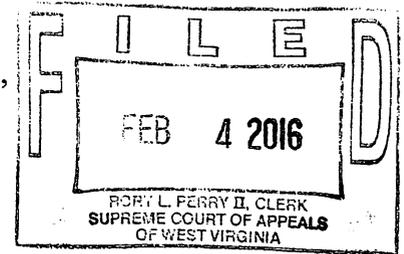


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February 2, 2016

Rory Perry, Clerk  
West Virginia Supreme Court Clerk's Office  
1900 Kanawha Boulevard, East-Room E-317  
Charleston, West Virginia 25305-0831

**Re: *Dayton Scott Lister v. David Ballard, Warden,*  
No. 15-0028**

Dear Rory:

Under Rule 10(i) of the West Virginia Rules of Appellate Procedure, after the briefing has been completed, a party has the right to send a letter to the Court to address additional authorities or other intervening matters that could not have been briefed originally. The State's brief was filed on or about June 8, 2015. After that date, this Court issued two decisions—*State v. Jenner*, 2015 WL 6875014 (No. 14-076, 11/9/15), and *State v. Trail*, 2015 WL 5928478 (14-0887, 10/7/15)—addressing the juror tampering issue raised in the present appeal. Furthermore, on January 26, 2016, the Supreme Court of Connecticut issued a comprehensive decision in *State v. Berrios*, 2016 WL 231094 (Conn. 2016), compiling the federal and state cases that continue to follow the presumption of prejudice recognized by the United States Supreme Court in *Remmer v. United States (Remmer I)*, 347 U.S. 227, 98 L.Ed. 654, 74 S.Ct. 450 (1954), when there are communications, contact, or tampering directly or indirectly with a juror during a criminal trial. Because all three of these decisions were issued months after the briefing was completed in this case, Petitioner Dayton Scott Lister respectfully files this letter pursuant to this rule.

One of the issues asserted in the present appeal is what standard will this Court apply when an unknown stranger, who apparently knew Petitioner by his nickname, made a death threat to a juror during the trial when this juror was shopping in a convenience store. This factual scenario is far different than any of the other juror misconduct or tampering cases previously decided by this Court.

Before the circuit court and in the appeal to this Court, Petitioner asserted under these facts, there was a presumption of prejudice arising from this outside contact with the juror. In *Remmer v. United States (Remmer I)*, 347 U.S. 227, 98 L.Ed. 654, 74 S.Ct. 450 (1954), the United States Supreme Court made this presumption of prejudice clear by stating 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**["] (Emphasis added). 347 U.S. at 229, 98 L.Ed. at \_\_\_, 74 S.Ct. at 451. While the "presumption is not conclusive, . . . 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." *Remmer I*, 347 U.S. at 229, 98 L.Ed. at \_\_\_, 74 S.Ct. at 451. The burden is so heavy that in *Remmer v. United States*, 350 U.S. 377, 379, 100 L.Ed. 435, \_\_\_, 76 S.Ct. 425, 426-27, 100 L.Ed. 435 (1956) (*Remmer II*), the United States Supreme Court, after remanding the case to the district court, held the defendant was entitled to have his conviction set aside and to be awarded a new trial.

In *Jenner*, this Court remanded the case to the circuit court to hold a *Remmer* hearing because the key witnesses involved in the possible conversations with a member of the jury had not been questioned under oath. The unique application of *Remmer* by this Court, which appears to be the only court in the country to follow this approach, is summarized as follows:

If the moving party proves that some improper event involving a juror did occur, the trial court must then determine whether that event affected the juror to the prejudice of the moving party. In that regard, we have held that

[i]n the absence of any evidence that an interested party induced juror misconduct, no jury verdict will be reversed on the ground of juror misconduct unless the defendant proves by clear and convincing evidence that the misconduct has prejudiced the defendant to the extent that the defendant has not received a fair trial.

