

This section explores the trilogy of cases that established the framework through which courts redress credible allegations of jury taint. It then turns to explain per se prejudice, which defines the upper limit of presumed prejudice. Taken together, these cases have built the legal sandbox in which courts confronting potentially contaminated juries begin their analyses.

---

62. *See id.* at 21–22.

63. *Id.* at 17 n.35. For example, society presumes that upon mailing a letter, and not having seen it returned, that letter arrived safely to its recipient. The high probability of proper mailing resulting in arrival informs society's common experience and common sense. It becomes a safe assumption. *Id.*

64. *Id.* at 21.

65. The presumption of innocence first took shape in *Coffin v. United States*, 162 U.S. 664, 682 (1896).

66. *Id.*

67. Irvin v. Dowd, 366 U.S. 717, 722–23 (1961).

68. *Id.* at 723; *see, e.g.*, Holt v. United States, 218 U.S. 245, 247–51 (1910) (alleging juror partiality); Reynolds v. United States, 98 U.S. 145, 157 (1879) (same).

69. *See infra* Parts I.C.1–2, II.

70. *See Irvin*, 366 U.S. at 722.

71. *See* Remmer v. United States, 347 U.S. 227, 229 (1954) (requiring the government to proffer evidence that rebuts a presumption of prejudice).

72. *See infra* Parts I.C.1–2.

### 1. Three Foundational Cases

The 1954 Supreme Court case *Remmer v. United States* established that extrajudicial communication with a jury merits an evidentiary hearing at which all parties may gather to determine the extent of harm to a defendant's trial.[73] In *Remmer*, an unnamed person approached a juror, who would later become the jury foreman, and suggested that the juror could profit if he delivered a verdict favorable to the defendant.[74] The juror reported this interaction to the judge, who conferred with the prosecuting attorneys prior to their opening an FBI investigation.[75] The FBI then conducted its investigation only to conclude that the third party's comment was made in jest and did not pose a threat to the ongoing trial.[76]

However, throughout the process, neither the judge nor the prosecuting attorneys had informed defense counsel of the incident or ongoing investigation.[77] In fact, defense counsel first learned of the ex parte exchanges from reading a newspaper article after his client had been convicted.[78] Subsequently, the defendant moved for a new trial and requested a hearing to examine whether the incident had deprived him of a fair trial.[79]

The trial court denied the defendant's request for a hearing, after which the defendant appealed his case up to the Supreme Court.[80] The Court explained the following standard, incidentally laying the foundation on which circuits have disagreed for decades:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties.[81]

Thus, the Court established that a defendant's prima facie showing of jury taint minimally entitles him to an evidentiary hearing.[82] As the trial court in *Remmer* had not yet convened a hearing, the Court could not discern what events had transpired or whether the alleged incidents had in fact harmed the defendant's right to a fair trial.[83] The Supreme Court vacated the judgment

---

73. *Remmer*, 347 U.S. at 229–30.
74. *Id.* at 228.
75. *Id.*
76. *Id.*
77. *Id.* at 228–29.
78. *Id.*
79. *Id.* at 229.
80. *Id.* at 229–30.
81. *Id.* at 229.
82. Jesse Gessin, *Bit by Bit: Breaking Down the Ninth Circuit's Frameworks for Jury Misconduct in the Digital Age*, 18 NEV. L.J. 709, 714 (2018) (noting the creation of evidentiary hearings known as "*Remmer* hearings").
83. *Remmer*, 347 U.S. at 229.

against the defendant with instructions to convene a hearing to discern the harm.[84]

Tucked within this holding lingers the question of whether the defendant's prima facie showing of jury taint also entitles him to a presumption of prejudice at the evidentiary hearing.[85] The *Remmer* Court found the extrajudicial contact to be "presumptively prejudicial," and it charged the government with showing harmlessness.[86] That is, the defendant's prima facie showing shifted the burden to the government to produce evidence. Unless the government could demonstrate that the third party's comments had not harmed the jury's verdict, the Court would presume that the contact had prejudiced the trial and would vacate the conviction.

In *Remmer*'s wake, however, circuit courts have construed the following two Supreme Court cases to cloud or even overturn the rule promulgated in *Remmer*. First, in *Smith v. Phillips*,[87] the Court denied a defendant's petition for a writ of habeas corpus, reasoning that the defendant's claim of juror partiality was insufficient to merit a new trial.[88] In this case, one of the jurors had applied for employment with the District Attorney's Office, but neither the trial court nor defense counsel had learned of the juror's application until after the jury had returned its guilty verdict.[89] Justice William Rehnquist, writing for the Court, explained that "the remedy for allegations of juror partiality is a hearing in which the *defendant* has the opportunity to prove actual bias."[90] Justice Sandra Day O'Connor, recognizing that the majority's view might prove too absolute, concurred to explain that the Court's opinion here would not foreclose the use of implied bias in all instances.[91]

Eleven years later, the Court returned to *Remmer*'s rule again in *United States v. Olano*.[92] Here, the trial court allowed two alternate jurors to observe jury deliberations.[93] On appeal, the defendant contended that the alternate jurors' presence during deliberations had undermined their ability to be impartial.[94] Justice O'Connor, this time writing for the Court, reiterated a similar standard to the one she had espoused in her concurrence in *Phillips*.[95] She departed from the focus on presumptions, and she instead encouraged courts to ask whether the intrusion influenced the ultimate verdict.[96] Not

84. *Id.* at 230.
85. *Id.* at 229.
86. *Id.*
87. 455 U.S. 209 (1982).
88. *Id.* at 217 (asserting that a ruling in the defendant's favor would render "few trials . . . constitutionally acceptable" as "it is virtually impossible to shield jurors" from every potential influence).
89. *Id.* at 212–13.
90. *Id.* at 215 (emphasis added).
91. *Id.* at 224 (O'Connor, J., concurring).
92. 507 U.S. 725 (1993).
93. *Id.* at 729–30.
94. *Id.*
95. *See id.* at 738–39; *see also Phillips*, 455 U.S. at 223 (discussing judicial discretion).
96. *Olano*, 507 U.S. at 739 ("[B]ut 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?").

every case should presume prejudice, and the presence of alternate jurors did not entail a "sufficient risk" of harm to justify such a presumption.[97] Thus, *Olano* established that only certain types of taint may trigger a presumption of prejudice, and courts should investigate how the intrusion influenced the verdict prior to granting one.[98]

### 2. Defining Per Se Prejudice

During the years between *Remmer* and *Phillips*, the Court also defined the kind of contact that per se prejudices a defendant.[99] Where jury taint definitively prejudices the defendant, as in these two cases below, a court need not grapple with *Remmer*'s line of cases. On its face, the contact has impaired the defendant's Sixth Amendment rights and merits reversal. Thus, the following two holdings structure the boundary between contact that presumptively prejudices and per se prejudices a verdict.

In *Turner v. Louisiana*,[100] two deputy sheriffs who served as principal witnesses for the prosecution simultaneously supervised the jury, transporting the jurors between meals and lodging each day.[101] In *Parker v. Gladden*,[102] the bailiff responsible for marshaling the jury declared his belief to one juror that the defendant was guilty and wicked.[103]

In both cases, the Court identified the official character of the deputy sheriffs and bailiff as capable of greatly influencing a jury's perception.[104] Both the deputies and the bailiff were responsible for protecting and escorting the jury—a role that inherently garners trust and confidence. The Court determined that such association with jurors, especially where positioned to foster rapport prior to jury deliberations, had infected the jurors with prejudice sufficient to reverse those convictions.[105] Accordingly, *Remmer*'s presumption did not apply to per se instances of taint. The presumption

97. *Id.* at 741. Some circuits have perceived this as Justice O'Connor seemingly substituting judicial guardrails for procedure and calling on courts to use their experience to discern when to apply the presumption. *See, e.g.*, United States v. Baptiste, 596 F.3d 214, 225–26 (4th Cir. 2010); United States v. Blumeyer, 62 F.3d 1013, 1017 (8th Cir. 1995).

98. *See Olano*, 507 U.S. at 737; *see also* United States v. Lawson, 677 F.3d 629, 642 (4th Cir. 2012) (interpreting *Olano* as framing the inquiry as either a *Remmer* presumption or as "a specific analysis").

99. *See generally* Parker v. Gladden, 385 U.S. 363 (1966); Turner v. Louisiana, 379 U.S. 466 (1965).

100. 379 U.S. 466 (1965).

101. *Id.* at 467–68.

102. 385 U.S. 363 (1966).

103. *Id.* at 363.

104. *See id.* at 365 (finding that the bailiff's role "as an officer of the court as well as the State" weighed greatly with the jury); *Turner*, 379 U.S. at 474 (describing the association with the jury as "even more prejudicial" since they were deputies).

105. *Parker*, 385 U.S. at 365–66; *Turner*, 379 U.S. at 472, 474. Justice John Marshall Harlan dissented in *Parker*, categorizing the bailiff's commentary as "no more than inconsequential incidents in an otherwise constitutionally flawless proceeding." *Parker*, 385 U.S. at 369. His dissent highlights the brewing tension over what calculus of prejudice conclusively strips a defendant of a fair trial. *See id.*

instead lives in the murky space between per se prejudice and harmless contact.

