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United States v. Lawson: Problems with Presumption in the Fourth Circuit

Anna H. Tison

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INTRODUCTION

In the month of June 2013, the English version of Wikipedia had 7,971,582,563 page views. Wikipedia is a free, user-edited online encyclopedia. The site attracts 470 million unique visitors monthly, and there are more than four million articles written in English currently on the site. These articles contain a wide variety of content, giving users instant access to the answer to almost any question imaginable. The danger that comes with this quick and easy accessibility is that “[a]nyone with Internet access can write and make changes to Wikipedia articles.” As a result, it is difficult to tell which articles are authoritative, which are misleading, and which are flatly incorrect. Some articles have even been subject to vandalism, in which users have purposely altered articles with false information. In spite of the potential inaccuracies, one study found 401 cases in which courts referenced a Wikipedia article. The use of Wikipedia has
become so ubiquitous that even the Fourth Circuit in United States v. Lawson\(^9\) admitted to citing to it in three prior opinions.\(^{10}\)

Changing technology, such as the advent of Wikipedia in 2001,\(^{11}\) has not only impacted judicial opinion writing, but it has also led to an increase in juror misconduct.\(^{12}\) Although some courts have cited Wikipedia articles in their opinions, they have not been as accepting when a juror uses Wikipedia during a trial. For instance, despite the Fourth Circuit’s admission that it had relied on Wikipedia in the past, the court held in Lawson that a juror’s use of Wikipedia to look up an element of the charged offense was presumptively prejudicial.\(^{13}\) As a result, it overturned the defendant’s conviction for violating the Animal Welfare Act.\(^{14}\) In reaching this conclusion, the Fourth Circuit applied the United States Supreme Court’s holding from Remmer v. United States\(^{15}\) that “any private communication, contact, or tampering, directly or indirectly, with a juror” is presumed to be prejudicial.\(^{16}\) Despite a circuit split on whether Remmer is still applicable following the Supreme Court’s decisions in Smith v. Phillips\(^{17}\) and United States v. Olano,\(^{18}\) the Fourth Circuit concluded that the presumption did apply and that the government had failed to rebut it.\(^{19}\)

This Recent Development argues that the Fourth Circuit should apply the Remmer presumption more narrowly to encourage finality

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9. 677 F.3d 629 (4th Cir. 2012).
12. See Ralph Artigliere, Jim Barton & Bill Hahn, Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers, 84 FLA. B.J. 9, 9 (2010) (“To say that current jurors have enhanced temptation and ability to communicate about the trial with the outside world is the understatement of this still young century. Jurors have the capability instantaneously to tweet, blog, text, e-mail, phone, and look up facts and information during breaks, at home, or even in the jury room if they are allowed to keep their digital ‘windows to the world.’ Jury instruction by the judge about communication outside the courtroom has not kept pace with technology.”).
13. Lawson, 677 F.3d at 651. The court found that the government failed to overcome the presumption of prejudice. Id.
14. Id.
16. Lawson, 677 F.3d at 641 (quoting Remmer, 347 U.S. at 229).
18. 507 U.S. 725 (1993); see also Lawson, 677 F.3d at 642-44 (discussing the circuit split).
19. Lawson, 677 F.3d at 651.
in criminal convictions and to avoid reversals based on minor technicalities like the one in Lawson. Although Remmer has not been overruled, the Supreme Court's subsequent decisions have restricted its scope, partially in recognition of the high threshold that Federal Rule of Evidence 606(b) demands when the government attempts to rebut presumptions of prejudice. While juror misconduct remains a real concern, strict application of Remmer is excessive when allegations of prejudice revolve around technicalities like a juror's consultation of Wikipedia for the meaning of a single word. The application of the Remmer presumption should thus be limited to cases involving egregious juror misconduct or situations where an outside influence has injected itself into the jury deliberations in order to affect the verdict. Further, even if the Fourth Circuit was correct in applying the Remmer presumption to the facts at issue in Lawson, the test the court applied makes it nearly impossible for the government to rebut the presumption, especially in light of the limitations imposed by Rule 606(b), which prevent jurors from testifying about the mental processes that went into deciding the verdict.\(^\text{20}\) If the Remmer presumption were more limited, the government would not be required to make a vain attempt to satisfy a nearly impossible test.

Part I of this Recent Development provides the facts of Lawson and the trial court's holding. Part II explains the Remmer presumption and the circuit split on whether it should still be applied in full force after the Supreme Court's decisions in Phillips and Olano. Part III provides the Fourth Circuit's reasoning for applying the Remmer presumption in Lawson and argues that the court incorrectly concluded that the presumption is applicable to a juror consulting a dictionary or Wikipedia to define a term. Part III analyzes the Fourth Circuit's application of the factors identified in Mayhue v. St. Francis Hospital of Wichita, Inc.,\(^\text{21}\) which further indicates the need for a more limited presumption given the difficulty of rebutting it in light of Rule 606(b).

I. BACKGROUND FACTS AND DISTRICT COURT DECISION IN UNITED STATES V. LAWSON

In Lawson, Scott Lawson and his codefendants (collectively, "Lawson") appealed their conviction for "violating, and conspiring to violate, the animal fighting prohibition of the Animal Welfare Act, 7

\(^{20}\) See infra notes 92–96 and accompanying text.
\(^{21}\) 969 F.2d 919 (10th Cir. 1992).
U.S.C. § 2156(a) . . . resulting from their participation in ‘gamefowl derbies,’ otherwise known as ‘cockfighting.’” The defendants’ convictions were based on their participation in cockfighting events in South Carolina in July 2008 and April 2009. Scott Lawson allegedly offered gaffs—sharp instruments that are attached to a bird’s leg in a cockfight—for sale and sharpened gaffs for individuals who entered birds into the event. Another defendant, Peeler, allegedly was a referee at a cockfighting event in April 2009, and the indictment against Lawson and Peeler alleged that they had “sponsored and exhibited an animal, or aided and abetted individuals who sponsored an animal, in an animal fighting venture that occurred in July 2008, and April 2009, respectively.” There was a separate indictment for three other defendants, alleging that they also participated in an unlawful animal fighting venture. All of the defendants were indicted on conspiracy charges stemming from an undercover investigation by the South Carolina Department of Natural Resources (“SCDNR”) of cockfighting “derbies.” During its investigation, the SCDNR sent undercover officers to these events who made video recordings of the derbies held in July 2008 and April 2009. They discovered that at these cockfighting derbies, birds were equipped with gaffs or other sharp metal objects attached to their legs and were entered into matches in which “[t]he birds fought their opponent to the death or at least until one of the birds was physically incapable of continuing to fight.”