*Sutphin*, 195 W.Va. at 554, 466 S.E.2d at 405, syl. pt. 3. If, however, the juror misconduct was induced or participated in by an interested party, prejudice will be presumed and must be rebutted. *Legg v. Jones*, 126 W.Va. 757, 763, 30 S.E.2d 76, 80 (1944); *State v. Daniel*, 182 W.Va. 643, 647, 391 S.E.2d 90, 94 (1990); *Sutphin*, 195 W.Va. at 559-60, 466 S.E.2d at 410-11; *Bluestone Indust., Inc. v. Keneda*, 232 W.Va. 139, 143, 751 S.E.2d 25, 29 (2013). Ultimately, if the court concludes that there was prejudicial juror misconduct, a new trial is warranted. *Legg*, 126 W.Va. at 757, 30 S.E.2d at 77, syl. pt. 3 ("Misconduct of a juror, prejudicial to the complaining party, is sufficient reason ... to set aside a verdict returned by the jury of which he is a member.").

Thus, under the case law summarized in *Jenner*, arguably if an “interested person” (the precise meaning of this phrase is not clear) threatened to kill a juror, there would be a presumption of prejudice, but if the same death threat was made by a complete stranger unrelated to the criminal defendant, no presumption of prejudice would arise. The basis for this Court adopting this “interested person” standard is not clear from the case law cited nor is there any explanation in these earlier cases explaining why this Court did not apply the *Remmer* presumption of prejudice.

In *Trail*, this Court was asked to reconcile its prior case law and specifically to adopt the *Remmer* presumption of prejudice. In footnote 13 of *Trail*, the Court declined this invitation and held:

The day prior to oral argument of this matter, counsel for Ms. Trail submitted to this Court the case of *Barnes v. Joyner*, 751 F.3d 229, 241 (4th Cir.2014), *cert. denied*, — U.S. —, 135 S.Ct. 2643, — L.Ed.2d — (2015). This submission was purportedly made pursuant to Rule 10(I) of the West Virginia Rules of Appellate Procedure. Rule 10(I) allows a party to present authorities to this Court that “were not available in time to have been included in the party's brief.” Insofar as the *Barnes* opinion was issued on May 5, 2014, and the deadline for perfecting this appeal was not until November 18, 2014, *Barnes* was available in time to have been included in Ms. Trail's brief and was not proper for submission under Rule 10(I). *See supra* note 1 for a comment related to a change in counsel of record for Ms. Trail.

Likewise, at oral argument, counsel for Ms. Trail urged this Court to adopt a presumption of prejudice deriving from *Barnes* that must be overcome by the government upon “ ‘any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury.’ ” We decline Ms. Trail's invitation for several reasons. First, unlike the present case where the trial court conducted a proper *Remmer* hearing, the issue in *Barnes* was the lower court's failure to conduct a *Remmer* hearing after being apprised of alleged juror misconduct. Second, the presumption addressed in *Barnes* is not settled law. The *Barnes* court observed that,

[w]ith respect to the presumption of prejudice, we have recently observed, “there is a split among the circuits regarding whether the *Remmer* presumption has

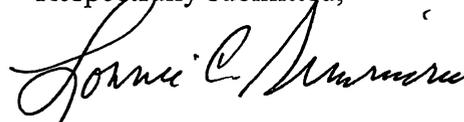
survived intact following” the Supreme Court's decisions in *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), and *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). *United States v. Lawson*, 677 F.3d 629, 642 (4th Cir.2012); see also *id.* at 643–44 (describing the circuit split).

751 F.3d at 242. Finally, this Court previously has itself interpreted *Remmer* and, based upon that interpretation, has adopted a procedure to protect a defendant's right to an impartial jury. See *Sutphin*, 195 W.Va. 551, 466 S.E.2d 402, discussed *supra* at note 9. As set out in our discussion above, the circuit court in this case followed *Sutphin* and held a proper hearing to address the juror misconduct alleged by Ms. Trail.

The present appeal once again provides this Court with the opportunity to reconcile its prior cases with the *Remmer* presumption of prejudice. While there still exists some federal and state court decisions rejecting the *Remmer* presumption of prejudice, the majority of federal and state courts do recognize and apply this presumption. In the *Berrios* decision, the Supreme Court of Connecticut identified the First, Second, Third, Fourth, Seventh, Eighth, Ninth, and Tenth Circuits as recognizing and continuing to apply the *Remmer* presumption of prejudice. Similarly, the *Berrios* court also concluded the *Remmer* presumption of prejudice is recognized and applied in Alaska, Arizona, California, Delaware, District of Columbia, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

Counsel for Petitioner appreciates the opportunity to provide the Court with these additional authorities.

Respectfully submitted,



Lonnie C. Simmons

cc: David A. Stackpole, Assistant Attorney General  
Dayton Scott Lister