Ultimately, the sporadic handful of Supreme Court cases on this matter have confused circuits about what contact to presume prejudicial and by which standard to evaluate alleged taint. Circuits have therefore diverged in their interpretations of *Remmer*'s presumption. While they agree that a prima facie showing entitles a defendant to a hearing, *Remmer* left unanswered whether that showing presumes prejudice and reallocates the burden of proof to the government.[106] The perceived ambiguity of, first, whether *Remmer* created a burden-shifting framework and, second, whether the subsequent cases dissolved its standard has challenged courts for years.

## II. THE CIRCUIT SPLIT AND PROCEDURAL OVERLAY

This part observes how circuit courts have grappled with *Remmer*'s presumption and whether to apply it or one of its successors' analyses. Some circuits, "*Remmer* circuits," have attributed the *Remmer* Court's language to create and apply a burden-shifting framework to questions of jury taint.[107] These courts view *Remmer* to have clearly entitled a defendant to an evidentiary hearing and to a presumption of prejudice.[108] In contrast, other circuits, "*Phillips* circuits," reason that the plain language of *Phillips* eliminated any prior entitlement to a presumption.[109] The remaining circuits, "*Olano* circuits," have construed the line of cases to narrow the presumption's applicability to a few types of cases.[110] While circuits agree that a prima facie showing entitles a defendant to a hearing, they disagree over whether it further creates a presumption of prejudice.[111]

This part analyzes how circuits have crafted their procedures to balance considerations imposed by unclear precedent, constitutional rights, and evolving technologies. Part II.A examines *Remmer* circuits, and Part II.B analyzes the *Phillips* and *Olano* circuits. Part II.C explores how the procedural posture of habeas corpus proceedings informs a defendant's rights and to what degree such posture limits a federal court's review of state court findings.

### *A.* Remmer *Circuits*

*Remmer* circuits reiterate the defendant's right to a presumption of prejudice under the foundational case—*Remmer*. Yet, even where these circuits coalesce to defend an entitlement to the presumption, they disagree as to what kind of outside exposure triggers it and as to the degree of force

106. *Compare* United States v. Lawson, 677 F.3d 629, 641 (4th Cir. 2012) (finding that *Remmer* entitles the defendant to a presumption), *with* United States v. Davis, 407 F. App'x 32, 36 (6th Cir. 2011) (confining *Remmer*'s entitlement to only a hearing).

107. *See infra* Part II.A (discussing the *Remmer* circuits within the circuit split).

108. *See, e.g.*, Barnes v. Joyner, 751 F.3d 229, 242 (4th Cir. 2014).

109. *See infra* Part II.B.1 (discussing *Phillips* circuits).

110. *See infra* Part II.B.2 (discussing *Olano* circuits).

111. *See infra* Parts II.A–C (contrasting cases).

such presumption carries at a hearing. For instance, should a presumption immediately attach whenever a defendant makes out a prima facie showing? If so, does that presumption also automatically shift the burden?

The following sections discuss how the Second, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits have implemented the rights and procedures they interpret to flow from *Remmer*. It explores where each of these circuits has diverged in construing a defendant's entitlement.

1. Hypothetical Average Juror: The Second and Third Circuits

The Second[112] and Third Circuits[113] use a "hypothetical juror" method to assess the potential effects of outside influence. Pursuant to *Remmer*, the Second Circuit holds that a jury's exposure to extrinsic information necessitates an evidentiary hearing, at which the government may rebut the presumption of prejudice by showing harmlessness.[114] Extrarecord information triggers the presumption, and the government may only defeat it by demonstrating that outside influence would not have affected a hypothetical average juror.[115]

The Second Circuit analyzes both the nature of the outside influence and its probable effect on an average juror to ensure the analysis remains objective.[116] In *United States v. Morrison*,[117] an unnamed third party attempted to bribe the jury foreman to induce a verdict favorable to the defendant.[118] The jury foreman did not report this encounter during trial, and he only disclosed the incident once the jury had delivered its conviction and the trial had concluded.[119] Upon learning of the attempted bribery, the district court convened a *Remmer* hearing.[120]

112. *See, e.g.*, United States v. Morrison, 580 F. App'x 20, 21–22 (2d Cir. 2014); United States v. Greer, 285 F.3d 158, 167 (2d Cir. 2002). The court made an "independent determination" as to whether the extrinsic evidence would have influenced "a hypothetical, average juror" and rejected the defendant's claim, finding it would not have. *Id.* at 166–67, 174.

113. *See, e.g.*, United States v. Fumo, 655 F.3d 288, 304 (3d Cir. 2011); United States v. Vega, 285 F.3d 256, 266 (3d Cir. 2002); United States v. Gilsenan, 949 F.2d 90, 96 (3d Cir. 1991).

114. United States v. Schwarz, 283 F.3d 76, 98–99 (2d Cir. 2002); *Greer*, 285 F.3d at 167; United States v. Weiss, 752 F.2d 777, 783 (2d Cir. 1985); 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, 1470 (2008).

115. *Greer*, 285 F.3d at 173; United States v. Ianniello, 866 F.2d 540, 544 (2d Cir. 1989); United States v. Hillard, 701 F.2d 1052, 1064 (2d Cir. 1983).

116. *See* United States v. Farhane, 634 F.3d 127, 168–70 (2d Cir. 2011); *Greer*, 285 F.3d at 173.

117. 580 F. App'x 20 (2d Cir. 2014).

118. *Id.* at 21.

119. *Id.*

120. *Id.*

As a court in a *Remmer* circuit, the district court presumed the contact to have prejudiced the verdict and asked the government to show otherwise.[121] The government argued that the length of jury deliberations and the conviction itself evidenced harmlessness.[122] Nevertheless, the court reasoned that attempted bribery would have surely troubled a hypothetical average juror under the same circumstances.[123] The government had therefore failed to carry its burden, and the court presumed the contact to have compromised the jury foreman's ability to remain impartial.[124] Accordingly, the district court granted a new trial.[125]

While the Third Circuit also reads *Remmer* to presume prejudice, it does not find the presumption particularly useful.[126] Third Circuit courts rely on *Remmer*'s language that "the presumption is not conclusive"[127] to reduce the presumption's weight within a hearing.[128] Upon learning that extraneous information or contact has reached the jury, a Third Circuit district court conducts voir dire of its jurors and asks whether the jurors can remain impartial.[129] The district court examines the jurors' answers in conjunction with the case's facts to determine the possibility of prejudice.[130] Thus, while recognizing a presumption in name, Third Circuit courts neither assign a burden to the government nor ask the government to rebut.[131] Rather, juror responses during voir dire fulfill this role, and the judge determines whether the answers affirm or deny the possibility of prejudice.[132]

On appeal, the Third Circuit asks whether the extraneous influence or contact would have impacted a hypothetical average juror's impartiality and subjects the defendant to "substantial prejudice."[133] Without finding substantial prejudice to the defendant, the Third Circuit concludes that voir dire has redressed the alleged taint.[134] In one case, two jurors allegedly violated the district court's instructions not to seek outside information.[135] Juror One posted updates about trial proceedings and jury deliberations to

121. *See id.* (discussing how the presumption applies when a juror is exposed to extrajudicial influence).
122. *Id.* at 22.
123. *Id.*
124. *Id.*
125. *Id.*
126. *See* United States v. Zgrzepski, 323 F. App'x 177, 183–84 (3d Cir. 2009); United States v. Vega, 285 F.3d 256, 266 (3d Cir. 2002); *cf.* United States v. Lawson, 677 F.3d 629, 643 (4th Cir. 2012) (considering the Third Circuit to not be among the *Remmer* circuits and categorizing it as only applying a presumption under serious circumstances).
127. Remmer v. United States, 347 U.S. 227, 229 (1954).
128. *See Vega*, 285 F.3d at 266.
129. *Id.* at 266; United States v. Gilsenan, 949 F.2d 90, 96 (3d Cir. 1991).
130. *Vega*, 285 F.3d at 266.
131. *See, e.g.*, United States v. Fumo, 655 F.3d 288, 307 (3d Cir. 2011) (reasoning that the court need not determine which party bears the burden of showing prejudice).
132. *See Vega*, 285 F.3d at 256; *Gilsenan*, 949 F.2d at 90.
133. United States v. Zgrzepski, 323 F. App'x 177, 183–84 (3d Cir. 2009); United States v. Kemp, 500 F.3d 257, 301 (3d Cir. 2007).
134. *Zgrzepski*, 323 F. App'x at 183–84.
135. *Fumo*, 655 F.3d at 304–06.

social media.[136] Shortly after, news outlets discovered Juror One's posts and began featuring them on the evening news.[137] Juror One watched the evening news, where newscasters then discussed the posts and trial at length.[138] Additionally, Juror Two learned from her coworkers of the defendant's prior convictions—evidence the judge had specifically excluded.[139] Despite the defendant's arguments that both jurors' outside contacts had influenced the ultimate verdict, the Third Circuit found the alleged conduct to fall short of producing substantial prejudice.[140] By intervening only in cases of substantial prejudice, the Third Circuit affords district courts broad latitude to determine the merits of alleged taint through voir dire.

