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Sorry Linus, I Need Your Security Blanket: How the Smartphone, Constant Connectivity with the Internet, and Social Networks Act as Catalysts for Juror Misconduct

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SORRY LINUS, I NEED YOUR SECURITY BLANKET: HOW THE SMARTPHONE, CONSTANT CONNECTIVITY WITH THE INTERNET, AND SOCIAL NETWORKS ACT AS CATALYSTS FOR JUROR MISCONDUCT

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"The jury has the right to judge both the law as well as the fact in controversy."[2]

– John Jay, First Chief Justice of the United States Supreme Court

INTRODUCTION

Linus van Pelt was first introduced to us as one of the characters from the Charles Schultz comic strip *Peanuts*.[3] Linus was the best friend of Charlie Brown, and serves as the comic's philosopher.[4] His most defining characteristic is his blanket, or "security blanket."[5] It was in fact Linus, or Charles Schultz, who coined the term "security blanket."[6] Linus was never without his blanket, and periodically even used the blanket to ward off those who would tease him about his unusual attachment.[7]

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1. Patrick M. Delaney is an Assistant Public Defender in Palm Beach County, Florida. The views and opinions expressed in this article are the author's own and should not be associated with the Office of the Public Defender- Palm Beach County or the State of Florida in any way. A special thanks to Therese Savona, Steven Singer, and all of those interviewed and consulted for their assistance.

2. State of Georgia v. Brailsford, 3 U.S. 1, 4 (1794) ("[Y]ou have nevertheless a right to take upon yourselves to judge both, and to determine the law as well as the fact in controversy.").

3. *See* 1 CHARLES M. SCHULTZ, THE COMPLETE PEANUTS 245 (Fantagraphics Books 2004) (1950–1952).

4. *See* DAVID MANSOUR, FROM ABBA TO ZOOM: A POP CULTURE ENCYCLOPEDIA OF THE LATE 20TH CENTURY 281 (2005).

5. *See generally* GORDON J. G. ASMUNDSON & STEVEN TAYLOR, IT'S NOT ALL IN YOUR HEAD: HOW WORRYING ABOUT YOUR HEALTH COULD BE MAKING YOU SICK — AND WHAT YOU CAN DO ABOUT IT 110 (Guilford Press 2005); FIFTY YEARS AMONG THE NEW WORDS: A DICTIONARY OF NEOLOGISMS 70 (John Algeo ed., Cambridge Univ. Press 1991); MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY 1123 (11th ed. 2007). A security blanket is defined as "usually a familiar object whose presence dispels anxiety." MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY 1123.

6. ASMUNDSON & TAYLOR, *supra* note 5, at 110; *see also* FIFTY YEARS AMONG THE NEW WORDS: A DICTIONARY OF NEOLOGISMS, *supra* note 5, at 70.

7. ASMUNDSON & TAYLOR, *supra* note 5, at 110; 16 CHARLES M. SCHULTZ, THE

Linus has many connections to today's average juror, not only due to his intelligence, but also, because of his defining characteristic: his security blanket. Today's jurors also report for jury duty with their own security blanket in the form of a cell phone or smartphone.[8] Cell phones have permeated every facet of our lives, and with the introduction of the smartphone, access to the Internet is increasing at an exponential rate. Much like Linus, jurors are using their security blanket for more than a comfort object.[9] However, whereas Linus merely sought to defend himself from a bully, a juror's use of his or her cell phone during trial threatens the legitimacy of the entire trial and turns what should be a neutral decider of fact into a biased party.

