EFiled: Mar 07 2025 09:32AM EST
Filing ID 75791773
Case Number 422,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| CALVIN USHERY,<br><br>Defendant Below,<br>Appellant,<br><br>v.<br><br>STATE OF DELAWARE,<br><br>Plaintiff Below,<br>Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 422, 2024 |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

# APPELLANT'S OPENING BRIEF

Elliot Margules, Esquire [#6056]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5141

Attorney for Appellant

DATE: March 7, 2025

## TABLE OF CONTENTS

TABLE OF CITATIONS ..... iii

NATURE AND STAGE OF THE PROCEEDINGS ..... 1

SUMMARY OF THE ARGUMENT ..... 2

STATEMENT OF FACTS ..... 3

ARGUMENT:

**I. THE TRIAL COURT ERRED BY PERMITTING SEATED JURORS TO ACCESS EXTRAJUDICIAL MATERIAL, FAILING TO PROHIBIT PRE-DELIBERATION DISCUSSIONS OF THE CASE, AND DECLINING TO CONDUCT ADDITIONAL *VOIR DIRE* AFTER ONE OF THE UNADMONISHED JURORS SUBMITTED A NOTE WHICH REVEALED HE MAY NOT HAVE HEARD THE PRETRIAL VOIR DIRE, AND (THE JUROR) FUNDAMENTALLY MISUNDERSTOOD THE RULES AND PURPOSE OF JURY SERVICE** ..... 6

a. *The trial court's instructions and admonishments were constitutionally inadequate such that this Court should presume juror misconduct* ..... 12

i. By informing the jury that it was "not concerned" with exposure to extrajudicial material, the trial court committed error and encouraged juror misconduct ..... 14

ii. This Court should presume Ushery's jury was exposed to extrajudicial information ..... 17

b. *In the context of deficient instructions, the note required an inquiry if not excusal. The trial court did neither, and its response encouraged the jury to access extrajudicial materials.* ..... 24

i. The trial court misapprehended the significance of the note ..... 24

ii. The trial court should have, at a minimum, inquired with Juror 15 about the note and reasonable inferences therefrom ..... 26

iii. The trial court's response to the note made matters worse ..... 28

Conclusion ..... 30

Sentence Order ..... Exhibit A

Order Denying Ushery's request to excuse Juror 15, or in the alternative, to make sure the is not conducting research or discussing the case jury ..... Exhibit B

## TABLE OF CITATIONS

***Cases***


*Anderson v. State,* 695 A.2d 1135 (Del. 1997) ..... 12, 28—29
*Baird v. Owczarek,* 93 A.3d 1222 (Del. 2014) ..... *passim*
*Banther v. State,* 823 A.2d 467 (Del. 2003) ..... 25
*Biddle v. State,* 302 A.3d 955 (Del. 2023) ..... 6, 12, 27
*Claudio v. State,* 585 A.2d 1278 (Del. 1991) ..... 12—13
*Collins v. State,* 852 A.2d 907 (Del. 2004) ..... 13
*Diaz v. State,* 743 A.2d 1166 (Del. 1999) ..... 26
*Dietz v. Bouldin,* 579 U.S. 40 (2016) ..... 15, 20
*Halko v. State,* 204 A.2d 628 (Del. 1964) ..... 13
*Knox v. State,* 29 A.3d 217 (Del. 2011) ..... 24, 26
*Longfellow v. State,* 167 A.3d 513 (Del. 2016) ..... 17
*McCoy v. State,* 112 A.3d 239 (Del. 2015) ..... 12, 25
*McGuiness v. State,* 312 A.3d 1156(Del. 2024) ..... 6
*Paskins v. State,* 513 A.2d 1319 (Del. 1986) ..... 13
*People v. Tyburski,* 518 N.W.2d 441 (Mich. 1994) ..... 15, 27
*Reyes v. State,* 819 A.2d 305 (Del. 2003) ..... 13
*Riley v. California,* 573 U.S. 373 (2014) ..... 19
*Rocco v. Yates,* 2009 WL 2095991 (C.D. Cal. July 13, 2009) ..... 26
*Schwan v. State,* 65 A.3d 582 (Del. 2013) ..... 12, 15, 26
*Sharp v. State,* 320 A.3d 236 (Del. 2024) ..... 15
*Smith v. State,* 317 A.2d 20 (Del. 1974) ..... 14
*State v. Burton,* 2001 WL 1480860 (Del. Super. Ct. Aug. 15, 2001) ..... 27
*State v. Smith,* 418 S.W.3d 38 (Tenn. 2013) ..... 20
*Swan v. State,* 248 A.3d 839 (Del. 2021) ..... 12—13
*U.S. v. Barth,* 424 F.3d 752 (8th Cir. 2005) ..... 12
*United States v. Bertoli,* 40 F.3d 1384 (3d Cir. 1994) ..... 12

*United States v. Fumo*, 655 F.3d 288 (3d Cir. 2011).....20
*United States v. Helton*, 2017 WL 4896933 (E.D. Ky. Oct. 29, 2017).....26
*United States v. Juror No. One*, 866 F. Supp. 2d 442 (E.D. Pa. 2011).....20
*United States v. Resko*, 3 F.3d 684 (3d Cir. 1993).....25
*United States v. Richardson*, 817 F.2d 886 (D.C. Cir. 1987).....12, 17
*United States v. Shackelford*, 777 F.2d 1141 (6th Cir.1985).....26
*United States v. Williams*, 635 F.2d 744 (8th Cir. 1980).....14
*Weber v. State*, 971 A.2d 135 (Del. 2009).....28
*Wyche v. State*, 202 A.3d 510 (Del. 2019).....13

***Court Rules, Constitutional Rules, and Statutes***

10 *Del.C.* § 4509.....26
Super.Ct.Crim.R. 24.....26
Supr.Ct.R. 8.....17
DE CONST. Art. 4, § 19.....13
DE CONST. Art. 1 § 4.....8
DE CONST. Art. 1 § 7.....8
U.S. Const. amend. VI. .....8
U.S. Const. amend. XIV. .....8

***Other Sources***

ABA Principles for Juries and Jury Trials (2023) .....17
Aja Romano, *Serial Transformed True Crime — and the Way We Think About Criminal Justice* (VOX, June 3, 2024) .....23
Bettina E. Brownstein, *It's Time to Make Jury Instructions Understandable*, ARK. LAW. (Fall 2002).....15
Elisha Fieldstadt, *New Crop of True Crime Shows Seduces Audiences, Compels Them to Dig*, NBC NEWS (Apr. 16, 2016).....23
Taylor Orth, *Half of Americans Enjoy True Crime, and More Agree it Helps Solve Cold Cases* (YouGov., Sept. 14, 2022).....22

