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Case Number 422,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CALVIN USHERY, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	)))))))))))	No. 422, 2024

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY 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: May 6, 2025

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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.

The Answer does not dispute that internet research about a case carries the presumption of prejudice (Answer at 33), that in modern times "[w]hen a group of everyday citizens get together and watch a criminal trial for days, absent a restriction… they are going to discuss it…[and] *will* google" (Op.Br. at 17 and 19), nor that "'true crime' has transformed the relationship which the everyday citizens who comprise our juries have to criminal investigations…[in that] true crime fans – which comprise more than 50% of Americans – are … prime[d] to believe that the evidence they will be presented is inadequate, and empowers them to be the real detectives and ferret out the truth… 'do outside research' *is the message* of true crime." Op.Br. at 22—23. The Opening Brief showed these points to be backed by quantitative research and everyday experience (Op.Br. nn.22—26), and the State does not dispute that Ushery's "reference to materials outside of the record" does not implicate Rule 8. Op.Br. at n.21.

Because the State does not dispute any of the above, neither can it dispute that "[w]hile 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." Op.Br. at 17. To be sure, the Answer does not challenge the presumption itself, but instead argues that the presumption does not apply here because the Opening Brief wrongly asserted that there was no admonishment whatsoever. Answer at 22. The State is correct that Ushery's description of the record was flawed in this regard, but incorrect in arguing that, because of that flaw, his argument fails "by its own terms." Answer at 22.

a. *The trial court's late admonishment had no impact on the entirely unadmonished first day of trial which had already passed.*

The previously unaddressed admonishment did not occur until the end of the first day; that is, after the unadmonished jury had been given Ushrey's name, the charges he faced, the location of the incident, and the names of the witnesses (more than enough information to prompt online research) (A19), taken a lunch break (A26), heard opening statements detailing the allegations and evidence (A27—A29), saw video evidence and heard testimony from three State witnesses (State's Exhibits 1, 4—8), and given ample unsupervised time to conduct internet research and discuss what they had learned (A36 (excusing jury from court room for a recess)).

The Answer's assumption that the subsequent admonishment (A43) somehow retroactively cured the previously *un*admonished period should be rejected as

unreasoned,[1] unsupported by the presumption that juries follow instructions as the admonishment does not, on its own terms (A40 ("don't do any of the Google, any of that stuff, don't talk to each other about the case")), apply to the day which had already passed, or otherwise indicate that the prohibitions had already been in place, despite the pretrial instructions (A19; A23) which (the Answer does not dispute) would have lead a reasonable juror to believe that research and discussions were permitted after "the selection process." Op.Br. at 13; Answer at 19.

At most,[2] the late admonishment supports that the jury did not conduct internet research or discuss the case *after* the end of the first day. But, even when accounting for the late admonishment, the first day remains an *entirely unadmonished* period controlled by the *undisputed* presumption that unadmonished juries will conduct research and discussions.

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[1] *See People v. Hatcher,* 2003 WL 23018776, at *2 (Mich. Ct. App. Dec. 23, 2003) (finding no juror misconduct occurred, *but only* considering admonishment not to discuss case for purpose of assessing juror conduct *after* admonishment was given, *not* for assessing conduct during a *previous* period when "they may have been able to discuss matters among themselves"); *United States v. Barth*, 424 F.3d 752, 763 (8th Cir. 2005) (finding no error in failing to give midtrial admonishment where trial court "had *earlier* given a continuing admonition.") (emphasis added).

[2] At the beginning of the third day, the trial court contradicted the admonishment and informed the jury it was not concerned with research. A243. The argument that this instruction reflects "correct principles of law" (Answer at 29) is wrong (Op.Br. n.17), ignores the Answer's eventual concession that the internet research at issue is presumptively prejudicial (Answer at 33), and undermines any value in its factual claim that "there is no evidence that any juror was aware of pretrial publicity about the crime" (Answer at 35).

b. *Ushery's jurors did not read the handbook, so it is irrelevant.*

"Entirely unadmonished" accurately describes the first day because the only theoretically relevant admonishment comes from the Superior Court Handbook for Petit Jurors ("the handbook), and there is no basis for this Court to find that any of Ushery's jurors had read the handbook. The State suggests that "[t]his Court can take judicial notice that the Superior Court *gives* jurors a handbook with an admonition against reading, seeing, or hearing any report about the case in the news." Answer at 20 (emphasis added). As support, it cites to B-10, a blank page of its appendix. Whatever page the State intended to cite, neither its appendix nor any portion of the record contain evidence that any of Ushery's jurors were given the handbook. Moreover, this Court should not take judicial notice of this "fact," because it is not "generally known within the trial court's territorial jurisdiction" and, while it might be the type of fact that can "accurately and readily determined from sources whose accuracy cannot reasonably be questioned," the State has not argued as much, and it is unclear what those unidentified sources might be.[3]