2. More than Innocuous: The Fourth and Seventh Circuits

Separately, the Fourth[141] and Seventh[142] Circuits apply *Remmer*'s presumption to minimal showings of extraneous contact. For instance, the Fourth Circuit applies the presumption to extrajudicial conduct that rises above "innocuous" contact.[143]

Under this standard, the Fourth Circuit vacated a defendant's conviction for facilitating animal fighting when one juror used Wikipedia to search the term "sponsor"—an element of the offense at issue.[144] Because the word this juror sought to define was integral to understanding the offense, the Fourth Circuit found that a confirmation of this search met the prima facie burden, and it automatically applied *Remmer*'s presumption.[145] The government was then unable to carry its burden to show that the juror's internet search did not affect the verdict, and the Fourth Circuit vacated the defendant's conviction.[146] Accordingly, the Fourth Circuit not only applies *Remmer*'s presumption and the accompanying automatic burden-shifting framework, but it comparatively places a greater burden on the government's rebuttal than on the defendant's initial showing.

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 306.
140. *Id.* at 306–07.
141. For examples of cases citing minimal or innocuous contact, see United States v. Lawson, 677 F.3d 629, 639–42 (4th Cir. 2012); United States v. Cheek, 94 F.3d 136, 141 (4th Cir. 1996).
142. Seventh Circuit courts do not apply a presumption when allegations are ambiguous or innocuous. *See, e.g.*, United States v. Martin, 692 F.3d 760, 765 (7th Cir. 2012); United States v. Delatorre, 572 F. Supp. 2d 967, 993–94 (N.D. Ill. 2008).
143. *See, e.g.*, United States v. Johnson, 954 F.3d 174, 180 (4th Cir. 2020) (discussing the standard and identifying behavior that is not innocuous and merits an evidentiary hearing). For an example of contact that is innocuous, and therefore does not make out a prima facie showing, see United States v. Small, 944 F.3d 490, 504–05 (4th Cir. 2019).
144. *Lawson*, 677 F.3d at 634, 651 (holding that juror misconduct interfered with the defendant's right to a fair trial).
145. *Id.* at 645.
146. *Id.* at 646–51.

Like the Fourth Circuit, the Seventh Circuit requires a minimal prima facie showing.[147] In one case, a juror informed the court nine days after the close of evidence that someone had written "GUILTY" in a notebook she had used for trial.[148] She reported the notation as threatening, which the Seventh Circuit ultimately found sufficient to merit a hearing on appeal.[149] The circuit court presumed that the incident prejudiced the defendant's trial and required the government to rebut.[150] Yet, the trial court's record was incomplete, leaving the government without the ability to carry its burden.[151] In the absence of evidence, the Seventh Circuit found that only a mistrial could cure a possible impairment of the defendant's Sixth Amendment right.[152]

Ultimately, the Fourth and Seventh Circuits implement lower prima facie thresholds, which more readily permit defendants to allege jury taint in different contexts. As both circuits also shift the burden to the government, their flexible interpretations of a prima facie showing produce more protective views of the Sixth Amendment than those of their sister circuits.

### 3. Overlooking Misconduct: The Tenth Circuit

In contrast, the Tenth Circuit limits *Remmer*'s presumption to cases of third-party contact with the jury about the matter pending before it.[153] As such, the Tenth Circuit's view has excluded various instances of juror misconduct from review.[154] For instance, the Tenth Circuit expressly declined to apply *Remmer* when a potential juror shared outside information about the impending trial with other potential jurors during voir dire.[155] The court reasoned that *Remmer* pertains only to communications regarding the trial between jurors and *third parties*.[156] Consequently, a juror's *own* actions do not enter into *Remmer* terrain, and only third-party influences invoke its application.

Given the contrast between the Tenth Circuit's view and the Fourth Circuit's above, these two circuits would draw different conclusions regarding the juror who used Wikipedia to define an element of the alleged

147. *See supra* note 142 (providing examples of cases using a minimal threshold).
148. United States v. Vasquez-Ruiz, 502 F.3d 700, 702 (7th Cir. 2007).
149. *Id.* at 702, 705.
150. *Id.* at 705.
151. The district court had elected not to question other jurors about the notation, which left the record devoid of evidence that may have rebutted the presumption. *Id.*
152. *Id.* at 707–08.
153. *See, e.g.*, United States v. Robertson, 473 F.3d 1289, 1294–95 (10th Cir. 2007) (explaining the goal of precluding incidental contact between jurors and nonjurors from coming before the court); United States v. Brooks, 161 F.3d 1240, 1246–47 (10th Cir. 1998) (qualifying what contact pertains to the matter before the court).
154. *See* United States v. Henderson, 564 F. App'x 352, 367–68 (10th Cir. 2014); Stouffer v. Trammell, 738 F.3d 1205, 1214 (10th Cir. 2013) (collecting cases).
155. United States v. Hawley, 660 F. App'x 702, 709 n.9 (10th Cir. 2016).
156. *See id.*

offense.[157] The very juror behavior that ultimately led the Fourth Circuit to vacate a defendant's conviction would not have been contemplated as *Remmer*-worthy in the Tenth Circuit.

### 4. Sometimes Automatic: The Eleventh Circuit

The Eleventh Circuit is best categorized as a "semi-*Remmer* circuit" because it epitomizes the indecision and disagreement among its sister circuits. In 2006, the Eleventh Circuit held that a prima facie showing of extrinsic evidence presumes prejudice.[158] It even formulated factors to determine what showing satisfies the rebuttal burden borne by the government.[159] However, in the same case, the court noted its previous departure from *Remmer* in two cases decided sixteen years prior.[160]

More recently, in a 2017 case, the Eleventh Circuit presumed that interactions between the defendant's friends and jurors had prejudiced that trial.[161] Although seemingly reiterating its adherence to *Remmer*, the Eleventh Circuit agreed with the district court's holding that the government had carried its burden where the jurors at issue had proclaimed their ability to remain impartial throughout trial.[162] In that sense, the word of a potentially partial jury was sufficient to confirm its own impartiality. Thus, the Eleventh Circuit has adopted a relaxed stance on procedural burdens and presumptions in the face of jury taint allegations.[163]

### 5. Discretionary Use: The Eighth Circuit

Last, while the Eighth Circuit claims to abide by *Remmer*, it narrowly and selectively applies the presumption.[164] The Eighth Circuit has previously declared that a defendant is not entitled to a *Remmer* hearing or presumption

157. *See supra* notes 144–46 (discussing United States v. Lawson, 677 F.3d 629 (4th Cir. 2012)).

158. United States v. Ronda, 455 F.3d 1273, 1299 (11th Cir. 2006) (encompassing both outside influence and juror misconduct).

159. *Id.* at 1299–300. The following factors identify when the government has successfully rebutted the presumption: "(1) the nature of the extrinsic evidence; (2) the manner in which the information reached the jury; (3) the factual findings in the district court and the manner of the court's inquiry into the juror issues; and (4) the strength of the government's case." *Id.* at 1300.

160. *Id.* at 1299 n.36 (first citing United States v. Rowe, 906 F.2d 654, 656–57 (11th Cir. 1990); and then citing United States v. De La Vega, 913 F.2d 861, 870 (11th Cir. 1990)). In the same footnote, the Eleventh Circuit recognized and recited "the apparent conflict between the standard pronounced in *Rowe* and the unambiguous mandate of *Remmer*," which it then refused to resolve. *Id.* (quoting United States v. Martinez, 14 F.3d 543, 550 n.3 (11th Cir. 1994)).

161. United States v. Schlecht, 679 F. App'x 817, 818 (11th Cir. 2017).

162. *Id.*

163. *See also* Kerr, *supra* note 114, at 1463 (characterizing the Eleventh Circuit as having no articulated standard).

164. *But see* United States v. Lawson, 677 F.3d 629, 643 (4th Cir. 2012) (including the Eighth Circuit among those circuits that do not follow *Remmer*).

for points of law[165] or factual evidence developed at trial.[166] In fact, the Eighth Circuit has restricted *Remmer* to cases "with facts like *Remmer*[]," which it categorizes purely as instances of outside communication or tampering.[167] Moreover, where a defendant alleges taint or outside influence within the Eighth Circuit's designated *Remmer* territory, the court calls on *Remmer* to supplement, not govern, the analysis.[168]

Should district courts in the Eighth Circuit deem a *Remmer* hearing appropriate, they then retain discretion to assign the burden to either party after having reviewed the case's facts.[169] For instance, in *United States v. Harris-Thompson*,[170] the district court investigated potential contact between members of the defendant's family and the jurors.[171] The court questioned the potentially compromised jurors, weighed the gravity of the allegations against the likelihood that they occurred, and determined the concerns would not have prejudiced the verdict.[172] This result departs from the classic *Remmer* recipe, neither presuming prejudice nor asking the government to rebut.[173] Instead, the district court used *Remmer* as guidance to investigate, leaving the execution of that inquiry subject to the court's discretion.[174]

While cloaked as a *Remmer* circuit, the Eighth Circuit resembles *Olano* circuits, asking what effect, if any, an intrusion had on the jury's deliberation and verdict.[175] The following section explores the *Phillips* and *Olano* circuits' departures from *Remmer* and the procedures they formulated to replace it.