In every trial, attorneys on both sides can agree on one thing: a biased juror or a juror who will engage in misconduct is unwanted.[10] The role of each juror in a trial is to decide the case based on the evidence presented within the walls of the courtroom.[11] If jurors take it upon themselves to research additional information or comment on the trial, misconduct has occurred.[12] Even though juror misconduct can occur in a variety of ways, a juror commits misconduct simply by violating the rules and instructions of the court.[13] Recently, the Internet and social networking websites, usually

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COMPLETE PEANUTS 222 (Fantagraphics Books 2011) (1981–1982); 7 CHARLES M. SCHULTZ, THE COMPLETE PEANUTS 28 (Fantagraphics Books 2007) (1963–1964); 3 CHARLES M. SCHULTZ, THE COMPLETE PEANUTS 3 (Fantagraphics Books 2004) (1955–1956); *see also* 2 CHARLES M. SCHULTZ, THE COMPLETE PEANUTS 284 (Fantagraphics Books 2004) (1953–1954); SCHULTZ, *supra* note 3, at 245.

8. *See infra* note 32.

9. *See infra* Section II.

10. David P. Goldstein, *The Appearance of Impropriety and Jurors on Social Networking Sites: Rebooting the Way Courts Deal with Juror Misconduct*, 24 GEO. J. LEGAL ETHICS 589, 594 (2011) ("Attorneys are concerned with not only the impact on the judicial system, but also the effects of such misconduct on their client and their ability to zealously represent the client.").

11. JUD. CONF. COMMITTEE ON COURT ADMIN. AND CASE MGMT., PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (2009), http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018- Attachment.pdf. Jurors are specifically instructed to decide the case based on the evidence presented within the courtroom and are instructed not to consult outside material, including media reports, both prior to and during the litigation of the case. *Id.* Obviously, it is more difficult for a juror to obey this order during a multiple day trial than it is for a juror who is asked to serve on a single day trial. *Id.*

12. *See* BLACK'S LAW DICTIONARY 1089 (9th ed. 2009). Juror misconduct is defined as:

> A juror's violation of the court's charge or the law, committed either during trial or in deliberations after trial, such as (1) communicating about the case with outsiders, witnesses, attorneys, bailiffs, or judges, (2) bringing into the jury room information relating to the case but not in evidence, and (3) conducting experiments regarding theories of the case outside the court's presence.

Id.

13. Laura Whitney Lee, *Silencing the "Twittering Juror": The Need to Modernize Pattern*

accessible via a smartphone, have emerged as a new outlet for juror misconduct.[14]

A juror conducting additional, unauthorized research is not a novel concept.[15] However, with the increasing popularity of social networking[16] and the ability to access the Internet through one's cellular telephone, courtrooms are discovering an alarming number of cases where "Internet Misconduct"[17] occurs through the use of a social networking website[18] or Internet search engine.[19] Whether the court presiding over a case

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Cautionary Jury Instructions to Reflect the Realities of the Electronic Age, 60 DEPAUL L. REV. 181, 186–87, 90 (2010). Jury instructions are presented to the jury twice: first, during voir dire, and second, before being sworn as a member of the jury, to ensure the effectiveness of the instructions and bind the juror to the law and the rules of the court. *Id.*

14. Goldstein, *supra* note 10, at 589 ("However, with the rise of social networking websites such as Twitter and Facebook, which allow for instantaneous communications with a potentially limitless audience, the risk of jurors discussing a case outside of the courtroom with non-jurors has grown exponentially."); *see also* Reba Kennedy, *Twitter at Trial: Tweets and Messages as Evidence in 2011*, FLA. DEFENDER, 11–12 (2011) (highlighting the fact that we are just beginning to see how social networking and the Internet is affecting the justice system).