Galen Stocking, et. at., *A Profile of the Top-Ranked Podcasts in the U.S.*, PEW RESEARCH CENTER (June 15, 2023) .....22

IN RE: USE OF PERSONAL ELECTRONIC DEVICES IN SUPERIOR COURT COURTROOMS, Admin. Order 2024-1 (Super. Ct., Jan. 26, 2024) .....21

Ira Glass, *The Alibi*, THIS AMERICAN LIFE (WHYY).....22

John P. Gismondi, *Bursting the Jury Bubble: The Internet's Threat to Jury Impartiality, and How the Courts Should Respond*, 96 PA. B.A.Q. 24 (2025).....18

K. Alberecht and K Filip, *The Serial Effect*, 53 N.M. L. REV. 29 (2023) .....22

Matt Zbrog, *Do True Crime Stories & Citizen Sleuths Produce Crowdsourced Justice?*, FORENSIC COLLEGES (August 25, 2022).....23

Michael Johnson, *The "CSI Effect": TV Crime Dramas' Impact on Justice*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 385 (2017) .....23

Oxford English Dictionary (Oxford UO, 2018).....29

Paula Hannaford-Agor, et. al., *Jurors and News Media: Filling Knowledge Gaps for Judicial and Legal Policymakers* (NATIONAL CENTER FOR STATE COURTS, April 2021).....*passim*

Ralph Artigliere, *Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial*, 59 DRAKE L. REV. 621 (2011) .....20

Robbie Manhas, *Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms*, 112 MICH. L. REV. 809 (2014) .....20

Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. Colo. L. Rev. 409 (2012) .....19, 20, 24

*The Delaware Judiciary Adopts Permanent Rules to Allow Cellphones and Other Personal Electronic Devices in all Court Facilities*, Press Release of Supreme Court of Delaware (July 31, 2024) .....18, 21

Valerie Hans and Juliet Dee, University of Delaware, *Media Coverage of Law and its Impact on Juries and the Public*, THE AMERICAN BEHAVIORAL SCIENTIST (Nov/Dec. 1991) .....22

## NATURE AND STAGE OF PROCEEDINGS

On November 21, 2022, Calvin Ushery was indicted on Robbery First Degree, Assault First Degree, two counts of Possession of a Deadly Weapon During the Commission of a Felony (PDWDCF), two counts of Possession of a Deadly Weapon by Person Prohibited, and Criminal Mischief. Ushery was *first* tried beginning September 11, 2023; however, on September 15, 2023, a mistrial was declared. A1, DI#4; A4, DI#22; A12—16.

Ushery was retried before a jury beginning April 29, 2024. A9, D.I.64. During the retrial, a juror submitted a note, in response to which both the State and Ushery argued the juror should be excused. A45—47; A328 In the alternative, Ushery asked the trial court to make sure the jury knew to avoid extrajudicial information, and to not discuss the case. A48. The trial court declined to excuse the juror, did not ask the juror any questions, and did not remind the jury of their obligations. A45—51; A243. Moreover, at no point did the trial court admonish the jury not to discuss the case or prohibit them from accessing extrajudicial material. On May 2, 2024, the jury found Ushery guilty of Robbery First Degree, Assault First Degree, and PDWDCF. A9, D.I.64. The remaining counts were dismissed.

On September 3, 2024, Ushery was declared a habitual offender and sentenced to serve the remainder of his natural life, suspended after 40 years, at Level V. Ex.A. This is Ushery's Opening Brief, following his timely filed notice of appeal.

## SUMMARY OF ARGUMENT

I. Juries can only be presumed to avoid extrajudicial information and pre-deliberation discussions about the case if they are warned to do so. Without a warning, common sense along with the internet's defining presence in modern society, justify a presumption that jurors will do both. In this case, the trial court failed to prohibit pre-deliberation discussions and went as far as telling the jury it was "not concerned" with exposure to extrajudicial materials. Moreover, one of these unadmonished jurors submitted a note which revealed that (i) he had significant hearing problems (such that he may not have heard the pre-trial *voir dire* questions), and (2) – as the trial court itself recognized –a problematic misunderstanding of his role as a juror. Nonetheless, the trial court conducted no inquiry. As a result, Mr. Ushery's rights to a fair trial decided by an impartial jury based only on evidence presented were violated.

## STATEMENT OF FACTS

On September 15, 2022, a masked assailant robbed Solid Gold Jewelry, pointed a gun at its 67-year-old owner Chang Yen Suh, and assaulted him with a hammer. Video surveillance captured the assault and robbery. State's Exhibits 1—5. As a result of the assault, Mr. Suh had bruises and lacerations around his head, and a subdural hematoma, spent eight days in the hospital, and ultimately needed various forms of therapy for the following eight months. A52—63; A281.

Antonio Farrace, manager of Levy's Pawn Shop, testified that on September 22, 2022, a man whom he later identified as Ushery, attempted to sell him jewelry he believed to have been from the robbery. A187—90. Later that day, Ushery was arrested nearby, in the midst of a dispute in which he was allegedly attempting to sell a bag of jewelry to Marilyn Brown. A194—200; A214—15. David Suh, the complaining witness's son, testified that he was familiar with the store's inventory and that the items recovered from Ushery were from the store. A278—85.

Numerous DNA swabs and latent prints were recovered from Solid Gold Jewelry; however, the DNA was inadequate to exclude or include Ushery, and the latent prints did not match Ushery's. A118—31; A153—55. Police also executed a search warrant on Ushery's home. Despite that the jewelry found on Ushery's person constituted only 15—20 percent of the stolen merchandise, no stolen jewelry was in the home. A263. Nor was any of the clothing the assailant was seen wearing. A263.

Det. O'Conner had previously testified that the assailant's bike was found in Ushery's home, but at trial, he conceded that there were visible differences, and he was not sure. A263.

The State presented photographs of the assailant alongside photographs of Ushery and argued that patches in the beards, and marks from piercings were similar. A266.

The State collaborated with FBI Special Agent Adam Cook to plot locations of Ushery's cell phone on the date of the robbery. A233—35; A249. Cook testified that the location of the phone was consistent with being at the store during the time of the robbery, and then leaving in the direction of Ushery's home, along the path the assailant took. A250—51. However, Cook also conceded that there were data points which indicated the phone was as far away as New York. A257—60. He testified that those data points were not relied on but conceded that "if the address for New York is incorrect [] it [is] possible that some of the other addresses in these spreadsheets are incorrect." A260.