22. Lawson, 677 F.3d at 633 (citing Animal Welfare Act, 7 U.S.C. § 2156(a) (2006 & Supp. 2011)). While this case dealt with several issues raised by the defendants on appeal, this Recent Development focuses solely on the issue of the alleged juror misconduct resulting from a juror looking up an element of the crime on Wikipedia. In addition to the juror misconduct issue, the court held that the animal fighting statute was enacted within Congress’s Commerce Clause powers, that the statute’s provision of different elements of the crime in jurisdictions where animal fighting is permitted did not violate defendant’s equal protection rights, and that the district court did not err by joining the trials of Lawson and his co-defendants. Id. at 634.
23. Id. at 634. Several defendants were also convicted of participating in an illegal gambling business, and those convictions were upheld in Lawson. Id.
25. Id.; see also Animal Welfare Act, 7 U.S.C. § 2156(e) (2006 & Supp. 2011) (“It shall be unlawful for any person to knowingly sell, buy, transport, or deliver in interstate or foreign commerce a knife, a gaff, or any other sharp instrument attached, or designed or intended to be attached, to the leg of a bird for use in an animal fighting venture.”).
26. Lawson, 677 F.3d at 634.
27. Id. at 634–35.
28. Id. at 635.
29. Id.
30. Id.
The district court consolidated the indictments so that all the defendants were tried together. After a five-day trial, the jury found the defendants guilty on all counts. However, six days later, one of the jurors informed a courtroom security officer that Juror 177 had consulted the Internet the morning before the jury reached its verdict. While searching the Internet, Juror 177 looked up the definition of "sponsor" on Wikipedia. Under the animal fighting statute, if the defendant lives in a jurisdiction where gamefowl fighting is prohibited, the government has to prove that the defendant "sponsored or exhibited an animal in an animal fighting venture," making the word "sponsor" a key element of the offense. Juror 177 printed out the definition and brought the printout to the jury room, where he shared it with the jury foreperson. He attempted to show the printout to other jurors as well, but they refused to look at the printout, stating that it was inappropriate to view the material because it would be a violation of the jury instructions that "had admonished the jurors not to conduct any outside research about the case, including research on the internet."

Nineteen days after the jury reached its verdict, the district court held a hearing to determine whether Juror 177's actions had unfairly prejudiced the defendants. By the time of the hearing, Juror 177 no longer possessed the original printout and instead provided the district court with a recently updated version of the Wikipedia page. Noting that this definition was different from the material Juror 177 produced during jury deliberations, the district court explained that the documents provided to the court for the hearing were "recreated" after the trial. The court was "nonetheless[] persuaded that the definitions found on [the exhibit were] in essentially the same form as

31. Id.
32. Id. at 635-36.
33. Id. at 639.
34. Id. It should be noted that the statute does not define "sponsor" in either the section at issue or in the definitions section. Animal Welfare Act, 7 U.S.C. §§ 2132, 2156 (2006 & Supp. 2011). Also, the district court did not provide a definition of the word to the jury, even though it is an element of the crime. Lawson, 677 F.3d at 647 n.24.
35. Lawson, 677 F.3d at 637 (citing Animal Welfare Act, 7 U.S.C. § 2156(a)(1)).
36. Id. at 639.
37. Id. at 639-40.
38. Id. at 640.
39. Id.
40. Id.
those brought in by Juror 177, although there ha[d] been at least some change to the Wikipedia definition of 'sponsor.'”

During the hearing, Juror 177 admitted to conducting Internet research and bringing it into the jury room during deliberations; however, he denied sharing it with anyone other than Juror 185 and said he did not recall any of the other jurors saying it would be improper to consider outside materials. Despite Juror 177’s testimony, there was some discrepancy among the other jurors as to how much Juror 177 had shared his research with them. The district court concluded that Juror 177 “may have orally shared some portion of the definition with the other jurors.”

The district court applied the factors set forth in Mayhue v. St. Francis Hospital of Wichita, Inc. to determine whether Juror 177’s misconduct prejudiced Lawson. Mayhue is a Tenth Circuit decision, but the Fourth Circuit previously employed these factors in McNeill v. Polk, which involved a habeas corpus appeal where a juror had referenced a dictionary. In his concurring opinion in McNeill, Judge King stated that the Supreme Court offered no clear test for when an extraneous influence might prejudice a juror, so he looked to the Tenth Circuit’s Mayhue factors to provide clarity. The district court in Lawson relied on the concurring opinion in McNeill to support its decision to apply the Mayhue factors. The factors, as stated in Lawson, include:

The importance of the word or phrase being defined to the resolution of the case.

42. Id.
43. Id. at 641. At least one juror testified that Juror 177 had shared the information with Juror 185 as well as other jurors, and three jurors testified that they saw Juror 177 “produce, or attempt to produce, the printed deliberations to share with the jury before he was told by the group that using the material would be inappropriate.” Id. Further, six jurors testified that they heard Juror 177 discuss the fact that he had conducted the research about a term at issue in the case. Id.
45. 969 F.2d 919 (10th Cir. 1992).
47. 476 F.3d 206 (4th Cir. 2007).
48. Id. at 210.
49. Id. at 226 (King, J., concurring) (citing Mayhue, 969 F.2d at 924).
50. Dyal, 2010 WL 2854292, at *13 (citing Mayhue, 969 F.2d at 924).
The extent to which the dictionary definition differs from the jury instructions or from the proper legal definition.

The extent to which the jury discussed and emphasized the definition.

The strength of the evidence and whether the jury had difficulty reaching a verdict prior to introduction of the dictionary definition.

Any other factors that relate to a determination of prejudice.\(^51\)

The district court concluded that the first factor could indicate prejudice because the term "sponsor" was important to the case against Lawson.\(^52\) However, the court found the second factor favored the government because, although the meaning of "sponsor" was taken from a lengthy Wikipedia discussion on the subject, it was "consistent with the definition that the court would have provided had it been asked for a definition."\(^53\) The third factor also favored the government because the court concluded that the jurors who did see the definition gave little emphasis to it, and the other jurors barely recalled what word had been referenced.\(^54\) In analyzing the fourth factor, the district court reasoned:

As to the definitions of "sponsor" and "exhibit," it is significant that each of the Defendants could be convicted not only for his or her own activities, but (depending on the charge) for conspiring with or aiding and abetting others in exhibiting or sponsoring an animal in an animal fighting venture. There was strong evidence both of conspiracy and aiding and abetting as to each of the Defendants tried.\(^55\)

In assessing the fifth factor, the district court did not find any other factors that related to a determination of prejudice.\(^56\) Because the definition procured by Juror 177 was consistent with the jury's understanding of the term on the first day of deliberations, and Juror 177 looked up the term to satisfy his own curiosity about whether "sponsor" could have multiple meanings, the court concluded that the research did "constitute[] an improper external influence but [was] not prejudicial per se" and that there was "no reasonable possibility

\(^{51}\) United States v. Lawson, 677 F.3d 629, 646 (4th Cir. 2012) (quoting Mayhue v. St. Francis Hosp. of Wichita, Inc., 969 F.2d 919, 924 (10th Cir. 1992)).

\(^{52}\) Dyal, 2010 WL 2854292, at *15.

\(^{53}\) Id.

\(^{54}\) Id. at *16.

\(^{55}\) Id. at *17.

\(^{56}\) Id.
that the external influence caused actual prejudice." As a result, the court denied Lawson's motion for a new trial.