15. *See* People v. Conkling, 111 Cal. 616, 627 (Cal. 1896) (including one of the earliest examples of a juror conducting his own additional research); *see also* Remmer v. United States, 350 U.S. 377, 378 (1956); Wash. v. Lorenzy, 109 P. 1064, 1066 (Wash. 1910); State v. Drake, 229 S.E. 2d 51, 53 (N.C. Ct. App. 1976). The conviction in *Conkling* was reversed on appeal after it was discovered that a member of the jury fired a rifle in order to check his research against the powder-mark evidence presented during trial. *Conkling*, 111 Cal. at 627–28. In *Drake*, the Court of Appeals of North Carolina ordered a new trial for the defendant, who was on trial for murder charges, after it was discovered that a disinterested witness testified that a juror had expressed an opinion on the crucial issue of self-defense during a recess following the presentation of the State's evidence. *Drake*, 229 S.E. 2d at 53, 55. An example of improper communications between jurors is also found in *Lorenzy*, a case where a conviction for "conniving at the prostitution of [a] wife" was reversed and remanded because a juror remarked that if other jurors saw the place where the defendant worked, "they would find it to be a house of prostitution yet." *Lorenzy*, 109 P. at 1065–67. Additionally, *Remmer*, a landmark United States Supreme Court case, involved a member of the jury having contact with a third party regarding the case. *Remmer*, 350 U.S. at 378, 80.

16. Ian Byrnside, *Six Clicks of Separation: The Legal Ramifications of Employers Using Social Networking Sites to Research Applicants*, 10 VAND. J. ENT. & TECH. L. 445, 446–48 (2008) (discussing the numerous implications of the growth of social networking sites and the users' willingness to display personal information).

17. *See infra* note 36. Any form of juror interaction with the Internet will be referred to as "Internet Misconduct." *Id.*

18. *Social Networking*, NETLINGO: THE INTERNET DICTIONARY, http://www.netlingo.com/word/social-networking.php (last visited Mar. 1, 2012). Social networking is "an online community of people who are socializing with each other via a particular website . . . . On an individual level, it is the practice of growing the number of one's business and/or social contacts by networking with individuals." *Id.*

19. *Search Engine*, NETLINGO: THE INTERNET DICTIONARY, http://www.netlingo.com/word/search-engine.php (last visited Mar. 1, 2012). A search engine is:

> A Web site . . . that acts as a card catalog for the Internet. Search engines attempt to index and locate desired information by searching for the keywords a user specifies. The ability to find this information depends on computer indices of Web resources . . .

determines that *actual* misconduct has occurred through the use of the Internet is not at issue in this article; rather, the prevailing problems of jurors using the Internet and social networking to violate their responsibilities, engage in Internet Misconduct, or create additional issues and burdens for the justice system shall be addressed.

The smartphone has led to uncontrollable access to the Internet at a moment's notice. Now, with the Internet at their fingertips, jurors have found two ways to subject themselves to misconduct by using the Internet. The first arises when a juror uses the Internet to research additional information that was not presented to him or her during the trial. The second occurs when a juror utilizes a form of social networking media. This form of misconduct arises when a juror posts a message on the Internet that is directly related to the trial of which he or she is a part of, or to look up participants in the trial itself.

This seemingly unstoppable wave of temptation for jurors is the product of a series of novel and profound inventions. The launch of Myspace[20] in 2003 prompted the advent of social networking. Instantly, anyone with an Internet connection could create a personal website featuring personal information and providing an uncensored forum to express ideas as well as discover data about other persons using the Internet. Not far behind, Facebook[21] followed suit in 2004, but started by limiting access only to college students. However, by September 2006, "anyone over the age of 13 with a valid email address could join Facebook."[22] Finally, in January 2007, Apple[23] unveiled the iPhone,[24]

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that can be queried for these keywords.

Id.

20. *About Us*, MYSPACE.COM, http://myspace.com/Help/AboutUs (last visited Mar. 1, 2012); *see also Suit over Sale of Myspace Dismissed*, SEATTLEPI (Oct. 9, 2006, 10:00 PM), http://www.seattlepi.com/business/article/Suit-over-sale-of-MySpace-dismissed-1216785.php. Myspace, a social networking platform, is:

> A leading social entertainment destination powered by the passions of fans. Aimed at a Gen Y audience, Myspace drives social interaction by providing a highly personalized experience around entertainment and connecting people to the music, celebrities, TV, movies, and games that they love. These entertainment experiences are available through multiple platforms, including online, mobile devices, and offline events.