[3] D.R.E. 201(b). The Answer's discussion of the handbook (nn.19—23) relies on this Court's decisions in *Smith, Phillips, and White.* None of these precedents even mention judicial notice. *Phillips* does not mention the handbook. And *White* relies on *Smith*, which relies on *Halko v. State*, whose finding that "the jurors had received a copy of" the handbook rested on an affidavit from the Chief Deputy Prothonotary, not judicial notice. 6 Storey 480, 509 (Del. Super. Sept. 5, 1963); *see Smith v. State*, 317 A.2d 20, 23 (Del. 1974); *White v. State*, 404 A.2d 137, 140 (Del. 1979); *Phillips v. State*, 154 A.3d 1146, 1157 (Del. 2017).

Even if there were a basis to find that Ushery's jurors were "given" handbooks, that finding does not reasonably allow one to infer that Ushery's jurors *read* those handbooks.[4] And, while *Smith v. State* can be understood to have found that the jurors in that case read the handbook,[5] that finding, made in a different case fifty-years earlier, is not the type of "indisputable fact" governed by D.R.E. 201.[6]

Finally, the handbook itself does not proscribe any conduct but rather "inform[s] jurors of their function[,] explain[s] legal language and proceedings" and makes clear that "[t]he presiding judge will instruct the jury on the law in each case." B17. If a juror had read the handbook, they would know that its statements did not reflect rules governing Ushery's trial. *E.g. compare* B21 ("[w]hen the jury has been selected, the jurors will be asked to rise and place their right hands on the Bible.

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[4] *U. S. ex rel. Goodyear v. Delaware Corr. Ctr.*, 419 F. Supp. 93, 95 n.1 (D. Del. 1976) ("routinely provid[ing] petit jurors with a handbook of instructions … does not reveal whether the jurors … read the handbook."); *Horton v. U.S.*, 256 F.2d 138, 142 (6th Cir. 1958) (holding, despite stipulation that jurors *received* the handbook, "[t]here was no showing that any member of the jury had read the handbook"); *United States v. Gordon*, 253 F.2d 177, 185 (7th Cir. 1958) ("The only evidence offered by the defendant was that the handbooks were distributed … with a suggestion that they be read. The record is completely devoid of any evidence that any of the members of the jury read the handbook.").

[5] Further, *Halko*'s jury was instructed to read the handbook; thereby enabling a presumption that they did so. *See Halko v. Anderson*, 244 F. Supp. 696, 702 (D. Del. 1965), *aff'd*, 359 F.2d 435 (3d Cir. 1966) ("Very important… that each member of the jury received a copy of the [handbook], with instructions from the Court to read it."). No evidence suggests that Ushery's jury was instructed to read the handbook.

[6] *See Lebanon Cnty. Employees' Ret. Fund v. Collis*, 311 A.3d 773, 797 (Del. 2023) (holding chancery court erred in taking judicial notice of disputable factual findings issued by a different court in a different case).

Those who object to swearing an oath may affirm by raising their right hands.") *with* A26 ("[w]e, at least me, do not use Bibles"). And, given that jurors are presumed to follow instructions, and the handbook states "[j]urors should not linger in the corridors or areas of the courthouse" (B24), the trial prosecutor's representation that "[t]he jury has been … congregating out in the hallway" (A180) is incompatible with a finding that Ushery's jury was aware of the "instructions" in the handbook.

c. *Juror 15's note required an inquiry.*[7]

The State's assertion that "Juror 15's questions did not give rise to even suspicion of misconduct" contradicts the position it took below: the questions not only provided a sufficient basis for an inquiry, but for removal. *Compare* Answer at 27 *with* A24. Further, its reversed position in the Answer makes no attempt to grapple with the trial court's findings that Juror 15 was an "active juror," that questions like his "frequently…reflect the jurors' biases or whatever more than they do the evidence" (A49), or the suggestion that the note provided a basis for concern that Juror 15 would prevent other jurors from giving the case their "undivided attention" (A20 and A22) by "driv[ing] everybody crazy."[8] A47.

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[7] The Opening Brief (n.8) relied on *Claudio v. State* to preempt a counterargument that prejudice specific to Juror 15 was harmless because he was an alternate. This was not a novel constitutional claim, but a statement of an already decided rule which need not be re-briefed. Answer at 17. In any case, the State chose not to make that counterargument, and thus it is waived and should not be considered.