II. THE REMMER PRESUMPTION

In Remmer, decided in 1954, the defendant was convicted by a jury for tax evasion. After the jury returned its guilty verdict, the defendant learned that during the trial, an unnamed individual remarked to a juror, who later became the jury foreman, that "he could profit by bringing in a verdict favorable to the [defendant]." The juror reported the communication to the judge, and the Federal Bureau of Investigation investigated the incident and reported that the statement was "made in jest" and "nothing further was done or said about the matter." The defendant moved for a new trial, claiming that the extraneous communication with the juror prejudiced him; the district court denied the motion, and the court of appeals affirmed. In a brief opinion, the Supreme Court remanded the case and ordered the district court to conduct a hearing to determine whether the defendant was prejudiced. In addition to ordering the hearing, the Court instructed that "[i]n 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."

The Supreme Court's subsequent decisions in Phillips and Olano seemingly indicated the Court's intention to narrow the Remmer presumption, without expressly overruling it. In Phillips, the alleged prejudice resulted from a juror submitting a job application with the District Attorney's Office during the trial. The juror learned about the position from a friend, who had inquired on the juror's behalf without mentioning his name or the fact that he was serving on the jury.

57. Id.
58. Id.
60. Id.
61. Id.
62. Id. at 229.
63. Id. at 230.
64. Id. at 229.
65. See 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, 1458 (2008); see also Bennett L. Gershman, Contaminating the Verdict: The Problem of Juror Misconduct, 50 S.D. L. REV. 322, 327 (2005) ("The continuing viability of Remmer's 'presumption of prejudice' test when jurors have been subjected to extra-judicial contacts has been questioned.").
jury in the respondent's trial. The office received the application but made no contact with the juror during the trial. The potential concern here was that the juror would favor his potential employer in the trial, believing a guilty verdict would help his chances for obtaining employment with the prosecutor's office. The Court nonetheless held that "due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." The Court implied that it was the defendant who should have the burden to prove actual bias at a Remmer-type hearing in which it would be determined if the defendant was prejudiced, rather than requiring the government to rebut a presumption of unfair prejudice. Such an implication would seemingly contradict its previous holding in Remmer, in which the Court stated "the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." As one commentator pointed out, "[t]he Court purported to apply the Remmer standard, but the Court's description of the Remmer hearing departed from Remmer's automatic presumption of prejudice." Several years later, in Olano, the Court declined to presume prejudice in a case where alternate jurors remained in the jury room during deliberations, noting that "[t]here may be cases where an intrusion should be presumed prejudicial, but a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?"

The Court's holdings in these two cases have led the circuit courts to struggle with the issue of when to apply a presumption of prejudice rather than analyze the prejudice on a case-by-case basis.

67. Id.
68. Id.
69. Id. at 229 (Marshall, J., dissenting).
70. Id. at 217 (majority opinion).
71. See id. at 215 ("Given the human propensity for self-justification, respondent argues, the law must impute bias to jurors in Smith's position. We disagree.").
72. Remmer v. United States, 347 U.S. 227, 229 (1954) (citing Mattox v. United States, 146 U.S. 140, 148–50 (1892); Wheaton v. United States, 133 F.2d 522, 527 (8th Cir. 1943)).
73. Kerr, supra note 65, at 1459–60.
75. See Kerr, supra note 65, at 1461; see also Gershman, supra note 65, at 328 ("If a court chooses not to apply a presumption of prejudice, then the court would evaluate the severity of the suspected intrusion, and only if the court determines that prejudice is likely would the government be required to prove its absence.").
Six circuits—including the Fourth Circuit—have held that the Remmer presumption remains fully intact after Phillips and Olano. However, even though the First and Third Circuits agree that the presumption should still be applied, these circuits conditionally apply the presumption. The First Circuit applies the presumption “only where there is an egregious tampering or third party communication which directly injects itself into the jury process.” Similarly, the Third Circuit applies the presumption “only when the extraneous information is of a considerably serious nature.” Specifically, the Third Circuit has stated that it tends to apply the presumption only in situations where a third party has directly contacted a juror, and it tends not to apply the presumption where a juror has been exposed to a media report, such as a newspaper article. In contrast, four circuits have declined to apply the presumption, citing Phillips and Olano as the basis for their conclusion. The Fifth Circuit held that Philips and Olano rejected the Remmer presumption and stated that “the trial court must first assess the severity of the suspected intrusion; only when the court determines that prejudice is likely should the

76. The Fourth Circuit cites several cases to indicate the five circuits that align with its position. United States v. Lawson, 677 F.3d 629, 643 (4th Cir. 2012) (citing United States v. Moore, 641 F.3d 812, 828 (7th Cir. 2011) (“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 presumptively prejudicial.”); United States v. Ronda, 455 F.3d 1273, 1299 (11th Cir. 2006) (holding that if the defendant establishes that the jury has been exposed to extrinsic evidence or contacts, “prejudice is presumed and the burden shifts to the government to rebut the presumption”); United States v. Greer, 285 F.3d 158, 173 (2d Cir. 2002) (citing Remmer for the proposition that “[i]t is well-settled that any extra-record information of which a juror becomes aware is presumed prejudicial” and that “[a] government showing that the information is harmless will overcome this presumption”); United States v. Dutkel, 192 F.3d 893, 895–96 (9th Cir. 1999) (applying the Remmer presumption in a jury tampering case and disagreeing that the presumption has been abrogated); Mayhue v. St. Francis Hosp. of Wichita, Inc., 969 F.2d 919, 922 (10th Cir. 1992) (“The law in the Tenth Circuit is clear. A rebuttable presumption of prejudice arises whenever a jury is exposed to external information in contravention of a district court’s instructions.”).

77. Circuit Split on Application of Remmer Juror Misconduct Presumption, FED. EVIDENCE REV. (Apr. 23, 2012), http://federalevidence.com/node/1464; see also United States v. Bradshaw, 281 F.3d 278, 287–88 (1st Cir. 2002) (observing that the Remmer presumption is still applicable in First Circuit “only where there is an egregious tampering or third party communication which directly injects itself into the jury process” (citation omitted)); United States v. Lloyd, 269 F.3d 228, 238 (3d Cir. 2001) (applying presumption of prejudice when a jury is exposed to extraneous information “of a considerably serious nature”).

78. Bradshaw, 281 F.3d at 288 (quoting United States v. Boylan, 898 F.2d 230, 261 (1st Cir. 1990)).
79. Lloyd, 269 F.3d at 238.
80. Id. at 238–39.
government be required to prove its absence." The Eighth Circuit and the D.C. Circuit have taken similar stances. The Sixth Circuit has rejected the Remmer presumption in all situations and placed the burden on the defendant to prove prejudice.