About Us, MYSPACE.COM, *supra*.

21. *Basic Information*, FACEBOOK.COM, https://www.facebook.com/facebook?sk=info (last visited Mar. 1, 2012) ("Facebook's mission is to give people the power to share and make the world more open and connected."); *see also F8 Developer Conference 2011* (Sept. 22, 2011), http://f8.facebook.com (announcing that Facebook has reached over 800 million users).

22. Dina Spector, *Facebook Description*, BUS. INSIDER, http://www.businessinsider.com/blackboard/facebook (last visited Apr. 4, 2012); *see also* Carolyn Abram, *Welcome to Facebook, Everyone*, THE FACEBOOK BLOG (Sept. 26, 2006, 4:47 AM), https://blog.facebook.com/blog.php?post=2210227130 (noting the expansion of Facebook to

thrusting society into the age of the smartphone.[25] The smartphone provided an individual with Internet access at a moment's notice. It is this combination of smartphone technology and social networking that has acted as the catalyst for increased juror impropriety. More recently, sites such as Twitter,[26] Foursquare,[27] LinkedIn,[28] Google+,[29] and YouTube[30] have continued to inject the Internet into our daily lives.

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accommodate more types of users).

23. Apple, Inc. (Form 10-K) (Sept. 25 2010), *available at* http://phx.corporateir.net/External.File?item=UGFyZW50SUQ9Njc1MzN8Q2hpbGRJRD0tMXxUeXBlPTM=&t=. "Apple Inc. . . . designs, manufactures and markets a range of personal computers, mobile communication and media devices, and portable digital music players, and sells a variety of related software, services, peripherals, networking solutions, and third-party digital content and applications." *Id.*

24. Matthew Honan, *Apple Unveils iPhone*, MACWORLD (Jan. 9, 2007, 3:00 AM), http://www.macworld.com/article/54769/2007/01/iphone.html.

25. *Definition of Smartphone*, PCMAG.COM, http://www.pcmag.com/encyclopedia_term/0,2542,t=Smartphone&i=51537,00.asp#fbid=AVDpHlijx8G (last visited Mar. 9, 2012). A smartphone is:

> A cellular telephone with built-in applications and Internet access. Smartphones provide digital voice service as well as text messaging, e-mail, Web browsing, still and video cameras, MP3 player, video viewing and often video calling . . . . [S]martphones can run myriad applications, turning the once single-minded cell phone into a mobile computer.

Id.

26. *See generally About*, TWITTER, www.twitter.com/about (last visited Apr. 4, 2012); *Twitter*, TOP TEN REVIEWS, http://twitter-client-review.toptenreviews.com/twitter-details.html (last visited Apr. 4, 2012). "Twitter is a real-time information network that connects you to the latest stories, ideas, opinions and news about what you find interesting." *About*, TWITTER, *supra*. Members of Twitter connect through the use of small messages called Tweets. *Id.* "Each Tweet is 140 characters in length, but don't let the small size fool you— you can discover a lot in a little space." *Id.* "Connected to each Tweet is a rich details pane that provides additional information, deeper context and embedded media." *Twitter*, TOP TEN REVIEWS, *supra*.

27. *See generally About Foursquare*, FOURSQUARE, http://foursquare.com/about (last visited Apr. 1, 2012). Foursquare is an Internet platform that allows its users to connect to each other through use of their mobile devices. *Id.* Foursquare's users "check in" at specific locations. *Id.* When a user "checks in," that information is sent out to other people within the same network, allowing friends to coordinate their locations more easily. *Id.*

28. *See generally About Us*, LINKEDIN, http://www.linkedin.com (last visited Apr. 4, 2012). LinkedIn is a social networking site developed for the professional sector. *Id.* LinkedIn's members develop connections based on professional relationships and educational institutions. *Id.*