### *B. The* Phillips *and* Olano *Circuits*

Other circuits have sharply deviated from *Remmer*'s presumption. Specifically, the First, Fifth, Sixth, Ninth, and D.C. Circuits have instead adopted the standards articulated in *Phillips* or *Olano*. This section explores the *Phillips* circuits and *Olano* circuits in turn.

---

165. United States v. Blumeyer, 62 F.3d 1013, 1016 (8th Cir. 1995) (reasoning that, even when substantive, issues of law are beyond the jury's consideration and therefore cannot prejudice the defendant under *Remmer*).

166. United States v. Honken, 541 F.3d 1146, 1167 (8th Cir. 2008).

167. *Id.*

168. *See generally* United States v. Harris-Thompson, 751 F.3d 590 (8th Cir. 2014); United States v. Tucker, 137 F.3d 1016 (8th Cir. 1998).

169. *Tucker*, 137 F.3d at 1030 (discussing how the court could not ascertain from the case's facts whether to apply the presumption and shift the burden); *see also Harris-Thompson*, 751 F.3d at 597 ("[T]he court understood the inquiry that *Remmer* and other cases required and attempted to fashion a procedure . . . .").

170. 751 F.3d 590 (8th Cir. 2014).

171. *Id.* at 598.

172. *Id.*

173. *See generally id.*

174. *See id.* at 596–97.

175. United States v. Hall, 877 F.3d 800, 806 (8th Cir. 2017); United States v. Honken, 541 F.3d 1146, 1167 (8th Cir. 2008); United States v. Tucker, 137 F.3d 1016, 1030 (8th Cir. 1998).

### 1. *Phillips* Circuits

In contrast to the *Remmer* circuits, *Phillips* circuits interpret the majority opinion in *Phillips* to have restricted the entitlements allotted to defendants under *Remmer*.[176] Where *Remmer* previously awarded defendants the right to a hearing and a presumption of prejudice at that hearing, *Phillips* now limits *Remmer*'s rule to a hearing alone.[177] Under this view, a prima facie showing of jury taint is no longer presumed to have prejudiced a defendant's right to a fair trial. Eliminating the presumption converts the hearing into an opportunity for the defendant to persuade the court of prejudice, rather than an opportunity for the government to show juror impartiality. Thus, *Phillips* circuits repackage the government's burden as the defendant's at a hearing.[178]

Specifically, the Fifth, Sixth, and D.C. Circuits make up the *Phillips* circuits. The Sixth Circuit outwardly rejects the presumption of prejudice.[179] The Fifth and D.C. Circuits acknowledge the presumption's theoretical existence, but they place it just out of a defendant's reach. Instead, a defendant in the Fifth or D.C. Circuit must additionally establish a likelihood of prejudice on top of the initial prima facie showing.[180] These sections first explore the Sixth Circuit and then explore the Fifth and D.C. Circuits.

#### *a. Goodbye* Remmer*: The Sixth Circuit*

The Sixth Circuit abandoned the *Remmer* presumption after the Supreme Court decided *Phillips*.[181] It finds *Phillips* to have reinterpreted *Remmer*, shifting the burden of proof onto the defendant to demonstrate that alleged outside contact with jurors resulted in actual juror partiality.[182] As such, a defendant in the Sixth Circuit retains the burden in a *Remmer* hearing, and "[p]rejudice is not to be presumed."[183]

---

176. *See, e.g.*, United States v. Sylvester, 143 F.3d 923, 934 (5th Cir. 1998); United States v. Williams-Davis, 90 F.3d 490, 496–97 (D.C. Cir. 1996); United States v. Pennell, 737 F.2d 521, 532 (6th Cir. 1984).

177. *See supra* note 176.

178. *See supra* note 176.

179. *See, e.g.*, United States v. Davis, 407 F. App'x 32, 36 (6th Cir. 2011); United States v. Gillespie, 61 F.3d 457, 460 (6th Cir. 1995); United States v. Zelinka, 862 F.2d 92, 95 (6th Cir. 1988).

180. *See, e.g.*, United States v. Smith, 354 F.3d 390, 395 (5th Cir. 2003) (explaining that, in light of *Phillips* and *Olano*, the government should only be required to rebut after a court determines a likelihood of prejudice); United States v. Edelin, 283 F. Supp. 2d 8, 15 (D.D.C. 2003) (discussing how this court first has discretion to convene a hearing and, that when it does, it only applies the presumption to a sufficient likelihood of prejudice).

181. *Pennell*, 737 F.2d at 532. In the Sixth Circuit, *Remmer* no longer governs the question of burden; it only "controls the question of how the district court should proceed where such allegations are made, *i.e.*, a hearing must be held during which the defendant is entitled to be heard." *Id.*

182. *Zelinka*, 862 F.2d at 95 ("This Court has consistently held that *Smith v. Phillips* reinterpreted *Remmer* to shift the burden of showing bias to the defendant rather than placing a heavy burden on the government."); *see also Davis*, 407 F. App'x at 36–37.

183. *Zelinka*, 862 F.2d at 95 (quoting *Pennell*, 737 F.2d at 532).

In a recent case, the defendant reported having received a LinkedIn notification from a member of the community where he stood trial and had been convicted.[184] After some additional research, the defendant learned that this person was the live-in girlfriend of one of the jurors.[185] The defendant presented the court with evidence that the juror had disclosed details of the ongoing trial to his girlfriend, after which she had searched Google for additional details.[186] The first page of search results included information that the court had specifically precluded the government from presenting at trial.[187] Thus, not only had the juror violated his oath by discussing details of the trial, but he also may have learned information that threatened to prejudice the proceedings.[188]

The Sixth Circuit remanded the case to the district court to conduct a *Remmer* hearing, explaining that the defendant would be entitled to a new trial on all counts if the district court found prejudice.[189] If the district court did not, the Sixth Circuit continued, the defendant's convictions would stand.[190] The district court convened a *Remmer* hearing, at which the defendant was not entitled to a presumption and was expected to prove actual prejudice.[191] His inability to do so resulted in the reinstatement of all convictions.[192]

Ultimately, the Sixth Circuit's retreat from *Remmer*'s presumption places greater onus on the defendant to show juror partiality. For defendants alleging a tainted jury, the path to a new trial is far more arduous in the Sixth Circuit than in others.[193]

### *b. A Sufficient Likelihood: The Fifth and D.C. Circuits*

Moreover, the Fifth[194] and D.C.[195] Circuits grant district courts discretion to apply a presumption, but they limit its application to few circumstances. Even when addressing jury tampering, which directly mirrors the facts of

184. United States v. Harris, 881 F.3d 945, 952 (6th Cir. 2018).
185. *Id.*
186. *Id.* at 952–53.
187. *Id.* at 952.
188. *Id.* at 953–54.
189. *Id.* at 954.
190. *Id.*; *see also* United States v. Lanier, 870 F.3d 546, 551 (6th Cir. 2017) ("Subject to review by this court, if the *Remmer* hearing reveals that any external influence prejudicially affected jury deliberations, defendants are entitled to a new trial, but if the *Remmer* hearing reveals that no external influence prejudicially affected jury deliberations, defendants' convictions must be reinstated.").
191. United States v. Harris, No. 15CR335-2, 2018 WL 3869579, at *3 (N.D. Ohio Aug. 15, 2018).
192. *Id.*
193. *Compare id.* (reinstating a conviction where a defendant could not produce evidence of actual prejudice), *with* United States v. Vasquez-Ruiz, 502 F.3d 700, 707–08 (7th Cir. 2007) (reversing a conviction where the government could not rebut presumed prejudice).
194. *See, e.g.*, United States v. Smith, 354 F.3d 390, 395 (5th Cir. 2003); United States v. Sylvester, 143 F.3d 923, 932–33 (5th Cir. 1998).
195. *See, e.g.*, United States v. Williams-Davis, 90 F.3d 490, 496 (D.C. Cir. 1996).

*Remmer*, the Fifth Circuit has not presumed prejudice.[196] In one case, unidentified third parties phoned two jurors and asked for details about the case, requested that another juror be lenient on the defendants, and delivered a mysterious package to another juror's home.[197] The Fifth Circuit declined to presume that such contact would have prejudiced the jury, stating that the presumption "cannot survive *Phillips* and *Olano*."[198]

Similarly, the D.C. Circuit must find a sufficient "likelihood of prejudice" before it shifts the burden to the government.[199] In *United States v. Williams-Davis*,[200] the defendants asserted numerous instances of juror misconduct, alleging that the jurors partook in conversations with third parties, read newspaper articles, relied on dictionaries to define legal terms, deliberated prematurely amongst themselves, and withheld information during voir dire.[201] In reviewing each allegation, the D.C. Circuit explained that its standard is not whether the defendant proffered evidence, but it is whether the alleged circumstances are sufficiently likely to produce prejudice.[202] It held that these facts were insufficient and declined to apply the presumption.[203] Accordingly, the D.C. Circuit views the presumption as not "particularly forceful," if it even applies at all.[204]

While the Sixth, Fifth, and D.C. Circuits agree that *Remmer* entitles a defendant to a hearing, they conclude that *Phillips* removed the presumption and refrain from requiring the government to show harmlessness. Defendants standing trial in these circuits therefore retain the burden of proving prejudice throughout each stage of the court's inquiry.[205]

### 2. *Olano* Circuits

Pivoting to *Olano*, the First and Ninth Circuits supplant the burden-shifting framework with a fact-intensive inquiry into whether the alleged jury taint impacts a defendant's substantive rights. Such determinations lean heavily on district judges' experience and discretion. This subsection explores the First Circuit and Ninth Circuit in turn.