[8] *See McCloskey v. State,* 457 A.2d 332, 337 (Del. 1983) (reversing conviction where trial court failed to address "animosity" amongst jury).

There is no dispute that during pre-trial *voir dire* and the admonishment at the end of the first day, the trial court was unaware of Juror 15's hearing impairment, and that the impairment *necessitated* an accommodation to ensure Juror 15 could adequately hear. To address Ushery's argument that the revelation of the impairment created doubt as to whether Juror 15 heard the trial court's pretrial *voir dire* (Op.Br. at 25—26), the State asks this Court to rely on another presumption: "[a]s an experienced jurist, the trial judge spoke into the microphone so that jurors could hear him [and therefore Juror 15 would have heard]." A36. Just like the handbook presumption, the microphone presumption is not supported by the record, which reflects that other experienced court room participants failed to do so. A45. And even without evidence to the contrary, the presumption is uncited, unexplained, and not "generally known."[9] Finally, Juror 15's failure to give a "yes" response when asked "[d]o you have any physical … disability that would affect your ability to render satisfactory jury service?" (A23) suggests he did not hear the trial court's questions, as his hearing impairment did in fact effect his ability to do so.[10]

The Answer's qualm with Ushery's characterization of Juror 15's questions as "peculiar" (Op.Br. at 24) misses the mark. Answer at 24. Ushery agrees that (the

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[9] D.R.E. 102(b)(1).

[10] To be clear, the point is not that his (or any) hearing impairment renders a potential juror unqualified or otherwise unable to serve; but only that his "ability to render satisfactory jury service" was "[e]ffect[ed]" by his impairment, in that it required increased attention to microphone use. A48; A328.

first two questions) "were very logical questions that anyone trying to assess Ushery's guilt might want to know about" (Answer at 24); nonetheless, it is peculiar for an individual juror, without involvement of the foreperson or any other juror, to give the trial court a typewritten note suggesting that his individual curiosities should dictate trial strategy and evidence presentation. A46; A328 ("I'm asking this early in the trial as I realize it might take some time and effort to perform"). And this peculiarity, the basis of the trial court's finding that he was an "active" juror, makes it more likely that this same curiosity might have prompted other peculiarities such as outside research and internal discussions

The State acknowledges that the third question suggests "familiarity with one or more Asian languages." Answer at 24. Juror 15's consideration of his own familiarity with another language is impermissible reliance on extrajudicial information, not common knowledge, and required an inquiry.[11] And further, the State does not dispute that the trial court's misreading of the third question (unintentionally) concealed a compelling basis to conduct an inquiry. Op.Br. at 25.

[11] *Diaz v. State*, 743 A.2d 1166, 1174 (Del. 1999) ("a determination must be made regarding the ability of a bilingual juror to follow the trial judge's instructions to rely exclusively upon the court interpreter's translation of testimony into English from the foreign language that is understood by the prospective juror.")

d. ***The State's interpretation of a trial court's duty to inquire is unsupported by the cases upon which it relies.***

The jurisprudential "support" for the State's position that an inquiry was not required (Answer n.32),[12] tellingly, comes from two cases in which inquiries were conducted. The State's reliance on trial courts' "broad discretion" wrongly conflates decisions regarding the "mode and depth of investigative hearings" (Answer at 26), with one to forgo an investigation all together. Op.Br. at 26—27. And finally, its assertion that "suspicious circumstances do not justify an inquiry" (Answer at 26 and 27) reflects the standard for post-verdict inquiries (Answer nn.35—37)[13] which have a higher burden because they require trial courts "to recall a jury months or years later," a "qualitatively different thing" than the requested inquiry in Ushery's

[12]*See United States v. Fumo,* 655 F.3d 288, 305–06 (3d Cir. 2011) ("The District Court questioned Juror 1 *in camera* at length"); *United States v. Console*, 13 F.3d 641, 667 (3d Cir. 1993) ("the district court conducted an individual *in camera voir dire* of each juror and on the basis of the *voir dire* concluded that Markoff had not been prejudiced" and finding an additional inquiry was not required because the basis for requesting an additional inquiry was "not credible")

[13] *Massey v. State*, 541 A.2d 1254, 1254 (Del. 1988) ("This postconviction relief appeal concerns an effort to impeach a jury verdict for alleged juror misconduct more than nine years after the verdict was rendered."); *Sheeran v. State*, 526 A.2d 886, 894 (Del. 1987) ("The basis of this assertion is a letter written to the trial judge by a juror [after the verdict]"); *Lovett v. State*, 516 A.2d 455, 474—75 (Del. 1986) ("Lovett's counsel filed a post-trial motion in the Superior Court asking for a hearing and a *voir dire* of the jurors on the issue of whether outside influences had possibly influenced the jury verdict."); *State v. Halko*, 193 A.2d 817, 831 (Del. Super. Ct. 1963), *aff'd,* 204 A.2d 628 (Del. 1964) ("In the cited cases, however, defense counsel raised the issue while the trials were in progress; this is not true here.")