29. *See generally* GOOGLE+, https://www.google.com/intl/en-US/+/learnmore/index.html#circles (last visited Apr. 4, 2012). Google+ is Google, Inc.'s social networking website. *Id.* The aim of the site is to improve Internet sharing and social networking. *Id.* "Real-life sharing, rethought for the web." *Id.*

30. *See generally* YOUTUBE, http://www.youtube.com/t/about_youtube (last visited Apr. 4, 2012). "YouTube allows billions of people to discover, watch and share originally-created videos. YouTube provides a forum for people to connect, inform, and inspire others across the globe and acts as a distribution platform for original content creators and advertisers large and small." *Id.*

Once thought to be mere toys and tools for members of Generation Y,[31] the popularity and usage of smartphones and social networking sites continues to grow exponentially.[32] To further complicate the matter, the unending connectivity to the Internet encourages the growing desire to post, blog, or Tweet[33] about each and every moment of an individual's life. Unfortunately, one of the stark realities of the Internet, which is becoming more widely known, is that once someone hits "send," the contents of the message are forever accessible to anyone with an Internet connection. The permanency of the Internet not only makes it easier for someone to discover a juror's misconduct, but also, transforms a momentary comment or byline into a defining statement for an individual that will follow him or her forever.[34]

In the context of the judicial system, it is the judges, lawyers, and parties to lawsuits who are equally affected by juror's statements.[35] While this problem is not exclusive to criminal law, it is within the context of

31. Stephanie Armour, *Generation Y: They've Arrived at Work With a New Attitude*, USA TODAY (Nov. 6, 2005, 10:36 PM), http://www.usatoday.com/money/workplace/2005-11-06-gen-y_x.htm (referring to Generation Y, or Gen. Y, generally as the group of people born between the mid 1970s and the early 2000s).

32. John W. Clark et al., *Social Networking and the Contemporary Juror*, 47 CRIM. L. BULL. 3, 1 (2011) (reporting that the prevalence of smartphones and the popularity of social networking has created an issue for our nation's courts). "With respect to wireless technology, 82% of American adults own a cell phone, iPhone, [B]lackberry or another similar device. By contrast, adult cell phone ownership stood at 65% in 2004." *Id.* (quoting AMANDA LENHART, CELL PHONES AND AMERICAN ADULTS 2 (2010), *available at* http://pewInternet.org/~/media//Files/Reports/2010/PIP_Adults_Cellphones_Report_2010.pdf). In addition, social networking has seen a dramatic rise in use over the last few years. Clark et al., *supra*. "[O]ne third (35%) of American adult Internet users have a profile on an online social network site, four times as many as three years ago, but still much lower than 65% of American teens who use social networks." *Id.* Moreover, "75% of adults between the ages of 18–24 have a social network profile." *Id.* The increasing numbers of cell phone/smartphone usage and social networking sites highlight the somewhat obvious trend that as a society, we are increasingly more dependent on our mobile devices. *Id.* Some scholars have suggested that, as a society, we have become programmed to be "wired" or "connected" at all times. *See id.* While interviewing potential jury members about the court's instruction to end cell phone use, Professor Clark was met with some alarming reactions. *See id.* One juror was quoted as saying "[t]hey (the court) expect me to give up my life for a week. They even told me I can't have my phone on in the courtroom. There is no way I am doing this. I text people all day long." *Id.* Another potential juror indicated she was in no way going to give up her Blackberry. Clark et al., *supra*. "I keep my Blackberry with me twenty-four hours a day. I am not turning it off. There is no way this Judge is taking my Blackberry if I get selected to serve on the jury." *Id.*

33. *See supra* note 26 (discussing Twitter).

34. *See* Sara Perez, *Is Facebook Your "Permanent Record?"*, READWRITEWEB (Feb 4, 2008, 9:49 AM), http://www.readwriteweb.com/archives/is_facebook_your_permanent_rec.php (stating that information posted online is not private, is retained indefinitely, and can come back to haunt someone even after one thinks it has been removed).