Vanyah Ushery, Calvin Ushery's daughter, testified that on September 22, 2022, she was present and observed her father win a bag of jewelry in a game of dice. A286—87. Robert Moser, an investigator on Ushery's defense team, testified that he spoke with Vanyah Ushery on July 25, 2023, and that she had made the same representation to him back then. A293. Moser also explained that it was not

surprising that additional witnesses to the game were not located because dice games "come and go," and they can move anywhere in the city. A295. Det. O'Connor testified that there were photos located in Ushery's phone which depicted him wearing the jewelry at issue on a date before the dice game occurred. A296.

## I. THE TRIAL COURT ERRED BY PERMITTING SEATED JURORS TO ACCESS EXTRAJUDICIAL MATERIAL, FAILING TO PROHIBIT PRE-DELIBERATION DISCUSSIONS OF THE CASE, AND DECLINING TO CONDUCT ADDITIONAL *VOIR DIRE* AFTER ONE OF THE UNADMONISHED JURORS SUBMITTED A NOTE WHICH REVEALED HE MAY NOT HAVE HEARD THE PRETRIAL VOIR DIRE, AND (THE JUROR) FUNDAMENTALLY MISUNDERSTOOD THE RULES AND PURPOSE OF JURY SERVICE.

### *Question Presented*

Whether a trial court errs by permitting seated jurors to access extrajudicial material, failing to prohibit discussing the case before deliberations, and declining to conduct additional *voir dire* after an unadmonished juror submitts a note which reveals he may not have heard the pretrial *voir dire*, and fundamentally misunderstands the rules and purpose of jury service? A45—51; A243.

### *Standard and Scope of Review*

Preserved constitutional claims are reviewed *de novo*.[1] Objections to a trial court's refusal to unseat a juror are typically reviewed for an abuse of discretion; however, when the trial court does so without an investigation, this Court's examination is "analogous to *de novo* review."[2]

[1] *E.g. McGuiness v. State*, 312 A.3d 1156, 1198 (Del. 2024).
[2] *Biddle v. State*, 302 A.3d 955 (Del. 2023).

## *Argument*

There is nothing inherently fair or reliable about tasking a group of legally unexperienced strangers with deciding the outcome of a complex trial. Instead, "the basis for the legitimacy of [a jury's] verdict" is the "presumption … that jurors understand and follow the law as instructed by the trial judge."[3] As explained below, instructions which inform the jury to avoid extrajudicial materials and discussions of the case are constitutionally required, practically necessary, and more critical in modern times than ever before. And because those rules are not intuitive,[4] one can only presume that they have been adhered to if the trial court directs the jury to do so.

In this case, the trial court did not instruct the jury to avoid exposure to extrajudicial information, or discussions of the case; and therefore, there is no basis to presume that they did so. Moreover, on the second day of trial a juror submitted a note, which the trial court itself acknowledged, evinced a fundamental misunderstanding of the rules; nonetheless the trial court still failed to adequately instruct the jury. By failing to do what was necessary to ensure Ushery's case was

---

[3] Paula Hannaford-Agor, et. al., *Jurors and News Media: Filling Knowledge Gaps for Judicial and Legal Policymakers* at 41 (NATIONAL CENTER FOR STATE COURTS, April 2021), (hereinafter "NCSC ON JURORS AND NEWS MEDIA") *available at* https://www.ncsc-jurystudies.org/data/assets/pdf_file/0020/63803/Jurors-and-New-Media-Report.pdf.

[4] NCSC ON JURORS AND NEWS MEDIA at 5 (noting restrictions on "use of new media… are becoming more and more counterintuitive for many jurors.")

decided by an impartial jury based on the evidence presented, the trial court violated his state and federal constitutional rights to due process and trial by jury.[5] This Court must reverse.

The above-mentioned note came from Juror 15 on the second day of trial. The trial court described the note to the parties as asking the following questions:

> **Question 1**: *Would it be possible to make sure witnesses talk in the microphone? … He had difficulty hearing what was said. His hearing aid is up as high as it can be.*
>
> **No. 2**: *Would it be possible to see a side-by-side comparison to the perpetrator's eyeglasses and the defendant's eyeglasses on the day he was arrested? I'm asking this early in the trial because I realize it may take some time and effort to perform. Also, if the eyeglasses are dissimilar, it might be possible to find out when and where the defendant's eyeglasses were purchased to verify whether the timing was before or after the crime event…*
>
> **No. 3**: *When the victim was saying with a black sundress, I think he may have been referring to a black face mask or a black mask. Don't know the victim's ethnicity, but maybe he characters a sundress and dress may be similar to a mask or face mask.* A45—46.

Both parties argued that the note, and/or reasonable inferences therefrom, required excusing Juror 15. The trial court decided that it would not do so; even before hearing from Ushery. With removal off the table, Ushery asked the trial court, in the alternative, to "mak[e] sure that they're not talking about anything, they're not looking anything up." A47.

[5] DE CONST. Art. 1 §§ 4 & 7; U.S. Const. amend.s VI. & XIV.

*PROSECUTOR: Your Honor, he's already commenting on the evidence. We believe that he should be excused.*

*THE COURT: **No, I'm not going to do that.***

*DEFENSE COUNSEL: Your Honor, I have a similar position as the State.*

*THE COURT: You want him excused?*

*DEFENSE COUNSEL: I'm just worried about, you know, his commentary on the evidence at this point.*

*THE COURT: Jurors are allowed to ask questions. Many, many juries, they're given notebooks and invited to ask questions. I'm not going to strike him just because he has questions. So give me something else. Do you want me to give an instruction to him or somebody else?*

*DEFENSE COUNSEL: I think it's a valid point that witnesses should be speaking in the microphone. But other than that**, just making sure that they're not talking about anything, they're not looking anything up**.*

*THE COURT: There's nothing in here that suggests he's talking to other jurors or looking anything up. If that were true, that would be a problem.*

*DEFENSE COUNSEL: I understand. I'm just concerned how much he might have done beyond this --*

*THE COURT: You're worried he's going to become one of the twelve to drive everybody crazy…*

*THE COURT: I don't think that Question 2 or 3 are -- this is this juror just basically just kind of shooting out the juror's questions about the evidence that he's seen. At the end of the day, the evidence is going to be what it's going to be. The jurors are perhaps gun jumping of speculation is not well taken. But I don't see any reason to instruct on these.*

*PROSECUTOR: To the extent Your Honor wishes to address the questions with this particular juror, I think something to the effect of to keep an open mind throughout*

> *the pendency of the case and to listen and hear all of the evidence and he'll be instructed on the law at the conclusion of the case is really the extent that these questions can be answered.*
>
> *DEFENSE COUNSEL: I also just have concerns about jurors really giving a heads up on what they want the State to prove and things like that and essentially asking them, hey, can we do this to help me along the way.*
>
> *THE COURT: Yeah. And I think in states and jurisdictions where juror questions are more -- are used more often, one of the reasons states are reluctant to allow jurors to fire out questions is that frequently the questions are not germane, they're not relevant, or* ***they reflect the jurors' biases or whatever more than they do the evidence. We just happen to have an active juror here who is offering his own view of how he thinks the case ought to be tried, but it's really not his business.*** A46—49.