#### *a. Merit-Based Claims: The First Circuit*

The First Circuit engages in Justice O'Connor's specific analysis to address the merits of jury taint allegations and to determine whether

196. *See Sylvester*, 143 F.3d at 933–34 (finding that the defendant bears the burden even where third parties pressured several jurors to tamper with the verdict).
197. *Id.* at 931–32.
198. *Id.* at 934; *see also* United States v. Bradshaw, 281 F.3d 278, 288 (1st Cir. 2002) (explaining that "[i]n the wake of [*Phillips*] and *Olano*," the Fifth Circuit concluded that "*Remmer* is a dead letter").
199. *See Williams-Davis*, 90 F.3d at 497.
200. 90 F.3d 490 (D.C. Cir. 1996).
201. *See generally id.*
202. *Id.* at 496–97.
203. *Id.* at 497.
204. *Id.* at 496.
205. *See supra* Part II.B.1.

*Remmer*'s presumption should apply.[206] A district judge will investigate an allegation by "assessing the magnitude and extent of any prejudice caused."[207] Upon finding a colorable claim, the district courts weigh the risk of influence to a juror against the juror's testimony that he can (or did) remain impartial.[208] Judges then reserve discretion to designate the appropriate method of investigation.[209] When a court identifies jury taint and its likelihood of prejudicing a jury, the court may cure it in any number of ways, including: discharging particular jurors, giving new instructions, or granting a mistrial.[210]

In *United States v. Zimny*,[211] the defendant appealed his case after learning that former jurors had posted details about his trial to a blog forum.[212] The trial court interviewed one suspected former juror, but it did not investigate the other.[213] On appeal, the First Circuit determined that an investigation into the unexamined juror's contact was necessary; yet, it noted a trial court's broad discretion to shape that investigation's rigor and depth.[214] Thus, First Circuit courts deviate from the categorical approaches espoused in *Remmer* and *Phillips*. Rather, they conduct fact-intensive inquiries aimed at analyzing the merits of each allegation before they commit to a course of action.

### *b. Jury Tampering Is Different: The Ninth Circuit*

Like the First Circuit, the Ninth Circuit conducts a fact-intensive inquiry to discern whether alleged jury taint may warrant a *Remmer* presumption. To determine whether the misconduct or extraneous influences merit a presumption, Ninth Circuit courts consider a variety of factors, such as the seriousness of the allegations, the content of the allegations, and the credibility of the information's source.[215]

Specifically, this circuit distinguishes between jury tampering, on the one hand, and other juror misconduct or improper contact, on the other.[216] *United*

206. *See* United States v. Bradshaw, 281 F.3d 278, 287–92 (1st Cir. 2002); *see also* United States v. Tejeda, 481 F.3d 44, 50–54 (1st Cir. 2007) (discussing First Circuit jurisprudence).

207. *Tejeda*, 481 F.3d at 52.

208. *Id.* at 52–53 (identifying how a threatening gesture may impact the trial by evaluating the risk of (1) a juror associating the threat with the defendant and (2) influence on the juror's deliberation process); *see supra* Part II.A.5 (likening the Eighth Circuit's process to the *Olano* circuits' processes).

209. United States v. Zimny, 846 F.3d 458, 465 (1st Cir. 2017) ("The touchstone is reasonableness: did the trial court fashion, and then even-handedly implement, a sensible procedure reasonably calculated to determine whether something untoward had occurred?" (quoting United States v. Paniagua-Ramos, 251 F.3d 242, 249–50 (1st Cir. 2001))).

210. *Bradshaw*, 281 F.3d at 289.

211. 846 F.3d 458 (1st Cir. 2017).

212. *Id.* at 461–64.

213. *Id.* at 465, 467–68.

214. *Id.* at 467, 472.

215. United States v. Brande, 329 F.3d 1173, 1176–77 (9th Cir. 2003); United States v. Saya, 247 F.3d 929, 934–35 (9th Cir. 2001).

216. *Brande*, 329 F.3d at 1176 (distinguishing the facts of *Remmer* from later cases, like *Olano*, because jury tampering clearly deserves a presumption).

*States v. Henley*[217] addressed an attempt to bribe jurors for a verdict favorable to the defendant.[218] On appeal, the Ninth Circuit found that the district court had erred by not immediately presuming prejudice and assigning a burden to the government.[219] Because jury tampering is "qualitatively more prejudicial" than other kinds of extraneous influence, the court reasoned, it merits *Remmer*'s automatic presumption.[220] Thus, pursuant to *Olano*, the *type* of intrusion instructs when to presume prejudice.

As evidenced above, the circuit split is a far cry from clean cut. The following section dives deeper to examine how posture complicates the doctrine and compounds the existing split.

### *C. Habeas Corpus Overlay*

Habeas corpus cases complicate the inquiries into whether to rely on *Remmer*'s presumption and by what standard to review allegations of jury taint. As background, defendants convicted in state systems may petition federal courts for a writ of habeas corpus—a collateral attack[221]—by asserting that a constitutional right has been violated.[222] When reviewing a state court's decision, a federal court examines whether the decision (1) was contrary to, or an unreasonable application of, clearly established federal law or (2) was predicated on an unreasonable determination of the facts presented at trial.[223] Thus, a federal court's review of habeas corpus cases contrasts with the abuse of discretion standard typical of cases on direct appeal.[224] Moreover, the federal court must also determine that the state court's error "actually prejudiced" the defendant.[225]

In sum, the habeas posture changes a federal court's calculus. It requires a defendant to carry the burden of persuasion throughout each aspect of the case, and it affords the state court a graciously forgiving standard of review.[226] Of the three foundational Supreme Court cases, only *Phillips* was a habeas case. Accordingly, there is an implicit question of whether *Phillips* is comparable to *Remmer* despite the difference between defendants' rights on appeal.

---

217. 238 F.3d 1111 (9th Cir. 2001).

218. *See generally id.*

219. *Id.* at 1118–19 (remanding the case for further investigation).

220. *Id.* at 1115 (explaining that jury tampering directly implicates a defendant's Sixth Amendment right to a fair trial).

221. Collateral attacks afford the defendant an indirect means to be heard in federal court after the defendant has exhausted all state remedies.

222. *See* 28 U.S.C. § 2254(d)(1)–(2).

223. *Id.*

224. For examples of cases on direct appeal in which the abuse of discretion standard was applied, see United States v. Warner, 498 F.3d 666, 680 (7th Cir. 2007); United States v. Vega, 285 F.3d 256, 265 (3d Cir. 2002); United States v. Greer, 285 F.3d 158, 171 (2d Cir. 2002).

225. Barnes v. Joyner, 751 F.3d 229, 239 (4th Cir. 2014) (quoting Bauberger v. Haynes, 632 F.3d 100, 104 (4th Cir. 2011)).

226. *See* Fry v. Pliler, 551 U.S. 112, 116 (2007) (explaining that the standard of review must be lenient since collateral attacks threaten "finality, comity, and federalism").

Specifically, habeas petitioners who allege jury taint assert a violation of their Sixth or Fourteenth Amendment rights.[227] In *Phillips*, the defendant alleged a violation of his Fourteenth Amendment due process right, and he argued that such injury necessitated a writ of habeas corpus.[228] In response, the Court focused its analysis on defining due process in cases of alleged taint, and it identified the procedure that due process requires.[229] Even where outside influences tiptoe past procedural safeguards, like voir dire and trial instructions, a breach does not per se entitle a defendant to a new trial or vacated conviction.[230] Rather, due process violations are appropriately remedied by evidentiary hearings.[231] To hold that a breach necessitates a writ of habeas corpus, as the lower courts had in *Phillips*, would suggest that due process requires more of state courts than of federal courts.[232] Therefore, where a state court convenes a hearing, the state court has complied with due process requirements.[233]

A Sixth Amendment injury—not due process—entitles the defendant to a new trial or writ of habeas corpus.[234] As the moving party, the defendant bears the burden of demonstrating an injury to his Sixth Amendment right to an impartial jury.[235] Upon making this showing, the defendant will have adduced sufficient evidence for the reviewing court to grant a writ of habeas corpus or mandate a new trial.[236] Short of this showing, the defendant has not alleged a Sixth Amendment injury and is therefore not entitled to a new trial or writ.[237]

The unique procedural criteria inherent to habeas cases overlay the existing circuit split with even more confusion. A circuit court's relationship to *Remmer* may turn on its understanding of *Phillips*. Whether it views the habeas posture as relevant to a defendant's entitlements on appeal instructs whether it views *Phillips* as an exception to *Remmer*'s rule or as a limitation on *Remmer*'s power. The following part addresses, in part, how posture informs a circuit's review.