35. *See infra* Part IV.

criminal law that the most severe problems are presented to the courts.[36] This is not an attempt to suggest any lack of seriousness associated with a civil claim, but the fact that the stakes for a defendant remain higher in a criminal case because an individual's fundamental, constitutional rights are at issue is a significant difference.[37]

36. U.S. CONST. amend. V; U.S. CONST. amend. VI; Miller v. Pace, 71 Fla. 274, 275 (Fla. 1916); 15C FLA. JUR. 2D CRIM. L. – PROC. § 3105 (2012); 38 FLA. JUR. 2D NEW TRIAL § 44 (2012); *see also infra* Part III. The Fifth Amendment of the United States Constitution provides that "[n]o person shall . . . be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V. The doctrine of Double Jeopardy prevents the state or federal government from charging someone with the same crime more than once. *Id.*; U.S. CONST. amend. VI (showing that another important foundation is an accused's Sixth Amendment right to counsel). In a civil trial, what is usually at stake is some form of money, while in a criminal trial, the two important foundations of no Double Jeopardy and a right to counsel come into play when dealing with Internet Misconduct. *See* 15C FLA. JUR. 2D CRIM. L. – PROC. § 3105. Once a defendant has been found not guilty, the prosecution for those specific charges ceases. *Id.* The prosecution in a criminal case does not have the right to a new trial even if it is determined after the verdict that the prosecution was prejudiced in some way. *Id.*; 38 FLA. JUR. 2D NEW TRIAL § 44 (citing *Miller*, 71 Fla. at 275). Conversely, if a defendant is found guilty in a criminal proceeding, he or she may move for a new trial on appeal. *Id.* The basis for a new trial may vary, but discovering a juror who engaged in Internet Misconduct may serve as a basis for a new trial depending on the context of the misconduct and whether the defendant was prejudiced. *See Miller*, 71 Fla. at 274. Should an accused's counsel act ineffectively during the trial? This ineffectiveness may also serve as the basis for a new trial. 38 FLA. JUR. 2D NEW TRIAL § 44. Regardless of the grounds, Internet Misconduct has the potential to overburden an already over-laden criminal court system, with the increased potential to re-litigate trials. *See infra* Part III.

37. U.S. CONST. amend. V; FLA. STAT. § 775.082 (2011). The rights to life and liberty are both fundamental, constitutional rights. U.S. CONST. amend. V. Criminal acts are punishable by imprisonment or, in specific cases, the death penalty may be imposed in Florida. Section 775.082 of the Florida Statutes provides:

> (1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.
>
> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.
>
> (3) A person who has been convicted of any other designated felony may be punished as follows:
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> (a) 1. For a life felony committed prior to October 1, 1983, by a term of imprisonment for life or for a term of years not less than 30.
>
> 2. For a life felony committed on or after October 1, 1983, by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years.
>
> 3. Except as provided in subparagraph 4., for a life felony committed on or after July 1, 1995, by a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment.
>
> 4. a. Except as provided in sub-subparagraph b., for a life felony committed on or

The knee jerk reaction by the courts and State Bar Associations has been to include a standard jury instruction admonishing jurors from using the Internet to either conduct any research or use social media to comment about the trial.[38] However, the alarming number of cases involving

after September 1, 2005, which is a violation of s. 800.04(5)(b), by:

(I) A term of imprisonment for life; or

(II) A split sentence that is a term of not less than 25 years' imprisonment and not exceeding life imprisonment, followed by probation or community control for the remainder of the person's natural life, as provided in s. 948.012(4).

b. For a life felony committed on or after July 1, 2008, which is a person's second or subsequent violation of s. 800.04(5)(b), by a term of imprisonment for life.

(b) For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment.

(c) For a felony of the second degree, by a term of imprisonment not exceeding 15 years.

(d) For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

(4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days.