The trial court addressed Juror 15 later that afternoon. It appears that headphones linked to the courtroom audio were provided but were not effective.

> THE COURT: *Juror No. 15, we're trying to help out your hearing. Do those things work?*
>
> JUROR NO. 15: *Don't seem working.* A186.

The trial court issued its ruling on the next day of trial. Rather than excusing Juror 15, conducting an inquiry with Juror 15 or the other jurors, or otherwise "making sure that the [jurors were] not talking about anything… [or] looking anything up" (A47), the trial court informed counsel that what it had decided to do "is say, look …you might have seen press coverage. If you did and if it affects you, I want to hear about it. If you did and it doesn't affect you, I don't care, it's not relevant." A243.

This ruling, and the corresponding instruction (below), made matters worse by *authorizing the jury to look at extrajudicial materials* and instructing them that, if they do so, they need only inform the court if they personally believe their ability to be fair and impartial was impacted:

> *THE COURT: after seeing the video from the inside of the store, that may have jelled some memories among some of you of having seen that video before or being aware of some publicity about this incident when it happened, or whenever. That does not concern me terribly…* ***Maybe you did see something, I'm not concerned whether you did or not. I am concerned, though, whether seeing it now changes your answers to your ability to be fair and impartial and objective and weigh the evidence that you hear in this case… if you're concerned about some pretrial or extrajudicial information may have come in and affected your ability to be fair and impartial, let the bailiff know and we'll talk about it during a recess.***
>
> *Finally to my friend Juror No. 15, I hope we've taken care of the -- well, maybe not -- I hope we've taken care of the hearing questions.*
>
> *JUROR: (Makes thumbs-up gesture.)*
>
> *THE COURT: Good?* ***You had some other questions that, frankly, are outside the scope of what we can talk about. And no dig on you, I appreciate an inquisitive mind, but we're stuck with the evidence that we hear in court.*** A243.

**a. *The trial court's instructions and admonishments were constitutionally inadequate such that this Court should presume juror misconduct.***

Just as any defendant, Ushery was entitled "to be … tried by an entire panel of properly instructed"[6] and adequately *voir dire*'d jurors.[7] Those rights are violated "if only one juror is improperly influenced."[8] While trial courts have discretion in instructing juries, "[i]n order to achieve the necessary insulation, trial courts admonish the jurors not to discuss the case with any other person until they have rendered a verdict…[and] to avoid exposure to media coverage of the trial."[9] The admonishments at issue – not to discuss the case, and to avoid extrajudicial materials –are well established in Delaware.[10] Further, as this Court has recognized, because

---

[6] *Anderson v. State*, 695 A.2d 1135, 1140 (Del. 1997).

[7] *Schwan v. State*, 65 A.3d 582, 588 (Del. 2013) (reversing where inadequate *voir dire* failed to uncover information concerning juror's connection to AG's office).

[8] *McCoy v. State*, 112 A.3d 239, 257 (Del. 2015). Moreover, in *Claudio v. State* this Court made clear that the use of alternate jurors is a departure from the common law right to a jury trial, and *only permitted* to the degree it "improve[s] the operation of the jury system… *without* changing the fundamental common law features," and on condition that alternates "are assiduously instructed not to discuss the case until it has been submitted to them for deliberation." 585 A.2d 1278, 1298—91 (Del. 1991).

[9] *United States v. Richardson*, 817 F.2d 886, 888 and n. 3 (D.C. Cir. 1987) ("we have held that failure to do so is grounds for reversal."); *United States v. Bertoli*, 40 F.3d 1384, 1393 (3d Cir. 1994) ("[i]t is fundamental that every litigant … is entitled to an impartial jury, free to the furthest extent practicable from extraneous influences that may subvert the fact-finding process. Partly to ensure that this right is upheld… jurors must not engage in discussions of a case before they … have begun formally deliberating"); *U.S. v. Barth*, 424 F.3d 752 (8th Cir. 2005) ("it is essential to a fair trial… that a jury be cautioned as to permissible conduct and conversations outside the jury room").

[10] *Biddle v. State*, 302 A.3d 955 (Del. 2023) ("I've given you instructions throughout this trial not to discuss this case with any other jurors"); *Swan v. State*, 248 A.3d

"under the Delaware Constitution, an essential element of the right to trial by jury is for verdicts to be based solely on factual determinations that are made from the evidence presented at trial,"[11] these admonishments have a distinct constitutional purpose in our state.

In this case, the trial court specifically confined the restrictions on discussions and outside research to "during the selection process;" (A19; A23) thereby implying that, *after* the selection process, they were permitted to do so.[12] Further, the trial court violated this Court's directive that, "[a]t the commencement of each new trial day the Court should inquire of the jury, collectively, as to whether any member has

---

839, 879 (Del. 2021) (noting instruction not to discuss); *Wyche v. State*, 202 A.3d 510 (Del. 2019) (noting instruction not to discuss); *Collins v. State*, 852 A.2d 907 (Del. 2004) ("trial judge's instruction that the jury not discuss the case amongst themselves"); *Reyes v. State*, 819 A.2d 305, 315 (Del. 2003) ("judge gave the entire jury a comprehensive explanation about the importance of assiduously adhering to the court's instructions not to discuss the case at all with anyone until the time of deliberation."); *Claudio*, 585 A.2d at 1299 (noting "procedure in the Superior Court… [is that jurors] are assiduously instructed not to discuss); *Paskins v. State*, 513 A.2d 1319 (Del. 1986) (noting trial judge's "cautionary instructions to the jury not to read about the case or discuss it or listen to any discussions about it."); *Halko v. State*, 204 A.2d 628, 632 (Del. 1964) ("The usual instruction to the jury not to discuss the case with anyone").

[11] *Baird v. Owczarek*, 93 A.3d 1222, 1225–26 (Del. 2014); DE CONST, Art. 4, § 19 ("Judges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law.").

[12] The trial court did inform the jury that they would "decide the case based upon the evidence presented from the witness stand, or through documentary or other evidence." A27. But the this is not a prohibition on outside research, and no reasonable juror would understand it to imply as much, because the trial court specifically indicated it was not concerned with outside research. A243.

in any way been exposed to such accounts."[13] To the contrary, the trial court specifically told the jury that it was "*not concerned*" with whether or not they had been so exposed. A243.