As the circuit split indicates, the Supreme Court did not provide much clarity in Phillips and Olano about when the Remmer presumption should apply. Nonetheless, by declining to apply the presumption in those cases, the Court indicated its intention to narrow Remmer's application. There are several possible explanations for the shift. One possible explanation, which supports the narrowing of the Remmer presumption, is that the Court intended to promote more finality in criminal convictions. Especially in cases such as Lawson where the court discovered alleged juror misconduct after the verdict, courts are generally reluctant to bring the jury back in to probe for potential misconduct. In Tanner v. United States, the Supreme Court stated that "[a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." Additionally, courts should be concerned that postverdict inquiries may inhibit the jury's discussions during deliberations. The Supreme Court stated in Tanner that "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror

81. United States v. Sylvester, 143 F.3d 923, 934 (5th Cir. 1998).
82. See United States v. Williams-Davis, 90 F.3d 490, 496–97 (D.C. Cir. 1996) (holding that Phillips and Olano narrowed the Remmer presumption and that trial courts must determine whether a particular intrusion showed "likelihood of prejudice," which would place on the government the burden of proving harmlessness); United States v. Blumeyer, 62 F.3d 1013, 1017 (8th Cir. 1995) (citing Olano for the proposition that the defendant has the burden to prove actual prejudice in cases involving extrinsic juror contact pertaining to issues of law, but not to issues of fact).
83. See United States v. Zelinka, 862 F.2d 92, 95 (6th Cir. 1988) ("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 to show that an unauthorized contact was harmless.").
84. See Kerr, supra note 65, at 1461 (noting that the circuit courts have struggled to reconcile the Supreme Court's inconsistent decisions); see also John J. Bonacum, III, Significant Development, Smith v. Phillips: Misconduct By or Affecting a Juror in a Criminal Prosecution, 62 B.U. L. REV. 361, 381 (1982) (suggesting that the Phillips decision has increased the confusion already present in misconduct cases).
85. See Bonacum, supra note 84, at 384.
86. See Gershom, supra note 65, at 326.
88. Id. at 120.
89. See Gershman, supra note 65, at 326.
While it is prudent to apply a presumption of prejudice in cases involving serious jury tampering, "applying an inflexible presumption in cases of technical, trivial, and arguably insignificant although improper transgressions, may be an excessive and unjustifiable response."91

Another possible explanation for the Supreme Court's decision to narrow the Remmer presumption is the enactment of Federal Rule of Evidence 606(b) in 1975.92 Rule 606(b) prohibits a juror from testifying about his mental processes in reaching a verdict, but makes an exception for testimony about "whether extraneous prejudicial information was improperly brought to the jury's attention [or] any outside influence was improperly brought to bear upon any juror."93 With the enactment of Rule 606(b), it has become very difficult for the government to overcome any presumption of prejudice.94 In fact, both the D.C. Circuit and the Tenth Circuit have suggested that the adoption of the rule necessitates narrowing the Remmer presumption.95 In deciding Remmer, the Supreme Court may not have anticipated that the government would be required to overcome such a high—or potentially impossible—burden in order to rebut the presumption. This might explain why the Supreme Court may have intended Phillips and Olano to narrow the Remmer presumption to apply only in situations involving egregious jury tampering, while in other cases the defendant still has the opportunity, and will bear the burden, to prove actual bias.96 Thus, although the Supreme Court may have intended to narrow the presumption of prejudice, it did not intend to do away with it completely. The presumption will still be

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90. Tanner, 483 U.S. at 120-21.
93. Id.; see also United States v. Williams-Davis, 90 F.3d 490, 496 (D.C. Cir. 1996) (citing Tanner, 483 U.S. at 116-27) ("The exception for improper outside influence allows testimony about the fact and nature of the contact (the input, as it were), but not about the effect it produced on the juror's state of mind.").
94. See Kerr, supra note 65, at 1458.
95. See Williams-Davis, 90 F.3d at 496 ("[I]f the Remmer presumption applied in full force, Rule 606(b) would generally make it difficult or impossible to overcome a presumption of prejudice once a jury had reached its verdict and a third-party contact were shown."); United States v. Greer, 620 F.2d 1383, 1385 & n.1 (10th Cir. 1980) (stating that "[t]he effect of the Rule is that a presumption of prejudice cannot be overcome once a jury has reached its verdict," and that "[t]his effect . . . may require the courts to narrow the definition of 'presumptively prejudicial' found in Remmer").
96. See Smith v. Phillips, 455 U.S. 209, 215 (1982) ("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.").
triggered by cases involving egregious misconduct or in situations in which an extraneous influence purposefully injects itself into the jury deliberations in order to bias the jury.

III. FOURTH CIRCUIT’S DECISION AND RATIONALE IN LAWSON

A. Application of the Remmer Presumption

On appeal, the Fourth Circuit reversed the district court and granted Lawson a new trial.\(^97\) In reaching this decision, the court applied the Remmer presumption, holding that the government failed to rebut the presumption under the Mayhue factors.\(^98\) Notably, the district court did not address Lawson’s argument that he was entitled to a rebuttable presumption of prejudice under Remmer.\(^99\) In fact, the district court cited a Fourth Circuit case to indicate that a juror’s reference to a home dictionary is not “prejudicial per se.”\(^100\)

While other circuits have held that the Remmer presumption should no longer be applied after Phillips and Olano,\(^101\) according to Lawson, the presumption “remains live and well in the Fourth Circuit.”\(^102\) The court based its conclusion on three other cases—\(^103\) Stockton v. Virginia,\(^104\) United States v. Cheek,\(^105\) and United States v. Basham—\(^106\) in which it applied the Remmer presumption to situations involving external influences on a jury’s deliberations.

In Stockton, the court expressly held that Phillips did not overturn the Remmer holding and therefore applied the Remmer presumption where a restaurant owner commented to jury members dining at the restaurant during sentencing deliberations that he thought “‘they ought to fry the son of a bitch.’”\(^107\) Even after Olano, the Fourth Circuit applied the Remmer presumption in Cheek and

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\(^97\) United States v. Lawson, 677 F.3d 629, 651 (4th Cir. 2012).

\(^98\) Id.

\(^99\) Id. at 641.


\(^101\) See supra notes 77–83 and accompanying text.

\(^102\) Lawson, 677 F.3d at 642.

\(^103\) 852 F.2d 740 (4th Cir. 1988).

\(^104\) 94 F.3d 136 (4th Cir. 1996).

\(^105\) 561 F.3d 302 (4th Cir. 2009).

\(^106\) Lawson, 677 F.3d at 642-43.

\(^107\) Stockton, 852 F.2d at 743-44. In concluding that the government failed to rebut the presumption, the Stockton court described the circumstances of the comment to the jury, noting that it was clearly impactful on the jurors and that it was relevant to the exact issue on which the jury was deliberating—whether to impose the death penalty. Id. at 746.
Basham. In Cheek, the court granted the defendant a new trial based on the attempted bribery of a juror, stating that "once a defendant introduces evidence that there was an extrajudicial communication that was 'more than innocuous,' the Remmer presumption is 'triggered automatically,' and '[t]he burden then shifts to the [government] to prove that there exists no reasonable possibility that the jury's verdict was influenced by an improper communication.'" Basham involved a juror who contacted various media outlets prior to receiving jury instructions and before the jury began deliberating. The court applied the Remmer presumption but concluded that the government had rebutted it, basing its decision on the fact that the phone calls were brief and that the media outlets had not provided any information to the juror. Taking these cases together, Lawson demonstrated the Fourth Circuit's continuing adherence to the Remmer presumption, even after Phillips and Olano.