FLA. STAT. § 775.082 (2011).

38. *See* ALA. PATTERN JURY INSTRUCTIONS CIV. 1.12 (2d ed. 2011); ALASKA CRIM. PATTERN JURY INSTRUCTIONS 1.02 (2011); REVISED ARIZ. JURY INSTRUCTIONS (CRIM.) 13 (3d ed. 2011); ARK. MODEL JURY INSTRUCTIONS 102 (2011); CAL. CRIM. JURY INSTRUCTIONS 101 (2011); COLO. JURY INSTRUCTIONS CRIM. C:10 (2008); CONN. CRIM. JURY INSTRUCTIONS 1.13 (4th ed. 2011); FLA. STANDARD JURY INSTRUCTIONS CRIM. 2.1 (2011); GA. SUGGESTED PATTERN JURY INSTRUCTIONS CRIM. 0.01.10 (2011); HAW. CRIM. JURY INSTRUCTIONS CRIM. 1.01 (2011); IDAHO CRIM. JURY INSTRUCTIONS 108 (2011); ILL. PATTERN JURY INSTRUCTIONS CIV. 1.01 (2011); PATTERN INSTRUCTIONS KAN. 3D CRIM. 51.01 (2011); MASS. JURY INSTRUCTIONS 1.120 (2011); MINN. JURY INSTRUCTION GUIDES CRIM. 1.02A (5th ed. 2011); MISS. MODEL JURY INSTRUCTIONS, CRIM. § 1:4 (2011); MO. APPROVED JURY INSTRUCTIONS (CIV.) 2.01 (6th ed. 2011); MONT. CRIM. JURY INSTRUCTIONS COMMISSION 1–101 (2009); NEB. JURY INSTRUCTIONS CRIM. 1.0 (2010); N.H. CRIM. JURY INSTRUCTIONS 12 (2010); N.J. JURY INSTRUCTIONS CRIM., NON 2C CHARGES, INSTRUCTIONS, *Instructions After Jury is Sworn* (2011); N.Y. CRIM. JURY INSTRUCTIONS, *Jury Admonitions* (2d ed. 2011); CRIM. OHIO JURY INSTRUCTIONS 205.03 (2011); PA. SUGGESTED STANDARD JURY INSTRUCTIONS § 2.06 (2010); TENN. PATTERN JURY INSTRUCTIONS CRIM. 1.09 (15th ed. 2011); S.C. CRIM. JURY CHARGES, *General Charge* 17 (2011); MODEL UTAH JURY INSTRUCTIONS 109(B) (2d ed. 2011); WASH. PATTERN JURY INSTRUCTIONS CRIM. 1.01 (3d ed. 2011). Currently, twenty-seven states have a jury instruction that directly admonishes a juror's use of the Internet to either conduct research or comment about a case, and some even go as far to directly mention and discourage use of Facebook, Twitter, and Myspace. *Id.* As of December 4, 2011, jury instructions for Delaware, Louisiana, Maryland, Michigan, Texas, and Virginia did not even mention the Internet in the cautionary instructions to the jury. *Id.* As for Indiana, Iowa, Kentucky, Maine, Nevada, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, West Virginia, Wisconsin, and Wyoming, access to jury instructions for these states are limited to members of their respective bar associations. *Id.* Currently, Colorado, Connecticut, and New Hampshire have jury instructions that caution a juror's access to media, as opposed to admonishing Internet use during

Internet Misconduct that arise from the use of social media or Internet search engines demonstrates that all too often, jurors succumb to the temptation of constant connectivity.[39] This growing trend highlights a breakdown between the mindset of jurors and the judicial system. "It seems . . . that many jurors do not see blogging, Tweeting or posting as communication, or at least they don't consider it to fall within the rubric of traditional admonitions."[40]

II. WHERE AND WHEN INTERNET MISCONDUCT IS OCCURRING

"[T]he growing research on jury behavior or jury decision making suggests that jurors are influenced by a host of factors that can derail jury impartiality."[41] Most importantly, jurors have become conditioned to be constantly wired to the Internet through the use of smartphones and continue to show a desire to share their daily activities through social networking[42] even in the face of direct instructions from the court to refrain from doing so.