It is common sense that a juror who is not admonished to avoid extrajudicial information and discussing the case, will likely do both. Afterall, the judicially recognized importance of *repeating* these admonishments is premised on that conclusion. Moreover, numerous factors create a heightened likelihood that members of this jury would have done so. First, as mentioned above, the trial court *permitted* the jury to access extrajudicial materials; and second, modern cultural and technological realities – which are generally known – have increased interest and ease in obtaining extrajudicial information such that this Court should presume it occurs when jurors are not admonished to the contrary.

**i. By informing the jury that it was "not concerned" with exposure to extrajudicial material, the trial court committed error and encouraged juror misconduct.**

The trial court's announcements that it was "not concerned" with exposure to "pretrial or extrajudicial information," and that jurors should only report such exposure if they are personally "concerned… [that it] affected [their] ability to be

[13] *Smith v. State*, 317 A.2d 20, 23 (Del. 1974); *United States v. Williams*, 635 F.2d 744, 746 (8th Cir. 1980) ("an admonition is particularly needed before a jury separates at night when they will converse with friends and relatives or perhaps encounter newspaper or television coverage of the trial").

fair and impartial" (A243) is reversible on its own. Firstly, while a juror's self-assessed partiality is a factor to consider, it is not particularly reliable,[14] and the decision is not theirs to make.[15] A trial court has discretion as to whether to remove or keep a juror and declining to use that discretion unless a juror first confesses that they are biased deprives the parties of a trial court's responsibility "to assess the veracity and credibility of the potential juror."[16] As this Court recently explained, when a juror is aware of extrajudicial information, whether or not a juror believes themselves to be biased, trial courts should "inquire[] into the basis and depth of the juror's prior knowledge of the case and [their] ability to evaluate the evidence impartially."[17]

Second, as a matter of law, this Court, and the United States Supreme Court, are necessarily "concerned" by exposure to "pretrial or extrajudicial information," because mere exposure creates a presumption of prejudice.[18] In *Baird v. Owczarek*

---

[14] Bettina E. Brownstein, *It's Time to Make Jury Instructions Understandable*, ARK. LAW. at 24, 25 (Fall 2002) ("Surveys of jurors reveal that their self-assessments are unreliable"); *People v. Tyburski*, 518 N.W.2d 441, 452 (Mich. 1994) ("A juror's self-assessment of bias should not be accepted without first eliciting information concerning the content and extent of the juror's exposure to publicity so that the court can make its own determination of the juror's impartiality.")

[15] *Schwan v. State*, 65 A.3d 582 (Del. 2013).

[16] *Id.* at 589.

[17] *Sharp v. State*, 320 A.3d 236 (Del. 2024).

[18] *Dietz v. Bouldin*., 579 U.S. 40, 48 (2016) ("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 trial court was presented evidence that one juror had conducted internet research. Despite that there was no evidence as to the substance of that research, or any assertion that it impacted the juror's partiality,[19] this Court held that the unconfirmed allegation of "[i]nternet research by a juror is intolerable misconduct because it is an extrinsic influence that has the potential to prejudicially compromise the jury's function under the Delaware Constitution to *determine facts exclusively based upon evidence that is presented in the courtroom*…it has the prospect of being so inherently prejudicial that it raises a presumption of prejudice.[20] Here, the trial court effectively nullified the presumption of prejudice by discouraging jurors from reporting exposure to extrajudicial information, the factual predicate which prompts that presumption.

---

*Baird v. Owczarek*, 93 A.3d 1222, 1229 (Del. 2014) (holding internet search by juror "an 'egregious circumstance' that raised a presumption of prejudice").

[19] *Id.* at 1225–26 ("following the trial, Juror No. 6 left a telephone message with Baird's counsel and repeatedly attempted to contact the trial judge … [and eventually] wrote a letter to the trial judge alleging that Juror No. 9 had done internet research during the jury's deliberations.")

[20] *Id.* at 1229–30 (citations and quotations omitted).

### ii. This Court should presume Ushery's jury was exposed to extrajudicial information.[21]

While jurors are presumed to follow instructions, when they are not instructed to avoid extrajudicial information and discussions of the case, the realities of human nature support a presumption that they do both.[22] The necessity for admonishment waxes and wanes with practical realities.[23] We are social creatures. When a group of everyday citizens get together and watch a criminal trial for days, absent a restriction, of course they are going to discuss it.[24] So too, we are curious, and any reasonable juror would research the case, absent a direction not to do so.[25]

---

[21] This section's reference to materials outside of the record to address *how this Court should remedy* the trial court's error – flawed instructions and failure to admonish – does not implicate Rule 8. Rule 8 addresses presentation of "the claim" and "the error complained of" (*e.g. Longfellow v. State*, 167 A.3d 513, at *1 and n.2. (Del. 2016)); and practically, remedies, including presumptions which flow from errors, are not discussed at a trial where no error was found.

[22] NCSC ON JURORS AND NEWS MEDIA at 5.

[23] *See e.g. United States v. Richardson*, 817 F.2d 886, 889 (D.C. Cir. 1987) ("admonitions are particularly crucial when the jury leaves the comparative shelter of the courthouse…[and during] the period of jury deliberation.")

[24] ABA Principles for Juries and Jury Trials at 116 (2023) ("State and federal trial judges who have studied juries and jury … recogniz[e] jurors' natural impulses to discuss at least limited aspects of their shared experience with other jurors as the trial unfolds") *available at* https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles-juries-jury-trial.pdf.

[25] *See Richardson*, 817 F.2d at 888–89 ("In order to achieve the necessary insulation, trial courts admonish the jurors not to discuss the case with any other person until they have rendered a verdict… failure to do so is grounds for reversal").