Next, the court addressed the issue of whether the Remmer presumption is applicable to a situation in which a juror looked up a key term on Wikipedia, recognizing that this is a different type of situation than its previous applications where allegations of jury tampering or a juror's contact with a third party were involved. The court had previously addressed a juror's use of a dictionary as misconduct but had never considered whether a rebuttable presumption of prejudice should apply under those circumstances. In resolving the question, the court noted a circuit split on the issue of whether to apply the rebuttable presumption to the unauthorized use of a dictionary during jury deliberations and found a clear pattern. The same courts that maintain that the Remmer presumption should continue to be applied have also found the presumption applicable to a juror's dictionary use. Similarly, the courts that decline to apply

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108. Cheek, 94 F.3d at 138.
109. Lawson, 677 F.3d at 642 (alterations in original) (quoting Cheek, 94 F.3d at 141 (internal quotation marks omitted)).
110. Basham, 561 F.3d at 316-17.
111. Id. at 320-21. While the court said it would look at a "variety of factors," it did not cite the five Mayhue factors, and it seemed to base its conclusion only on the "extent of the communication," which it identified as the "most important factor." Id. at 320.
112. Lawson, 677 F.3d at 642-43.
113. Id. at 644.
114. Id.
115. Id. at 645.
116. Id. (citing United States v. Aguirre, 108 F.3d 1284, 1288 (10th Cir. 1997) (applying the Mayhue factors to determine whether the government rebutted the presumption of prejudice that arose from a juror's use of a dictionary); United States v. Martinez, 14 F.3d 543, 550 (11th Cir. 1994) (holding that once the defendant proves extrinsic contact with the
the presumption with regard to dictionary use have held that the rebuttable presumption no longer applies.\textsuperscript{117} In concluding that the presumption was applicable to a juror conducting unauthorized research on Wikipedia, the court relied on its prior application of the \textit{Remmer} presumption and stated that "many of the concerns that arise when a juror discusses a case with a third party . . . are likewise concerns inherent in a juror's unauthorized use of a dictionary during jury deliberations."\textsuperscript{118} Additionally, the court noted that a great concern under the specific facts of this case was that the term researched was an element of the crime for which Lawson was on trial.\textsuperscript{119}

As the Fourth Circuit pointed out in \textit{Lawson}, "[t]he continued vitality of \textit{Remmer} in this Circuit, however, does not resolve the question whether the presumption is applicable in cases involving a juror's unauthorized use of Wikipedia."\textsuperscript{120} Arguably, the \textit{Remmer} court did not intend for this type of juror misconduct to be subject to a rebuttable presumption of prejudice because it does not involve an extraneous communication between a juror and an outside party.\textsuperscript{121} Moreover, even if this view of \textit{Remmer} is too narrow, given the Supreme Court's narrowing of the \textit{Remmer} presumption in \textit{Phillips} and \textit{Olano}, the Fourth Circuit should not have applied it to the circumstances of this case. \textit{Remmer} involved a situation where an unknown individual contacted a juror, saying that the juror could profit by entering a verdict in favor of the defendant.\textsuperscript{122} The Fourth Circuit acknowledged up front that "an allegation of jury tampering

\textsuperscript{117} Id. (citing United States v. Williams-Davis, 90 F.3d 490, 502-03 (D.C. Cir. 1996) (refusing to apply a rebuttable presumption to a juror's reading of a dictionary definition during deliberations); United States v. Gillespie, 61 F.3d 457, 460 (6th Cir. 1995) ("[i]f members of the jury in fact used the dictionary definition [to reach their verdict], the defendant must prove that he was prejudiced thereby; prejudice is not presumed."); United States v. Cheyenne, 855 F.2d 566, 568 (8th Cir. 1988) (stating that if "the jury simply supplements the [trial] court's instructions of law with definitions culled from a dictionary, it remains within the province of the judge to determine" whether the defendant was prejudiced)).

\textsuperscript{118} Id. at 645-46.

\textsuperscript{119} Id. at 646.

\textsuperscript{120} Id. at 644.

\textsuperscript{121} See United States v. Bradshaw, 281 F.3d 278, 288 (1st Cir. 2002) (discussing why \textit{Remmer} is inapplicable where the presence of a potentially prejudicial document was inadvertently left in the jury room).

\textsuperscript{122} Remmer v. United States, 347 U.S. 227, 228 (1954).
or of a juror's contact with a third party . . . is of a much different character than a juror's unauthorized use of a dictionary during jury deliberations."

Prior to Lawson, the Fourth Circuit had not addressed the precise issue of whether the unauthorized use of a dictionary gives rise to the presumption of prejudice. However, among other circuits, a split developed regarding this issue, which exhibited a clear pattern. A number of circuits have held that the use of a dictionary does not automatically give rise to a presumption of prejudice.

In Remmer, the Court stated:

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. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Although this case was decided long before the invention of Wikipedia, and thus the Court clearly did not contemplate it in making this statement in Remmer, nothing in its opinion indicates that the Court specifically contemplated that the use of dictionaries should give rise to a presumption of prejudice either. The Court is referring to external forces that communicate, contact, or tamper with the jurors. Those are obviously very different situations from the

123. Lawson, 677 F.3d at 644.
124. Id.
125. See supra notes 115–17 and accompanying text.
126. See, e.g., United States v. Williams-Davis, 90 F.3d 490, 502–03 (D.C. Cir. 1996) (holding that the defendant has the burden to show prejudice where a juror read a dictionary definition during deliberations to persuade jurors to convict); United States v. Gillespie, 61 F.3d 457, 460 (6th Cir. 1995) ("[I]f members of the jury in fact used the dictionary definition [to reach their verdict], the defendant must prove that he was prejudiced thereby; prejudice is not presumed."); United States v. Cheyenne, 855 F.2d 566, 568 (8th Cir. 1988) (stating that where "the jury simply supplements the [trial] court's instructions of law with definitions culled from a dictionary, it remains within the province of the judge to determine" whether this conduct prejudiced the defendant).
127. Remmer, 347 U.S. at 229 (citing Mattox v. United States, 146 U.S. 140, 148–50 (1892); Wheaton v. United States, 133 F.2d 522, 527 (8th Cir. 1943)).
128. See supra text accompanying note 11.
129. Williams-Davis, 90 F.3d at 501 (“Indeed, on its face Remmer refers only to a 'private communication, contact, or tampering' with a juror.” (quoting Remmer, 347 U.S. at 229)).
case of a juror looking up a term on Wikipedia. This distinction alone
provides a strong argument against applying the Remmer
presumption to the facts of Lawson.