case, "an ongoing proceeding."[14] And finally, none of these decisions relied on by the State account for the undisputed presumption that an unadmonished juror – as Juror 15 was during the first day of trial (and longer if he did not hear the instructions at the end of the first day) – will conduct research and discuss the case. This presumption applies with extra force when it comes to an "active juror."

Extrajudicial material does not necessarily require excusal, it does require an investigation to determine if there was prejudice.[15] And, as the Answer acknowledges, prejudice is presumed with internet research about the case.

e. *The Answer exaggerates the implications of Ushery's arguments.*

Ushery's argument and requested relief (Op.Br. at 30) do not entail the watershed ruling the Answer suggests. He has not asked this Court to hold that jurors must be ignorant (*see* Answer at 31, 34); that hearing impaired individuals cannot serve as jurors (*see* Answer at 16); to walk back the presumption that jurors follow instructions (*see* Answer at 22); to hold that exposure to any extrajudicial information carries the presumption of prejudice (Answer at 31—32); or made any arguments which require sequestration (*see* Answer at 23).

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[14] *Fumo*, 655 F.3d at 306; *Lovett*, 516 A.2d at 474—75 ("post-verdict questioning of jurors is sparingly employed because of the potential for harassment and intimidation.")

[15] *White v. State*, 404 A.2d 137, 139 (Del. 1979) ("[t]he presence in the jury room of the newspaper required the Court to determine whether defendant's right to a fair trial had been prejudiced)

Instead, Ushery has asked this Court to make clear that *undisputed* realities of modernity have made the rules, directives, or guidelines this Court has consistently supported and which trial courts by and large adhere to (Op.Br. at nn.6—13), more important than ever: trial courts *must*, at the outset of a trial, direct juries not to discuss the case or conduct extrajudicial internet research. If they do so, courts can presume those instructions are followed; if they fail to do so, courts should presume that discussions and research occurred and conduct an inquiry. And, if that inquiry is not conducted –as occurred here, despite that Juror 15 provided a distinct and separately sufficient basis for an inquiry – courts should presume prejudice. This rule is hardly demanding, but it is necessary to maintain the premise of our jury system's reliability.

f. *Ushery's claim was preserved, and also satisfies the plain error requirements.*

Although Ushery did not initially request the admonishments, after learning of the note, he asked the trial court to "mak[e] sure that they're not talking about anything, they're not looking anything up." A47. As to Juror 15 specifically, trial counsel and the prosecutor both argued he should be removed (A46), trial counsel clarified that while the questions themselves did not attest to extrajudicial research or improper discussions, they created concern about conduct "beyond" what was specifically stated (A47), the prosecutor suggested additional *voir dire* of Juror 15 ("[t]o the extent Your Honor wishes to address the questions with this particular

juror"), and trial counsel signed on to that request ("I also"). A49. The Answer discounts this objection because Ushery did not object later on when the trial court issued its ruling. Answer at 29. But Ushery had already objected (A46—49) and the trial court's denial of his proposed relief does not require an additional objection.[16] Finally, reliance on trial counsel's response to the trial court's denial of his request –"[t]hank you" (A242)–confuses trial counsel's respectful deference for a formal retraction of a previously preserved claim. Answer at 29.

In any case, the trial court's failure to take adequate and well-established measures to ensure jurors did not discuss the case or conduct internet research, and in particular, its failure to further investigate Juror 15, constituted plain error. [17] The requirement to admonish juries at the outset of the trial is clear from this Court's decisions, and well-established practice. Failure to do so, in conjunction with the trial court's failure to conduct an inquiry and informing the jury that it was "not concerned" with extrajudicial research, support a conclusion that there was internet research and discussions, and in turn, a presumption of prejudice. Therefore, the errors in Ushery's trial were "clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." Answer at 14.

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[16] D.R.E. 103(b).

[17] *Monroe v. State*, 9 A.3d 476 (Del. 2010) (alleged violations of the "right to a fair trial by an impartial jury under the Sixth Amendment" will constitute plain error if circumstances "support a presumption of prejudice.")

CONCLUSION

For the reasons argued above, and in the Opening Brief, this Court should vacate all of Ushery's convictions.

Respectfully submitted,

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

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