---

227. *See, e.g.*, Smith v. Phillips, 455 U.S. 209, 214 (1982) (Fourteenth Amendment); *Barnes*, 751 F.3d at 239 (Sixth and Fourteenth Amendments); Stouffer v. Trammell, 738 F.3d 1205, 1220 (10th Cir. 2013) (Sixth Amendment); Hall v. Zenk, 692 F.3d 793, 798 (7th Cir. 2012) (Sixth and Fourteenth Amendments).

228. *Phillips*, 455 U.S. at 214, 217.

229. *Id.* at 217.

230. *Id.*

231. *Id.* at 217–18; Ewing v. Horton, 914 F.3d 1027, 1031–33 (6th Cir. 2019).

232. *Phillips*, 455 U.S. at 218 (reasoning that a *Remmer* hearing in federal court complies with constitutional requirements).

233. *See id.* at 221 (limiting federal review in habeas cases since federal courts reviewing federal habeas actions "hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension").

234. *Ewing*, 914 F.3d at 1033.

235. *Id.*; *see supra* Part I.C (discussing burden-shifting).

236. *Ewing*, 914 F.3d at 1033; *see also* Lang v. Bobby, 889 F.3d 803, 812 (6th Cir. 2018) (distinguishing a habeas petitioner's case from the direct appeal precedent on which he relied).

237. *Ewing*, 914 F.3d at 1033 ("Until [the defendant] shows actual prejudice, he has shown only a due process violation—for denial of an opportunity to prove prejudice—and not yet a violation of his Sixth Amendment right to an impartial jury.").

## III. ADJUSTING THE LEGAL SANDBOX

This part argues that courts can harmonize the three Supreme Court cases that sparked the circuit split. Despite a deepening split, circuits begin their analyses in the same manner. First, each defendant must make out a colorable claim of jury taint.[238] This showing permits the court to address the basic dimensions of an intrusion, asking what happened and what impact it had on the defendant's right to a fair trial. Courts further agree that a sufficient showing entitles a defendant to an evidentiary hearing.[239] They diverge, however, in how they perceive the presumption and allocate its burdens.

This part argues that the inquiry into whether to apply or reject *Remmer*'s presumption is too narrow, rendering subsequent procedure too rigid. This Note makes three observations to reconcile the Court's seemingly disparate holdings and to recommend a unified analysis moving forward. First, this part distinguishes between prehearing and posthearing remedies,[240] and it then argues that timing instructs different burdens within the same legal framework. Second, this part argues that *Olano* extends, rather than limits, *Remmer*'s presumption. Third, this part analyzes where procedural posture confuses circuit analysis, and it seeks to disentangle the different standards. These three considerations, taken together, bridge the gaps in Supreme Court jurisprudence. Last, this part proposes a path forward for circuits to redress jury taint in the digital era.

### *A. Prehearing Versus Posthearing Remedies*

This section argues that *Remmer* and *Phillips* should be understood as individual developments in the legal framework, not as conflicting propositions about presumptions. Their relationship turns largely on whether a claim of jury taint is prehearing or posthearing. Where the trial court previously refused to convene a hearing, *Remmer* governs. Where the trial court granted a hearing, *Phillips* explains that the defendant bears the burden of persuasion.

Some circuits have grounded their rejection of *Remmer* in the *Phillips* Court's highly debated and sometimes acclaimed line: "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."[241] Circuits have inevitably latched onto the Court's use of "the defendant," reading *Phillips* to shift the burden from the government to the defendant.[242] Yet the

238. *See supra* Parts I.C.1–2.

239. *See supra* Parts II.A–B. Although, they disagree as to what evidence satisfies that threshold.

240. These labels refer respectively to when a court has yet to grant a hearing and has already agreed to convene one.

241. Smith v. Phillips, 455 U.S. 209, 215 (1982); *accord* United States v. Sylvester, 143 F.3d 923, 934 (5th Cir. 1998); United States v. Williams-Davis, 90 F.3d 490, 496 (D.C. Cir. 1996); United States v. Pennell, 737 F.2d 521, 532–33 (6th Cir. 1984).

242. *See supra* Part II.B (observing that some circuits view *Phillips* as having overruled *Remmer*).

surrounding phrases, "a hearing in which" and "to prove actual bias," are more instructive.[243]

The *Remmer* Court established the remedy for prehearing allegations.[244] As a matter of due process, the defendant is entitled to a hearing at which all parties examine the effect of outside influence on the jury.[245] Since the lower courts in *Remmer* had denied the defendant an evidentiary hearing, they had denied him due process of the law.[246] Without a further inquiry, the Supreme Court could at most presume that such contact with the jury prejudiced the defendant's trial.[247] By remanding the case for a hearing, the Supreme Court instructed future courts to gather all parties to the litigation before investigating extraneous influence.[248] Either judicial inaction or ex parte responses to credible allegations of jury taint deprive the defendant of due process of the law. Thus, *Remmer* prescribes a prehearing remedy to alleged jury taint as a measure of ensuring due process.

In contrast, *Phillips* instructs the proper procedure posthearing. In *Phillips*, the trial court had already convened an evidentiary hearing, only after which it concluded that such evidence had not prejudiced the defendant.[249] In essence, the trial court in *Phillips* accorded the precise remedy called for by the *Remmer* Court. The Supreme Court then ventured a step beyond the *Remmer* Court's initial holding, endeavoring to establish what must happen during a hearing for the presiding court to vacate a conviction.[250] By distinguishing between injuries to procedural rights and injuries to substantive rights, the Court quelled ambiguity about which remedy redresses which injury.[251] The relief a defendant seeks must match the constitutional violation alleged.[252]

*Phillips* explained that the defendant bears the ultimate burden of persuading a court to grant a mistrial or vacate a conviction.[253] Regardless of whether a court initially applies a presumption, the defendant bears this burden. And even where a court initially presumes prejudice, thereby assigning a burden to the government, the defendant may carry this ultimate burden in one of two ways. If the government cannot rebut, the defendant has carried his burden to persuade the court to grant a mistrial or vacate the conviction. Alternatively, if the government does rebut the presumed

243. *See Phillips*, 455 U.S. at 215.

244. *See generally* Remmer v. United States, 347 U.S. 227 (1954).

245. *See, e.g.*, Ewing v. Horton, 914 F.3d 1027, 1031 (6th Cir. 2019) (citing *Remmer* to demonstrate that "due process requires the opportunity to show" that the extraneous information tainted the jury).

246. *See Remmer*, 347 U.S. at 229.

247. *See infra* Part III.B (discussing how the degree of intrusion merited a presumption).

248. *See Remmer*, 347 U.S. at 229–30.

249. Smith v. Phillips, 455 U.S. 209, 216–18 (1982) (explaining that the trial judge found no evidence to suggest prejudice).

250. *See id.* at 215; *see supra* Part II.C (discussing the difference between constitutional rights).

251. *See generally Phillips*, 455 U.S. 209.

252. *See* Ewing v. Horton, 914 F.3d 1027, 1031–33 (6th Cir. 2019).

253. *See Phillips*, 455 U.S. at 215 (citing prior Supreme Court cases that required actual bias).

prejudice, the defendant may carry his burden by demonstrating actual prejudice. Irrespective of the presumption's application or force, a defendant must carry this ultimate burden to persuade the presiding court to grant a mistrial or vacate a conviction.

Thus, *Phillips* addressed a discrete issue than *Remmer* had contemplated. In fact, *Phillips* overlooked a presumption and instead addressed broader procedure. Because the cases address distinct stages of the court's inquiry, the appropriate lens for understanding their relationship first turns on whether a case is prehearing or posthearing. *Remmer* protects the defendant's right to an evidentiary hearing once he has made the requisite showing of jury taint. Twenty-eight years later, *Phillips* reiterated *Remmer*'s holding by examining whether the trial court had afforded the defendant the very remedy *Remmer* had prescribed. Upon finding it had, the *Phillips* Court deemed *Remmer* satisfied, and it moved forward to explain the defendant's burden once at a hearing. Therefore, *Phillips* does not reduce *Remmer*. It lives alongside *Remmer* as a companion, establishing the defendant's burden regardless of whether the evidence initially presumed prejudice.

### *B. Jury What?: Expanding the Jury Taint Category*

While *Phillips* did not address the presumption's applicability, *Olano* did.[254] The *Olano* Court explained that the type of taint informs whether to presume prejudice.[255] This section argues that *Olano* did not restrict *Remmer*, but it in fact expanded its holding by extending *Remmer*'s rule to other forms of taint.

First, the *Olano* Court established that not all intrusions presume prejudice to the defendant.[256] In that case, specifically, the Court focused on the kind of contact that should warrant a presumption.[257] Instead of restricting *Remmer* to cases that share similar facts, as some *Remmer* circuits do,[258] the *Olano* Court suggested that jury taint is amorphous. In response, the proper lens for examining allegations must be equally flexible. This analysis opened the door to other types of taint that would not have previously implicated *Remmer*.