On the other hand, even if Remmer was intended to apply a
rebuttable presumption to all extraneous influences on the jury, the
holdings in Phillips and Olano sufficiently narrowed the Remmer
presumption so that it should be applied only in limited
circumstances. In Phillips, the Court refused to apply the
presumption where a juror had direct contact with the District
Attorney's Office, through the submission of a job application.130
Olano involved alternate jurors sitting in the jury room during
deliberations, which arguably would be considered an external
influence on the jury, yet the Court refused to apply a presumption of
prejudice in that case.131

But what about a dictionary? The Fourth Circuit has held that it
will apply the presumption automatically when a defendant
introduces evidence that an extraneous influence on the jury was
" 'more than innocuous.' "132 Thus, the question is whether the use of
a dictionary is innocuous. In this case, Juror 177 looked up a term that
was an element of the crime at issue, which was particularly troubling
to the court and ultimately factored prominently into its conclusion
that the use of Wikipedia in this case was more than innocuous.133 The
fact that the Wikipedia definition was three pages long—far more
detailed than the definition the court would have provided if
requested by the jury—also weighed heavily in the court's
reasoning.134 However, in a world in which people are used to having
information at their fingertips, it is unsurprising that a juror might
resort to looking up a term on Wikipedia without contemplating the

132. United States v. Lawson, 677 F.3d 629, 642 (4th Cir. 2012) (quoting United States
v. Cheek, 94 F.3d 136, 141 (4th Cir. 1996)).
133. Id. at 646.
134. See id. at 648 ("The Wikipedia entry for that term reviewed by the district court is
three pages long, and contains a thirteen-paragraph 'definition' that reads more like a
narrative than a definition. This Wikipedia entry also contained a three-paragraph section
titled 'sponsorship controversies,' as well as internal and external 'weblinks.' Thus, even if
some part of the Wikipedia entry is not in direct substantive conflict with traditional legal
definitions of the term 'sponsor,' the expansive nature of that Wikipedia entry suggests
that '[t]he extent to which the [Wikipedia] definition differs from the proper legal
definition' likely is significant." (alterations in original) (quoting Mayhue v. St. Francis
Hosp. of Wichita, Inc., 969 F.2d 919, 924 (10th Cir. 1992))).
possibility of a mistrial. While the court may have been correct in deciding that the use of Wikipedia, based on its user-generated content, was presumptively prejudicial, extending this conclusion to the use of a regular dictionary is problematic. While a dictionary provides a short reference to a term, "Internet search engines and special Web sites give jurors the tools to conduct extensive investigations about parties, their attorneys, and the very subject matter of any given lawsuit." Further, unlike an ordinary dictionary, "the Internet is virtually boundless, ever-changing and, for the most part, not susceptible to authentication." These two types of media should not be treated by the courts as if they are the same.

What the court also fails to recognize is that in holding that the use of Wikipedia is presumptively prejudicial, courts in the Fourth Circuit will likely be faced with more mistrials because the test—at least as applied in Lawson—makes it nearly impossible for the government to rebut the Remmer presumption. The Fourth Circuit should not apply the presumption to the use of a dictionary due to the difficulty, in light of Rule 606(b), of rebutting the presumption by showing that the jury was not actually prejudiced. During the postverdict hearing, Juror 177 testified that "he gave little emphasis to the definition in deciding the case." But, in light of Rule 606(b), the court cannot consider the mental processes of the jurors during deliberations. Thus, it is difficult to see how the government could rebut the presumption without being able to delve into how, if at all, the outside influence affected the jury's decision-making process. This

135. See Gareth S. Lacy, Untangling the Web: How Courts Should Respond to Juries Using the Internet for Research, 1 REYNOLDS CT. & MEDIA L.J. 169, 169 (2011) ("With nearly 58 million U.S. cell-phone users accessing the mobile Internet on a daily basis, it is critical that courts respond quickly and effectively to [the] increased use of the Internet during trial.").
136. Jonathan M. Redgrave, Unplugging Jurors from the Internet, 48 FED. LAW. 19, 20 (2001) (posing that there is a greater potential for prejudice when a juror starts surfing the Internet rather than merely referencing a dictionary).
137. Id.
138. Id.
139. See Lacy, supra note 135, at 169 ("Courts have been wholly unprepared for this new wave of immediate access to useful information. In recent years, several courts have ordered mistrials after discovering jurors had accessed Wikipedia or conducted other Internet research during trial.").
140. See supra notes 92-96 and accompanying text.
142. See FED. R. EVID. 606(b) ("[A] juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the jury to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith.").
could mean that—absent more careful jury instructions about not using the Internet—mistrials will be more likely to occur.143 Alternatively, it is likewise difficult to see how the defendant could prove prejudice without being able to show that the verdict was actually biased by the outside information.144 Rather than declaring mistrials every time a juror conducts Internet research about a case, the better practice would be to educate the jurors about why Internet research is not allowed in order to prevent the misconduct in the first place.145

Because of the time and money spent on retrials,146 courts should consider whether a jury has been prejudiced by an external influence on a case-by-case basis rather than automatically applying a presumption of prejudice and forcing the government to make a nearly futile attempt to rebut it. Although it is important to recognize the possibility of inconsistent results if it is within the sole discretion of the trial courts to determine if prejudice is likely, rather than applying the potentially more consistent automatic presumption,147 a case-by-case approach would avoid providing a retrial for an obviously guilty defendant based on a minor technicality. The district court in Lawson held that the evidence against the defendants for both conspiracy and aiding and abetting was strong.148 The Fourth Circuit did not disagree with this conclusion but noted that the district court was focusing on the evidence for the aiding and abetting theory of liability, and because of Rule 606(b), there was no way to know whether the jury convicted based on this theory.149

143. See Artigliere et al., supra note 12, at 10–14.

144. See Catherine (Katie) Gleeson, Note, To Presume or Not to Presume Prejudice? Kilgore v. Fuji Heavy Industries Changes the Way New Mexico Analyzes Juror Misconduct, 41 N.M. L. REV. 501, 531 (2011) (“No matter who bears the burden of proving that an extraneous communication probably prejudiced the jury, the fact remains that parties have an arduous task of proving anything in light of Rule 606(b)’s prohibition against jurors testifying as to the effect that extraneous information had on their mental processes or deliberations.”).

145. For a thorough explanation of how judges should educate jurors about Internet research to prevent misconduct, see Artigliere et al., supra note 12, at 10–14.


147. See Kerr, supra note 65, at 1482 (“Granting courts complete discretion to decide when to apply a presumption of prejudice has led and will continue to lead to inconsistent results.”).


B. Application of the Mayhue Factors

Finally, the court applied the Mayhue factors to determine whether the government had rebutted the presumption of prejudice, and after analyzing each of the five factors at length, held that the government had not met its burden. With regard to the first factor, "the importance of the word or term at issue to the resolution of the case," the court found that it weighed heavily in favor of Lawson, since "sponsor" was an element of the offense. The court disagreed with the district court's conclusion that the second factor weighed in favor of the government because the Wikipedia definition was three pages long, which almost certainly contained "more information than any traditional legal definition of the term," and it had been changed since Juror 177 had originally printed it. The court said meaningful analysis of this factor was impossible because it had no way of knowing exactly what the jury had referenced as the definition of "sponsor." In analyzing the third factor, the court said it could not be certain how much the jury used the definition, so it concluded that this factor weighed in favor of Lawson, given the government's burden to rebut the presumption. The fourth factor deals with the strength of the evidence against the defendant and whether the jury was having trouble coming to a consensus before the definition was introduced into deliberations. The court conceded that it could not say that the jury was having difficulty in reaching a verdict before Juror 177 introduced the "sponsor" definition based on the timeline of deliberations; however, when balanced with the lack of evidence presented by the government on the theory of liability involving the element of sponsorship, the court concluded the factor was either "in equipoise or weigh[ed] in favor of Lawson," despite the possibility that the jury convicted Lawson on a different theory of liability. The final Mayhue factor is a catch-all factor that incorporates anything else that relates to a finding of prejudice. In finding that this factor weighed in Lawson's favor, the court focused on the open-access nature of Wikipedia and said that "the danger in relying on a Wikipedia entry is obvious and real." It also cited to other federal citations.
cases where courts had expressed concerns about Wikipedia's lack of reliability.\textsuperscript{159}