The presumption that an unadmonished jury will conduct research and discuss the case is justified by modern technological realities.[26] In modern times, "reliance on new media has become so ingrained that it would require conscious effort for many jurors to refrain from doing so for the duration of a trial. As a result of these developments, judges and lawyers can no longer be confident that impaneled jurors will remain impartial for the entire trial."[27] In other words, absent instructions, jurors revert to the default of everyday citizens, which for "[m]any people [involves] … reliance on new media …[that is] so ingrained that it would require conscious effort for many jurors to refrain from doing so for the duration of a trial."[28]

Smart phones and internet access are a complete "gamechanger."[29] Today cell phones are "essential to everyday life"[30] and there is a meaningfully large portion of potential jurors – or everyday citizens generally – who can be counted on to use their

[26] NCSC on Jurors and News Media at 5 (contrasting "much of the twentieth century, [when] it was relatively easy to protect jurors from extraneous information" *with* modern times in which "the rapid evolution of new media…[to include] Internet based technologies and social media platforms …[enable] jurors to access virtually any piece of published information about pending cases in minutes.")
[27] NCSC ON JURORS AND NEWS MEDIA at 5.
[28] NCSC ON JURORS AND NEWS MEDIA at 5.
[29] John P. Gismondi, *Bursting the Jury Bubble: The Internet's Threat to Jury Impartiality, and How the Courts Should Respond*, 96 PA. B.A.Q. 24, 26 (2025) (describing unprecedented scope of accessible information, and ease in obtaining that information).
[30] https://courts.delaware.gov/forms/download.aspx?id=254388.

phones unless prohibited from doing so.[31] In our reality there are no sacred spaces which enjoy public consensus regarding limited cell phone use: people text during communal prayer, take calls during funerals, and video record concerts despite prohibitions. Without a firm admonishment from the judge in the courtroom, at a minimum, jurors *will* google.

As early as 2013, Delaware courts had already begun issuing admonishments specifically tailored to juror use of the internet.[32] The next year, the Supreme Court of the United States observed that smart phones are "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[33] And since then, the use of smartphones has become more prevalent and impulsive, and the risk of internet based juror misconduct has only increased.[34] In 2016 the United States Supreme Court

---

[31] Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. Colo. L. Rev. 409, 422–23 (2012) ("more people have grown accustomed to and reliant on it. In fact, going online to find information has become almost instinctive, something people do without giving it much thought. For many, the customary preparation for, or follow-up after, meeting a new person, either professionally or socially, is to research that person by Googling or Facebooking him or her.") (citations and quotations omitted).

[32] *Baird v. Owczarek*, 93 A.3d 1222, 1228 (Del. 2014) (citing favorably to trial court's 2013 instruction prohibiting use of internet and/or social media "to communicate to anyone any information in this case or conduct any research about this case until I accept your verdict.")

[33] *Riley v. California*, 573 U.S. 373, 385 (2014).

[34] NCSC ON JURORS AND NEWS MEDIA at 5 (describing 2012 survey investigating juror misconduct related to modern media in which "[s]izeable proportions of jurors reported that they would have liked to use the Internet to conduct research on case-

recognized the presumptive impact of smart phones on juries by acknowledging the "now-ingrained instinct to check our phones whenever possible" as one reason for reversing a trial court's decision to recall a jury to address problematic verdict.[35] Numerous courts,[36] and commentators[37] have similarly recognized that the risk of juror misconduct posed by the ubiquity of smartphones coupled with the ease of

---

related topics" and stating it is "likely, that juror misconduct involving communication over social media has become more common.")

[35] *Dietz v. Bouldin*., 579 U.S. 40, 51 (2016) ("Courts should also ask to what extent just-dismissed jurors accessed their smartphones or the internet, which provide other avenues for potential prejudice.").

[36] *United States v. Fumo*, 655 F.3d 288, 331 (3d Cir. 2011) (J. Nygaard, concurring) ("Courts can no longer ignore the impact of social media on the judicial system, the cornerstone of which is trial by jury… The availability of the Internet and the abiding presence of social networking now dwarf the previously held concern that a juror may be exposed to a newspaper article or television program …Courts must be more aggressive in enforcing their admonitions."); *United States v. Juror No. One*, 866 F. Supp. 2d 442, 451 (E.D. Pa. 2011) ("The great benefit of social-networking websites like Facebook and Twitter is that they allow users to easily and efficiently communicate with others on a mass scale. Yet those very benefits also exponentially increase the risk of prejudicial communication with jurors.") (internal quotations omitted); *State v. Smith*, 418 S.W.3d 38, 46–47 (Tenn. 2013) (internal citations omitted) ("new communications technology has exponentially increased the risk that jurors will conduct research and investigate the law and facts.")

[37] Hoffmeister, *supra* note 31 at 422–23 ("Jurors have the capability instantaneously to . . . look up facts and information …[which has] led jurors to more readily seek out facts on their own.") (citations and quotations omitted); Ralph Artigliere, *Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial*, 59 DRAKE L. REV. 621, 626–27 (2011) ("Many jurors, young and old, are habitually linked to other people and information resources through the Internet, phone technologies, and social networks."); Robbie Manhas, *Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms*, 112 MICH. L. REV. 809 (2014) ("[i]ndependent juror research …[has] increased in the internet age, where inappropriate sources of information are ubiquitous and where improper access is hard to detect.").

internet research is too great to go unadmonished. The need for an admonishment is maximized here because the trial court was aware that the allegations were covered "on social media and in the news quite a bit," which included "a lot of comments and… remark[s] on Mr. Ushery as having a record." A47—48, 50.

Of particular importance, the Delaware Superior Court now permits jurors to bring their cell phones into court,[38] and this will be this Court's first chance to review the legal impact of that decision. The wisdom and necessity of this decision is not being challenged – the court's goal of "enhance[ing] access to justice for litigants and other visitors to our courthouses"[39] is beyond compelling; however, it is nonetheless a significant change in circumstances with at least two pertinent impacts. First, permitting phones provides more opportunity to conduct research; and secondly, prior to the change in policy, even after a juror leaves the courthouse, the fact that they were not permitted to bring their phone, was a significant experiential reminder that the information one can access through a cell phone has no place in the jury process.

The presumption of research and discussion is also justified by modern cultural realities. "Because most of the public has little direct experience with the justice system, public knowledge and views of law and the legal system are largely

[38] https://courts.delaware.gov/forms/download.aspx?id=229388.
[39] https://courts.delaware.gov/forms/download.aspx?id=254388.

dependent on media representations."[40] In particular, "true crime" has transformed the relationship which the everyday citizens who comprise our juries have to criminal investigations. The "*Serial* Effect" (named after the hit podcast), like the CSI effect (named after the TV show),[41] refers true crime media's impact on the way potential jurors relate to and think about criminal investigations and prosecutions. Before being selected for jury duty, true crime fans – which comprise more than 50% of Americans[42] – are told "what really happened [in a given case is]… actually much more complicated than what [you will] hear" in court.[43] Many of these potential jurors are not just "listeners" of true crime, but participants in the amateur

[40] Valerie Hans and Juliet Dee, University of Delaware, *Media Coverage of Law and its Impact on Juries and the Public*, THE AMERICAN BEHAVIORAL SCIENTIST at 136 (Nov/Dec. 1991) *available at* https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1463&context=facpub; *Id.* at 142 ("the media shape jurors' predispositions to trials.").