In doing so, *Olano* further reflects the importance of evaluating what types of intrusion may presume prejudice.[259] The *Olano* Court cites *Remmer* as "a prime example," recounting third-party contact with a juror, the appearance

254. *See generally* United States v. Olano, 507 U.S. 725 (1993).

255. *See id.* at 739.

256. *Id.* at 738–39 (assessing the impact on the verdict to discern which intrusions should presume prejudice).

257. *Id.* at 737. The Court discusses Federal Rule of Criminal Procedure 52(b), which is a procedural dimension outside the scope of this Note. *See generally id.*

258. For examples of circuits that restrict *Remmer*'s doctrine to cases like *Remmer*, such as the Tenth and Eighth Circuits, see *supra* Parts II.A.3, II.A.5.

259. *See Olano*, 507 U.S. at 737–38 (rejecting the facts in the case as insufficient).

of a bribe, and an FBI investigation.[260] The Court found facts like *Remmer*'s to presume prejudice because their egregious nature threatens the integrity of a jury's verdict to a greater extent than other intrusions may.[261] Indeed, the circumstances in *Remmer* were sufficient to presume prejudice but not necessary. *Olano* explains that lesser intrusions may equally merit a court's attention.[262] As such, *Olano* supplements *Remmer* by allowing courts to conduct "specific analys[es]" into circumstances that may not trigger the rebuttable presumption.[263]

*Remmer* circuits have suggested that *Olano* undermines *Remmer*'s rule by permitting courts to decide between a presumption and a specific analysis.[264] However, this argument misunderstands that not all instances of jury taint result from third-party attempts to induce a verdict, nor should all presume prejudice. To assume that any allegation, however small, merits a presumption would equip every defendant with sweepstake incentive to allege jury taint, and it would render few trials permissible.[265] On the other hand, restricting the presumption to apply only to third-party intrusions discounts cases, like *Olano*, that do not involve outside influence.[266] It would ignore juror misconduct completely, which would fissure *Remmer*'s entitlement and withhold remedial measures from defendants whose trials were made partial through misconduct.

Accordingly, *Olano* did not constrain or weaken *Remmer*. It left intact a court's ability to presume prejudice when warranted, and it supplemented the types of activity that may prejudice a verdict. Whether the intrusion entitles a defendant to a presumption at the hearing should not inform a court's decision to convene one at all. Instead, *Olano* recognizes that jury taint comes in many forms, not all of which will resemble facts so shocking as to presume prejudice on their face. By distinguishing between the types of intrusions, courts are more apt to determine the effects on jury deliberations, the verdict, and defendants' rights.

Ultimately, special attention to how these three cases interact illustrates the underlying harmony among them. *Remmer* examines a prehearing injury and redresses it by granting the defendant an entitlement to a hearing. The facts of *Remmer* were sufficiently extreme to presume prejudice, but the

260. *Id.* at 738. The Court further referenced the per se rules it established in *Turner* and *Parker* as replete with facts that confirmed prejudice to the defendant. *See* Parker v. Gladden, 385 U.S. 363, 363 (1966); Turner v. Louisiana, 379 U.S. 466, 467–68 (1965).

261. *Olano*, 507 U.S. at 738 (collecting cases).

262. *Compare Turner*, 379 U.S. at 467–68 (per se prejudicial), *and* Remmer v. United States, 347 U.S. 227, 229–30 (1954) (presumed prejudicial), *with* Holbrook v. Flynn, 475 U.S. 560, 571–72 (1986) (not prejudicial), *and* Patton v. Yount, 467 U.S. 1025, 1033 (1984) (not prejudicial).

263. *See Olano*, 507 U.S. at 739.

264. *See* Hall v. Zenk, 692 F.3d 793, 800–02 (7th Cir. 2012); United States v. Lawson, 677 F.3d 629, 641–43 (4th Cir. 2012).

265. *See* Smith v. Phillips, 455 U.S. 209, 217 (1982) (discussing policy concerns about permitting per se invalidation of trial proceedings).

266. *Olano*, 507 U.S. at 739; *see also* United States v. Zimny, 846 F.3d 458, 462–66 (1st Cir. 2017).

Court neither endorsed nor foreclosed the use of a presumption in other situations. *Olano* then explained how to presume prejudice, encouraging courts to conduct a specific analysis when presuming prejudice would not be appropriate. Once at a hearing, *Phillips* governs what burden the defendant must bear before a reviewing court will vacate the conviction.

### *C. Collateral Attack Versus Direct Appeal*

Last, this section argues that a case's posture influences how circuits have inconsistently applied the presumption, unnecessarily muddying the doctrine. *Remmer*, a case on direct appeal, asked the Court to review for an abuse of discretion.[267] Comparatively, this standard benefits the defendant because it gives a reviewing court full visibility into the evidence, logic, and discretion of the lower court.[268] Because *Phillips* rose through the federal courts on a habeas action,[269] the Court could not disturb anything short of a constitutional violation producing substantial and injurious effect on the verdict.[270]

Some *Remmer* circuits point to the intentionally restrictive habeas procedure to suggest that *Phillips* may be altogether inconsistent with *Remmer*.[271] These circuits either selectively apply the presumption to habeas cases, or they withhold it from habeas cases altogether.[272] Specifically, *Remmer* circuits extend the presumption to cases on direct appeal, and they engage in a case-specific analysis to discern whether presumptions may ever apply in habeas cases.[273]

The habeas petitioner must demonstrate in part that a state court's decision contradicted or unreasonably applied existing Supreme Court precedent.[274] Therefore, to obtain relief in a *Remmer* circuit, a defendant may spotlight a state court's refusal or failure to apply the presumption as evidence of that state court having violated clearly established federal law.[275] A defendant may be successful in obtaining a writ where he can demonstrate that a state court's failure to apply the presumption resulted in actual prejudice.[276]

---

267. *Remmer*, 347 U.S. at 229.

268. For examples of cases in which the abuse of discretion standard was used, see *supra* note 224. For examples of cases with habeas posture, see Ewing v. Horton, 914 F.3d 1027, 1030 (6th Cir. 2019); Barnes v. Joyner, 751 F.3d 229, 246–49 (4th Cir. 2014); Hall v. Zenk, 692 F.3d 793, 798 (7th Cir. 2012).

269. *Phillips*, 455 U.S. at 218.

270. *Id.* at 218, 221. While this is the majority's position, the dissent argues that the habeas posture "poses no obstacle to this conclusion" since the Court could deem the state court's findings unreliable and conduct its own inquiry. *Id.* at 243 (Marshall, J., dissenting).

271. *See infra* notes 273–83 and accompanying text.

272. *See infra* notes 273–83 and accompanying text.

273. *See, e.g.*, Stouffer v. Trammell, 738 F.3d 1205, 1214 n.5 (10th Cir. 2013); *Hall*, 692 F.3d at 805.

274. *See supra* notes 222–26 and accompanying text.

275. *See, e.g.*, Barnes v. Joyner, 751 F.3d 229, 237–49 (4th Cir. 2014); *Hall*, 692 F.3d at 804–06; Wisehart v. Davis, 408 F.3d 321, 326–28 (7th Cir. 2005). *But cf.* Crease v. McKune, 189 F.3d 1188, 1193 (10th Cir. 1999) (arguing that the presumption is a rule of criminal procedure, not constitutional law, and therefore cannot apply in habeas cases).

276. *See Hall*, 692 F.3d at 805; Bibbins v. Dalsheim, 21 F.3d 13, 16 (2d Cir. 1994).

Especially in a circuit that strongly enforces the presumption, a defendant more easily satisfies the habeas burden.

Alternatively, other *Remmer* circuits assert that habeas petitioners relinquish the right to a presumption altogether.[277] Under this view, any defendant in either the state or federal system retains his right to a presumption so long as he appeals within the same system.[278] When stepping outside of one system, however, the defendant forfeits that right.[279] The Fourth Circuit previously explained this distinction when it noted how appellate state courts should have afforded one defendant a presumption.[280] Yet, since the state courts had not done so and the case had arrived at the Fourth Circuit through collateral attack, the circuit court could not restore that same right to the defendant.[281] Thus, the potential success of a defendant's claim hinges on how the reviewing circuit understands *Remmer* and its progeny.[282]

These approaches unnecessarily restrict when, to whom, and to which case a rebuttable presumption may apply. They complicate the doctrine and how circuits successively adopt it. These approaches further insinuate that *Phillips*, for its habeas posture, is maximally an exception to the *Remmer* presumption instead of a companion case seeking to clarify federal law.[283] As discussed in Part III.A, however, courts can mend the brewing split by reconceptualizing the relationship between *Remmer* and *Phillips*.

### *D. Redressing Threats in a Digital Age*

This section suggests that contemplating the three categories offered above reconciles the case law and forges a path to redress jury taint in the face of advancing technologies. It further urges that increased exposure to information expedites the need for reform.

The rise of the digital age presents increased opportunities for juries to misbehave or to become the targets of outside influence. Roughly ten years ago, federal courts and a handful of state courts rewrote their jury instructions to include bans on "tweeting, texting, blogging, emailing, or researching proceedings online."[284] Yet, despite efforts to adapt, courts still saw a rise in motions for mistrial due to internet-related misconduct.[285] Thus, the added procedural mitigant did little to quash the ultimate effect on defendants'

277. *See, e.g.*, *Barnes*, 751 F.3d at 246–49; *Hall*, 692 F.3d at 804–06.