In concluding its analysis of the \textit{Mayhue} factors, the court recognized that there are unresolved questions in the case because of the "unreliability and ever-changing nature of Wikipedia," the fact that Juror 177 did not retain his original printout, the government's failure to establish whether the Wikipedia entry could be "retraced," the discrepancies in the jurors' testimony, and the restraints imposed by Federal Rule of Evidence 606(b).\textsuperscript{160} However, despite these unresolved questions, the government had the very high burden of rebutting the \textit{Remmer} presumption "by showing that 'there [was] no reasonable possibility that the verdict was affected by the' external influence,"\textsuperscript{161} and it failed to do so.\textsuperscript{162}

In considering the \textit{Mayhue} factors, the court was limited in its analysis by Federal Rule of Evidence 606(b).\textsuperscript{163} In fact, "[a] trial judge will rarely be able to ascertain the actual prejudicial impact of a jury's exposure to external influences because a juror cannot testify regarding the subjective effect of such influences during a Rule 606(b) hearing."\textsuperscript{164} Therefore, if the courts are to maintain this test, it is essential that they do a thorough analysis and consider all the facts and circumstances objectively to ensure a proper balance.\textsuperscript{165} On the other hand, review of the use of these factors in \textit{Lawson} demonstrates a need to limit the presumption of \textit{Remmer}, or it should at least encourage the courts to consider a different test to determine whether the presumption has been rebutted, since Rule 606(b) makes it nearly impossible for the government to succeed. This is especially true in \textit{Lawson} because even though the district court concluded that the jury could have decided the case on an alternate theory of liability, Juror 185's testimony to that extent "goes far beyond the bounds of the limited exceptions provided in [the rule]."\textsuperscript{166}


\textsuperscript{160} \textit{Id.} at 651.

\textsuperscript{161} \textit{Id.} (quoting United States v. Cheek, 94 F.3d 136, 142 (4th Cir. 1996)).

\textsuperscript{162} \textit{Id.}

\textsuperscript{163} \textit{See Mayhue v. St. Francis Hosp. of Wichita, Inc., 969 F.2d 919, 923 (10th Cir. 1992).}

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{See id.} at 923-24.

\textsuperscript{166} \textit{Lawson}, 677 F.3d at 647.
The first *Mayhue* factor was correctly decided in favor of Lawson, because neither the district court nor the Fourth Circuit could dispute that "sponsor" was an important word in the case, since it was an element of the offense with which Lawson was charged. Because the definition in this case was taken from Wikipedia rather than a standard dictionary, the second factor brought out a unique circumstance in this case in that the definition had been changed from the time the juror first consulted it to the time of the hearing. Thus, the Fourth Circuit was persuaded to balance this factor in Lawson's favor as well, despite the findings of the district court that the essence of the Wikipedia definition was consistent with what it would have provided to the jury upon request. An interesting point is that the Fourth Circuit failed to directly address the district court's finding that "[g]iven the meaning which Juror 177 seems to have derived from the definition . . . any meaning germane to this action which may be drawn from the definition has remained unchanged," except to dismiss it breezily as "highly speculative."

The court could not fully analyze the third factor—"'[t]he extent to which the jury discussed and emphasized the definition'"—without encountering Rule 606(b). Although the court did not explicitly mention Rule 606(b) in its analysis of this factor, it also gave little weight to the district court's finding that "the jurors . . . placed little emphasis on the Wikipedia definition obtained by Juror 177," even after stating it agreed with this finding. This was likely because, as the court pointed out, there were some discrepancies among the jurors in their testimony during the hearing. Some of the discrepancies were likely the result of the limitations on the testimony because of Rule 606(b), since the jurors could not share any details of their mental processes during deliberation and the extent to which the definition provided by Juror 177 influenced their decisions. However, despite these limitations, the district court concluded that "'[t]he only

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168. Lawson, 677 F.3d at 648.
169. Id.
170. See id.; Dyal, 2010 WL 2854292, at *16.
171. Lawson, 677 F.3d at 648.
172. Id. (quoting Mayhue v. St. Francis Hosp. of Wichita, Inc., 969 F.2d 919, 924 (10th Cir. 1992)).
173. Id.
174. Id. at 649.
other jurors who were made aware of Juror 177's external research recalled only his reference to the word 'sponsor.'

With regard to both the second and third factors, the court gave little weight to the district court's analysis and conclusions that these factors showed a lack of prejudice. While the standard of review is something akin to abuse of discretion, it is a narrowed version that allows the appellate court to have "more latitude to review the trial court's conclusion in this context than in other situations." Notably, the courts in other circuits that have held the Remmer presumption to be inapplicable to the unauthorized use of a dictionary have been far more deferential to the district court's conclusions in terms of whether the use was prejudicial. For example, in United States v. Cheyenne, the Eighth Circuit gave "substantial weight to the trial court's appraisal of the prejudicial effects of extraneous information on the jury, since the trial judge has the advantages of close observation of the jurors and intimate familiarity with the issues at trial." The Fourth Circuit should have given more deference to the findings of the district court in Lawson, where the trial judge actually observed the demeanor and expressions of the jurors as they testified about the use of the Wikipedia definition. Part of the trouble with giving the district court more deference here was that the court had to work around the limitations of Rule 606(b), which prevented it from considering some of the testimony from the jurors about how they made their decision in the case and what theory of liability they found most convincing. Essentially, because of Rule 606(b), the Fourth Circuit had to ignore the district court's findings that the Internet research by Juror 177 did not affect the jury's decision to convict the defendants.

175. Dyal, 2010 WL 2854292, at *16.
176. See Lawson, 677 F.3d at 647-49.
177. Id. at 639 (quoting United States v. Cheek, 94 F.3d 136, 140 (4th Cir. 1996)).
178. 855 F.2d 566 (8th Cir. 1988).
179. Id. at 568.
180. Lawson, 677 F.3d at 651 ("These conclusions reflect the fact that there remain many unresolved questions in this case due to the unreliability and ever-changing nature of Wikipedia, to Juror 177's failure to retain a copy of the printout containing the entry he examined, to the government's failure to establish whether the entry could be 'retraced,' to the differences between Juror 177's recollection of the events at issue and the recollections of his fellow jurors, and to the constraints imposed by [Rule] 606(b). ")
181. United States v. Dyal, No. CR. 3:09-1295s-CMC, 2010 WL 2854292, at *16 (D.S.C. July 19, 2010) ("[T]he court finds that there was no more than a mention of a single excerpt from the definition of sponsor (or example drawn from that definition) which might have influenced the jury in any way."). rev'd in relevant part sub nom. Lawson, 677 F.3d 629.
In analyzing the strength of the evidence, the Fourth Circuit took a more narrow approach by considering only the evidence of one theory of liability, the one containing the sponsorship element, and concluded that the government failed to present a meaningful argument on the issue of whether Lawson was a "sponsor" in an animal fighting venture. In looking at whether the jury was having difficulty reaching a verdict before the introduction of the definition of "sponsor," the court stated that "the issue whether the jury convicted Lawson under an aiding and abetting theory cannot be resolved in this case without inviting improper speculation and violating the general prohibition of Rule 606(b)." This factor demonstrates the difficulty the government faces in rebutting the presumption of prejudice.