[41] K. Alberecht and K Filip, *The Serial Effect*, 53 N.M. L. REV. 29 (2023) (coining "serial effect" but focusing on different components of its impact; and describing "'CSI Effect' [as] theoriz[ing] that criminal juries can be unduly influenced by fictional crime dramas such that they demand a higher standard of forensic evidence than is available, or even possible to provide, in most criminal cases.")

[42] A 2022 YouGov poll found that more than 50% of Americans enjoy true crime, and 35% consume true crime at least once per week. https://today.yougov.com/entertainment/articles/43762-half-of-americans-enjoy-true-crime-yougov-poll; a 2023 pew research poll found that true crime is the most common topic (24%) among top-ranked podcasts, and that 34% of podcast listeners regularly listen to podcasts about true crime. https://www.pewresearch.org/wp-content/uploads/sites/20/2023/06/PJ_2023.06.15_Podcasts-Audit_FINAL.pdf.

[43] Ira Glass, *The Alibi*, THIS AMERICAN LIFE (WHYY) (introducing first episode of *Serial*) *available at* https://www.thisamericanlife.org/537/transcript.

sleuthing process itself.[44] True crime – fairly or not – primes jurors to believe that the evidence they will be presented is inadequate, and empowers them to be the real detectives and ferret out the truth.[45] In other words, "do outside research" *is the message* of true crime. Just as courts have acknowledged and accounted for the CSI effect, so too, they must for the *Serial Effect*, which has cemented outside research as the natural proclivity of many.[46]

---

[44] Matt Zbrog, *Do True Crime Stories & Citizen Sleuths Produce Crowdsourced Justice?*, FORENSIC COLLEGES (August 25, 2022) ("this modern era of true crime is defined by three characteristics: bingeing, intimacy, and engagement. It's the engagement component that has given rise to crowdsourced justice and the trend of citizen sleuths: people who operate outside of the criminal justice system but independently contribute to investigations. These citizen sleuths seek out open source evidence, share their theories on social media, and can ultimately affect the outcome of a case") (citations omitted) *available at* https://www.forensicscolleges.com/blog/resources/true-crime-and-citizen-justice.

[45] *See* Elisha Fieldstadt, *New Crop of True Crime Shows Seduces Audiences, Compels Them to Dig*, NBC NEWS (Apr. 16, 2016) ("Viewers … see themselves as constituents in the process, and in the case itself.") *available at* http://www.nbcnews.com/news/us-news/new-crop-true-crime-shows-seduces-audiences-compels-them-dig-n546821; Aja Romano, *Serial Transformed True Crime — and the Way We Think About Criminal Justice* (VOX, June 3, 2024) ("After *Serial*, millions of people became amateur detectives. Legions of fans have made themselves an invaluable part of the crime-solving process via social media") *available at* https://www.vox.com/culture/351238/serial-true-crime-podcast-criminal-justice-adnan-syed.

[46] Michael Johnson, *The "CSI Effect": TV Crime Dramas' Impact on Justice*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 385, 399 (2017) ("There are multiple cases throughout the United States in which *voir dire* was employed to help lessen the *CSI* Effect.") (citing cases).

**b.** ***In the context of deficient instructions, the note required an inquiry if not excusal. The trial court did neither, and its response encouraged the jury to access extrajudicial materials.***

**i. The trial court misapprehended the significance of the note.**

Questions 2 and 3 are *extremely* peculiar and reflect that Juror 15 had a fundamental misunderstanding of his responsibilities (which aligns with the *Serial Effect*). Question 2 implies that he believed – through no fault of his own –he could somehow direct the course of the investigation and trial presentation. This is a confused juror who needs instructions, and the trial court's own findings reflect as much. An "active juror [] who is offering his own view of how he thinks the case ought to be tried, [despite that] it's really not his business" is more inclined to discuss the case and conduct research.[47] Finally, the trial court recognized that questions like Juror 15's "frequently …reflect the jurors' biases,"[48] and that these issues could very well taint, or at least distract, other jurors ("drive [them] crazy"). A50.

Question 3, through which Juror 15 suggested evidentiary value in an oddly particular linguistic theory, suggests research – perhaps with an easily accessible translator app – or reliance on extraneous knowledge or experience. More problematic, however, is that the trial court did not accurately read, or ever provide,

[47] *See* Hoffmeister, *supra* note 31 at n. 66 ("the jurors who end up causing problems by conducting their own research are the most conscientious ones, because they want all of the facts so they can make an informed decision.") (citation omitted)

[48] *See Knox v. State*, 29 A.3d 217, 223 (Del. 2011) ("jury bias, either actual or apparent, undermines society's confidence in its judicial system.")

the full text of this question. *Compare* A45—46 *to* A328. Juror 15 wrote "[d]on't know the victim's ethnicity, but the Asian characters for 'sundress'/'dress' may be similar to 'mask' / 'facemask,'" *but the trial court (mis)read* "[d]on't know the victim's ethnicity, but maybe he characters a sundress and dress may be similar to a mask or face mask." As a result, the parties did not receive important information about Juror 15's focus on the victim's race, which is a basis for a follow up, especially in a cross-racial crime like this; additionally, Juror 15's apparent belief that there is a defined set of "Asian characters" when in fact, there are many distinct Asian languages (to include distinct alphabets/characters) could be completely innocuous, no doubt this is how some well-intended people speak, but it is a problematic phrasing which the (quite capable) attorneys in this case would have wanted to explore in additional *voir dire*.

The trial court also misapprehended the significance of Question 1, in which Juror 15 revealed he has significant hearing challenges. This revelation, in the absence of any inquiry, leaves doubt as to whether Juror 15 heard the trial court's *voir dire* questions directed at prior knowledge, bias, and partiality.[49] Moreover, the Delaware juror qualification statute *requires* a meaningful inquiry[50] into

[49] *McCoy v. State*, 112 A.3d 239, 257 (Del. 2015) (describing *voir dire*'s essential role in seating a constitutionally adequate jury).