278. *See supra* note 277.

279. *See* Stouffer v. Trammell, 738 F.3d 1205, 1214 n.5 (10th Cir. 2013) (noting that the *Remmer* presumption of prejudice does not apply in a collateral review).

280. *Barnes*, 751 F.3d at 252.

281. *Id.*

282. *See supra* Part II.C.

283. *Cf.* United States v. Lawson, 677 F.3d 629, 642 (4th Cir. 2012) (referring to *Remmer* and *Olano* for their postures, rather than *Phillips*, where the court was analyzing a case on direct appeal).

284. Brian Grow, *Juror Could Face Charges for Online Research*, REUTERS (Jan. 19, 2011), https://www.reuters.com/article/us-internet-juror/juror-could-face-charges-for-online-research-idUSTRE70I5KI20110119 [https://perma.cc/G2KC-HM4X].

285. *See id.*

rights. Provided that technology has since advanced to grant users greater, quicker access to information, jury taint is increasingly more likely.

Not only does technology erode traditional access barriers, but the societal moment may eventually call for a strictly technology-based approach to jury trials. As the country navigates the COVID-19 pandemic in 2020, courts are considering whether virtual trials are feasible.[286] They are primarily contemplating the impact of separating the judge from the jury, how the jury may deliberate, and how to prevent jurors from conducting independent research.[287]

This moment exposes how current procedural tools for preserving impartiality rely on the ability to sequester jurors or temporarily confine their access to phones or computers.[288] In a virtual trial, what mechanisms ensure that jurors are not continuously texting each other? How would a court prevent jurors from simultaneously researching whom they see or what they hear during the course of each party's argument? Without a court's ability to monitor jurors at a physical trial, jurors are especially vulnerable to outside influence.

Now consider not only the added structural obstacle that virtual trials present to detecting taint, but also consider the disagreement among courts as to what qualifies as taint and what course of action redresses an injury. The existing circuit split tasks a defendant in the Sixth Circuit with proving actual prejudice, while a defendant in the Fourth or Seventh Circuit presumes it. The advent of the digital age amplifies this disparity, thereby creating greater impetus for courts to control the flow of information in and out of the jury box.

By orienting where in the sandbox courts reside when initiating their analyses, courts can better pinpoint the rights and procedural safeguards that flow from Supreme Court case law. As previously discussed, the remedy granted should match the injury sustained.[289] Applying that logic to types of jury taint, this section disassembles jury taint into three smaller categories distinguished by the types of intrusion they pose to a trial's fairness and a defendant's rights in the digital age. The three main lenses are: jury tampering, which includes third-party inducements or threats intended to alter the verdict; outside influence, which includes third-party actions not intended to affect the verdict; and internal misconduct, which includes inappropriate juror conduct.

---

286. *See Judiciary Preparedness for Coronavirus (COVID-19)*, U.S. CTS. (June 3, 2020), https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19 [https://perma.cc/5BKV-K3DD].

287. Matt Reynolds, *Could Zoom Jury Trials Become the Norm During the Coronavirus Pandemic?*, AM. BAR ASS'N J. (May 11, 2020, 8:00 AM), https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic [https://perma.cc/PC38-NGCQ].

288. *Judiciary Preparedness for Coronavirus (COVID-19)*, *supra* note 286 (noting a preference for postponing criminal trials until after the pandemic concludes); Reynolds, *supra* note 287 (raising concerns about due process and an impartial jury).

289. *See supra* Parts III.A–C (analyzing how the three proposed categories classify what injury deserves what remedy).

### 1. Jury Tampering

Jury tampering is the most sinister of intrusions because it reflects a covert desire to tip the judicial scales to favor one party. It directly threatens the core of the judicial process, and it "cuts to the heart of the Sixth Amendment[]."[290] It conjures images of insidious characters who slip money through handshake agreements or approach vulnerable jurors on their commutes home.

Applying the reasoning of both *Remmer* and *Olano*, third-party contact intended to influence the verdict is presumptively prejudicial. It directly implicates a defendant's Sixth Amendment right because the intended outcome proactively seeks to alter the jury's verdict. Regardless of whether a case is brought on direct appeal or as a collateral attack, injury to the Sixth Amendment right evidences a sufficient intrusion to grant the defendant relief. Thus, where a court faces credible allegations of jury tampering, the presiding court should grant the defendant a *Remmer* hearing and presume prejudice.

### 2. Outside Influence

But what happens when a third party influences the jury without intending to? Contact in this category especially blurs the lines between tampering and innocuous contact, ultimately underscoring the importance of first identifying the intrusion and its impact on the verdict. As technology lowers many of the procedural hurdles implemented to insulate juries, courts must adjust how they define possible types of taint. In today's twenty-four-hour news cycle, jurors can never truly shield themselves from outside influence. A coworker or family friend may innocently refer to an ongoing story or news coverage about the case, or the juror may overhear information regarding the case while commuting. There are endless possibilities for how extraneous information may unintentionally seep into a juror's routine.

Recognizing where *Olano* instructs the proper procedure is integral to crafting a proportionate response. While some outside contact may per se taint the verdict, as in *Parker* and *Turner*,[291] other types may not. *Olano*'s flexible standard permits courts to adjust their calculus by balancing the likelihood of prejudice to the defendant with the remedial measures it assigns. Accordingly, a fact-intensive inquiry best equips courts to differentiate between meritorious and nonmeritorious allegations of outside influence.

### 3. Internal Juror Misconduct

Juror misconduct has become the biggest blind spot of *Remmer*'s rule.[292] As the doctrinal lens largely focuses on preventing outside-in contact, it

290. United States v. Henley, 238 F.3d 1111, 1115 (9th Cir. 2001).
291. *See supra* notes 100–05 and accompanying text.
292. *See supra* Part II (discussing the circuit split).

cannot fully account for what happens when a jury self-infects. What good is fortifying the exterior when jurors themselves are capable of precipitating the taint? As circuits have largely disagreed on how to apply *Remmer* to instances of juror misconduct, clearly defining its borders and procedure remains a crucial concern. Again, *Olano*'s flexible standard is particularly instructive for diagnosing potential misconduct. That said, the first step is recognizing that juror misconduct squarely falls within *Remmer*'s rule[293]—especially as the possibility for misconduct looms.

### 4. Protecting the Sixth Amendment

The different standards by which circuits evaluate jury taint ultimately entitle defendants to varying degrees of constitutional protection at trial. The Sixth Amendment promises each criminal defendant the right to an impartial jury. Yet, divergent applications of *Remmer*'s rule call into question what is meant by "impartial." What one circuit determines to have infringed on the Sixth Amendment may not trigger the same response in a different circuit.[294]

Consequently, a defendant's right to contest proceedings rests largely on how that jurisdiction perceives outside information to influence them. As advancing technology makes access to information more readily available, safeguarding defendants' Sixth Amendment rights becomes harder and more important. Resolving *Remmer*'s rule clarifies what intrusions impinge on juror impartiality, thereby better protecting Sixth Amendment interests.

## CONCLUSION

In 1954, the Court first established that a prima facie case of jury tampering presumes prejudice to a defendant's Sixth Amendment right to a fair trial. Over the almost forty years following, the Court developed its framework by defining criteria for lower courts to utilize when identifying potential intrusions on that right and, once detected, by supplying instructions to redress them. Circuit courts are split over how they interpret these foundational cases, and they ultimately contemplate them as contradictory instead of complementary. Further, circuits' varying treatment of habeas corpus has overlaid the existing split with even more ambiguity.

By broadening and reframing how courts assess jury taint, however, courts can harmonize the case law. *Remmer* established a defendant's right to an evidentiary hearing. Years later, *Olano* expanded courts' investigatory discretion by permitting them to either presume prejudice, as the Court did in *Remmer*, or to conduct a special analysis. *Phillips* reiterated a defendant's

293. *See generally* United States v. Lawson, 677 F.3d 629 (4th Cir. 2012) (reversing a conviction when a juror used Wikipedia to define the offense at issue); United States v. Bristol-Martir, 570 F.3d 29 (1st Cir. 2009) (ordering a new trial after a juror admittedly researched the crime online).

294. *Compare Lawson*, 677 F.3d at 636 (finding that juror research triggered *Remmer*'s presumption and ultimately reversing the conviction), *with* United States v. Hawley, 660 F. App'x 702, 709 n.9 (10th Cir. 2016) (declining to investigate allegations of juror misconduct because the court only applies *Remmer* to third-party contact with the jury).

right to a hearing, and it instructed courts to find actual prejudice before contemplating a mistrial, vacating a conviction, or granting a writ of habeas corpus.

As technology advances, juries become more susceptible to outside influence, and the circuit split deepens. Consequently, defendants receive varying degrees of constitutional protection depending on where they stand trial. Adopting new standards and categories permits courts to holistically evaluate modern contaminants while also protecting defendants' Sixth Amendment rights to an impartial jury.