The court's analysis of the final factor distinguishes this case from other cases where a juror has used a conventional dictionary to research a term related to the case. In this case, the juror conducted his unauthorized research on Wikipedia, an online resource written by anonymous Internet users who write for free. The court observed that it was not the first federal court to be concerned about Wikipedia's lack of reliability given its open-access nature, while also admitting in a footnote that it had cited to definitions from Wikipedia in three prior opinions. This factor demonstrates that while this case might have been properly decided, a different outcome might have been appropriate had the juror used a conventional dictionary instead of Wikipedia. Rather than holding that the unauthorized use of Wikipedia to research an important term in the case implicates a presumption of prejudice, however, the court held that the presumption applies to the use of "a dictionary or similar resource." The holding was broader than necessary, especially when much of the potential for prejudice arose because the juror used a resource like Wikipedia that is inherently less reliable than a conventional dictionary.

In sum, the analysis of the Mayhue factors in light of the restrictions imposed by Rule 606(b) leads to much ambiguity in determining whether the government has rebutted the presumption

182. See Lawson, 677 F.3d at 649.
183. Id.
184. Id. at 650.
185. Id.
186. Id. at 650 n.28.
187. Id. at 645.
arising from juror misconduct. While the first and fifth factors more clearly weighed in favor of Lawson under the circumstances of the case, the second, third, and fourth factors favored Lawson only because of the uncertainties presented in this case, which can be attributed, at least partially, to the limited nature of the jurors' testimony allowed at a postverdict hearing due to Rule 606(b). The analysis is so limited that it warrants encouraging the courts to consider whether this test is the best method for determining whether the government rebutted the Remmer presumption. A better solution is to limit the application of the Remmer presumption to egregious jury misconduct, since a presumption would be so difficult for either side to rebut in light of the limitations placed on the jurors' testimony by Rule 606(b).

CONCLUSION

In conclusion, there is little doubt the Supreme Court intended the continued application of the Remmer presumption under certain circumstances. The situation in Remmer, where a third party made direct contact with a juror, may necessitate a presumption of prejudice because that third party has purposely injected himself or herself into the jury deliberations. However, in light of the restrictions imposed on jury testimony by the enactment of Federal Rule of Evidence 606(b) and the subsequent decisions in Phillips and Olano, the Fourth Circuit in Lawson should have concluded, as several other circuits have, that the Remmer presumption is limited to situations of egregious juror misconduct. Using Wikipedia to perform outside research does constitute juror misconduct, which the district court recognized. Even so, the district court concluded, based on all the evidence against the defendants and based on testimony by the jurors, that Juror 177's research into the definition of “sponsor” did not actually prejudice the defendants. Innovations in technology, like the creation of websites such as Wikipedia, have changed our world, and the law must adapt to these changes. The increased availability

188. See id. at 651.
189. See supra notes 92–96 and accompanying text.
190. See supra Part II.
191. See supra note 96 and accompanying text; see also Kerr, supra note 65, at 1480 n.218 (discussing the fact that the circuit split on the presumption issue essentially means that a criminal defendant’s Sixth Amendment rights depend on where he happens to live).
193. See id.
194. See supra notes 135–38 and accompanying text.
of information accessed by devices that fit in our pockets means that juror misconduct, like that found in Lawson, will become more and more frequent. If courts attach a presumption of prejudice to this type of misconduct, there is a strong likelihood of an increase in the number of mistrials as well.

By applying the presumption to a case like Lawson, or any case where the extraneous influence had little or no effect on the deliberations, courts are practically guaranteeing a costly mistrial because the government cannot realistically rebut the presumption without violating Rule 606(b). Narrowing the presumption to cases involving serious misconduct that is very likely to have prejudiced the jury will ensure that jury verdicts will not be second-guessed in cases where the verdict was clearly supported by the evidence. It would also ensure that technicalities like the mere use of a conventional or online dictionary by a single juror will not impede the search for justice in criminal cases such as Lawson, where “the evidence against each of the Defendants... [is] strong.”

The trial court should be given broad discretion to look closely at alleged juror misconduct and determine the effect of that misconduct on the verdict. Even if the presumption should apply to cases involving a juror’s unauthorized external research on Wikipedia, because of its user-generated nature, the court should consider that the current use of the Mayhue factors to determine if the government has rebutted the presumption makes it nearly impossible for the government to rebut this presumption in light of Federal Rule of Evidence 606(b). Therefore, if it continues to apply the Remmer presumption, the court should seek other means of applying the presumption and determining whether it has been rebutted. Rather than applying an exclusive list of factors, the court should take a less constricted approach and consider the facts on a case-by-case basis to determine if the government has rebutted the presumption. Further, the appellate court should be more willing to give deference to the trial court’s findings, as the Fourth Circuit failed to do here,

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195. See supra notes 135–38 and accompanying text.
196. See supra notes 139–40 and accompanying text.
197. See supra notes 139–40 and accompanying text.
199. For example, the D.C. Circuit has said that “[a]lthough often referring to Remmer, this court has in fact not treated the supposed ‘presumption’ as particularly forceful, but rather has accepted the necessity of focusing on the specific facts of the alleged contact, and, as a result, has found broad discretion in the trial court to assess the effect of alleged intrusions.” United States v. Williams-Davis, 90 F.3d 490, 496–97 (D.C. Cir. 1996).
200. See supra Part III.B.
particularly on the issue of the strength of the evidence against the defendants. By taking a less rigid view on the *Remmer* presumption, a court would ideally prevent unnecessary retrials in cases such as *Lawson*, where the evidence against the defendant was strong and the evidence indicated that the jury did not even consider the extraneous influence in reaching its verdict.

ANNA H. TISON
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Victor B. Flatt, B.A., J.D., Thomas F. and Elizabeth Taft Distinguished Professor in Environmental Law and Director of the Center for Law, Environment, Adaptation and Resources (CLEAR)
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Deborah R. Gerhardt, A.B., J.D., Assistant Professor of Law
Michael J. Gerhardt, B.A., M.S., J.D., Samuel Ashe Distinguished Professor in Constitutional Law and Director of the Center for Law and Government
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Margaret F. Hall, B.A., M.L.I.S., J.D., Reference and Student Services Librarian and Clinical Assistant Professor of Law
Aaron R. Harmon, B.A., M.A., J.D., Clinical Assistant Professor of Law
Thomas Lee Hazen, B.A., J.D., Cary C. Boshamer Distinguished Professor of Law
Jeffrey Michael Hirsch, B.A., M.P.P., J.D., Associate Professor of Law
Amanda S. Hitchcock, B.A., J.D., Clinical Assistant Professor of Law
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Melissa B. Jacoby, B.A., Graham Kenan Professor of Law
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DEVON WHITE, A.A.S., B.A., M.A., J.D., Adjunct Associate Professor of Law
GORDON WIDENHOUSE, A.B., M.A., J.D., Adjunct Professor of Law
MELVIN F. WRIGHT JR., B.A., J.D, Adjunct Professor of Law

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