[50] *Banther v. State*, 823 A.2d 467, 477 (Del. 2003); *United States v. Resko,* 3 F.3d 684, 695 (3d Cir. 1993) (remanding for new trial where trial court failed to conduct meaningful inquiry into allegations of prejudicial intra-jury communications).

disqualifying characteristics, and dismissal[51] of those who are unqualified. Accommodations (such as headphones and ensuring witnesses use the microphones) should of course be provided; but ultimately, a juror who has not heard the instructions is "[i]ncapable, by reason of physical … disability, of rendering satisfactory jury service."[52]

**ii. The trial court should have, at a minimum, inquired with Juror 15 about the note and reasonable inferences therefrom.**

When evidence suggests the possibility of extrajudicial influence, the trial court must inquire.[53] The trial court has discretion in *how* to conduct the inquiry,[54]

---

[51] *Diaz v. State*, 743 A.2d 1166, 1171—72 (Del. 1999).
[52] 10 *Del.C.* § 4509.
[53] *Schwan v. State*, 65 A.3d 582, 590 (Del. 2013) (holding procedures in Super.Ct.Crim.R. 24 apply "after a juror has been seated and issues about that juror's impartiality are raised. The trial judge must personally conduct such examination as is necessary to ascertain the seated juror's ability to reach a verdict fairly and impartially"); *United States v. Shackelford*, 777 F.2d 1141, 1145 (6th Cir.1985) ("When possible juror misconduct is brought to the trial judge's attention he has a duty to investigate and to determine whether there may have been a violation of the sixth amendment."); *United States v. Helton*, 2017 WL 4896933, at *3 (E.D. Ky. Oct. 29, 2017) (holding juror's ambiguous answer, "yeah kind of," on potentially disqualifying issue, triggered trial court's duty to inquire); *Rocco v. Yates*, 2009 WL 2095991, at *10 (C.D. Cal. July 13, 2009) ("Once a court is put on notice of the possibility that improper or external influences are being brought to bear on a juror, it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and whether the impartiality of other jurors has been affected.").
[54] *See Knox v. State*, 29 A.3d 217, 220 (Del. 2011) ("the exercise of this discretion is limited by the essential demands of fairness.")

but it is an abuse of discretion to forgo it altogether.[55] Without hearing from the juror, "the trial judge's examination [is] incomplete… [,] there [is] no opportunity to assess [the juror's] credibility … [and] no record to support a determination on appeal that [the] Juror [] had the capacity to render a fair and impartial verdict."[56]

If the note, combined with the deficient admonishments and approval of extrajudicial materials, did not require excusal – as was *argued by both parties* – it certainly required an inquiry.[57] By recognizing that Juror 15 was an *active* juror, with significant hearing problems, and possible bias, *but* conducting no inquiry as to what *activities* he engaged in (for instance, had he researched his theory about the glasses?), whether he heard the *voir dire* questions, or whether he could be fair and impartial, the trial court violated its duty to inquire. And because the jury was not instructed to avoid extrajudicial materials and discussions, and the trial court conducted no investigation as to whether Juror 15 had done so, there is no record

[55] *People v. Tyburski*, 518 N.W.2d 441, 452 (Mich. 1994) ("While it is within the trial court's discretion to select the method for eliciting such information, it is an abuse of discretion to abdicate this responsibility.")

[56] *Biddle v. State*, 302 A.3d 955 (Del. 2023).

[57] In *State v. Burton*, the Superior Court, on appeal, approved of the Court of Common Pleas' handling of an analogous midtrial juror note which commented on trial strategy without explicitly admitting to outside research. In *Burton*, "the trial court held an *in camera* interview of the juror and then decided to dismiss him. The remaining members of the jury were polled to determine whether they had" any prejudicial discussions with the dismissed juror. 2001 WL 1480860, at *5 (Del. Super. Ct. Aug. 15, 2001).

basis to find that he even had a rudimentary understanding of the governing rules and requirements.

**iii. The trial court's response to the note made matters worse.**

The trial court's response to Juror 15, which was delivered without informing counsel in advance,[58] diminished the vital importance of avoiding exposure to extrajudicial materials. Immediately after telling the jury that it was not concerned about accessing extrajudicial information, the trial court told Juror 15 that his "questions … are outside the scope of what we can talk about. And no dig on you, I appreciate an inquisitive mind, but we're stuck with the evidence that we hear in court." A243. "[*W*]*e're stuck with* the evidence that we hear in court" is an example of why this Court has expressed a preference for formal language in communications between the trial court and the jury.[59] Lawyers and judges, familiar with the process, certainly know what the trial court intended; but the same cannot be said about a juror who has displayed unfamiliarity with the rules. Unsurprisingly, an NCSC survey of judges found that explaining the rationale behind these types of restrictions was the most effective means of preventing misconduct; and repetition of the

[58] *See Anderson v. State*, 695 A.2d 1135, 1138 (Del. 1997) ("[t]he trial judge should inform counsel of the court's proposed response on the record and provide counsel with the opportunity to object or otherwise be heard.")

[59] *Weber v. State*, 971 A.2d 135, 143 (Del. 2009) ("While to some judges the urge to be 'folksy' and 'familiar' to the jury may be appealing, those desires when fulfilled create less appealing, appealable issues for counsel and the Supreme Court.")

admonishment was second.[60] Rather than explaining the rationale of the rule, telling a jury that we are "*stuck* with" the evidence, suggests the rule is unfortunate, rather than rational; and the informal and friendly preface to that statement, "no dig on you, I appreciate an inquisitive mind" is hardly a "firm warning."[61] In the context of the "not concerned" instruction, a reasonable juror would have understood the statement as allowing jurors to research the questions in the note, as long as *those jurors believe* they can be impartial.

Separately, when the note arrived, a foreperson had not been designated and the jury had not been instructed "to communicate any questions, regarding matters not personal to a particular juror, in writing through the foreperson."[62] So, however the note got to the trial judge, there is no reason to believe any juror other than Juror 15 was aware of its contents. In these circumstances,[63] responding to the note with all jurors present, but without providing those other jurors any context, was improper and all but guaranteed that the 14 jurors who were unaware of the questions to which the trial court referred (unless they'd been discussing the case with Juror 15), would now ask Juror 15, and discuss his investigative theories about the case.

---

[60] NCSC on Jurors and News Media at 17.
[61] *See* "Admonish." Oxford English Dictionary (Oxford UO, 2018).
[62] *See Anderson*, 695 A.2d at 1138 (requiring such an instruction *prior to deliberation*).
[63] *But see id.* at 1139 ("The trial judge's response to the jury's note should be delivered in open court, on the record, with all jurors… present").

## CONCLUSION

This Court should rule that *if* a trial court fails to admonish a jury to not discuss the case or conduct research, *then* there is a (rebuttable) presumption that the jury will do exactly that. And in this case, because that presumption was not rebutted, this Court must presume prejudice,[64] and since that presumption was not rebutted either, it must reverse.

In the alternative, this Court should find that the note, coupled with the deficient admonishment and misleading instruction support an inference of juror misconduct which required an inquiry, and since the trial court failed to do so, it should reverse based on the unaddressed misconduct.

Respectfully submitted,

/s/ Elliot Margules
Elliot Margules [#6056]
Office of Public Defender
Carvel State Building
820 North French Street
Wilmington, DE 19801

DATED: March 7, 2025

[64] *Baird v. Owczarek*, 93 A.3d 1222, 1229 (Del. 2014).