For example, in July 2011, Jonathan Hudson was selected to serve on a civil trial in Fort Worth, Texas.[43] During the trial, Mr. Hudson sent a "Friend Request" to the defendant and discussed the case on his Facebook page.[44] The defendant promptly notified her "lawyer who, in turn, notified the presiding judge."[45] Mr. Hudson, who was dismissed from the case,

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trial. *See* COLO. JURY INSTRUCTIONS CRIM. C:10; CONN. JURY INSTRUCTIONS CRIM. 1.13; N.H. CRIM. JURY INSTRUCTIONS 12.

39. *See infra* Section II.

40. Rosalind R. Greene & Jan Mills Spaeth, *Are Tweeters or Googlers in Your Jury Box?*, ARIZ. ATT'Y, Feb. 2010, at 39, *available at* http://adjuryresearch.com/pdf_docs/pubs_art_jury_selection/AZAttorneyTwitterFeb2010.pdf.

41. Clark et al., *supra* note 32.

42. *See* Kennedy, *supra* note 14, at 10; *see also* CHRISTOPHER HOPKINS, *WHAT ARE YOUR JURORS DOING ON THE INTERNET?*, PALM BEACH COUNTY BAR ASS'N BULL. 13 (Dec. 2011), *available at* http://www.palmbeachbar.org /downloads/Dec_11_Bully.pdf. "In September 2011, the social media website Twitter (www.twitter.com) had 200 million registered users, with 50 million accounts publishing at least once every 24 hours." Kennedy, *supra*. "[C]urrently, there are over 1 billion posts on Twitter [that] occur every five days." *Id.* Today, only 1 in 5 Americans have *never* used the Internet. HOPKINS, *supra*. "42.3% of all Americans had a Facebook account as of March 2011." *Id.* "65% of adults who are connected to the Internet use social networking sites." *Id.*

43. *See North Texas Juror Tried to 'Friend' Defendant*, CBSLOCAL.COM, Aug. 29, 2011, http://dfw.cbslocal.com/ 2011/08/29/north-texas-juror-tried-to-friend-defendant/ [hereinafter *North Texas Juror*].

44. *Id.*; Eva-Marie Ayala, *Tarrant County Juror Sentenced to Community Service for Trying to 'Friend' Defendant on Facebook*, STAR-TELEGRAM, Aug. 28, 2011, http://www.star-telegram.com/2011/08/28/v-print/3319796/juror-sentenced-to-community-service.html.

45. Ayala, *supra* note 44.

plead guilty to four counts of contempt of court.[46]

The most alarming aspect of the misconduct was Mr. Hudson's reaction to the incident. Prior to the trial, Texas amended its jury instructions to include specific language that prohibited jurors from using the Internet for either additional research or social networking.[47] In the wake of the incident, Mr. Hudson still felt as if he had not done anything improper.[48] Following his dismissal from the jury, Mr. Hudson sent an additional message to the defendant apologizing for his conduct and complaining that he was being prosecuted for his conduct.[49] The prosecutor in the case was quoted as saying "I've never seen this before."[50] "[Mr. Hudson] seemed to be a very nice kid who just made a silly mistake . . . ."[51] After the criminal proceedings, Mr. Hudson's attorney described his client's mistake as "a reflection of the times."[52]

Although this incident occurred in a civil case, this type of juror behavior is not reserved solely for the civil sector.[53] Mr. Hudson's conduct is a prime example of the evolving mindset of the contemporary juror. "With Twitter and instant messaging, being first, getting something out immediately is a thrill for them. They get caught up in the excitement instead of following the rules and laws of the legal system."[54]

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46. *Id.*

47. *North Texas Juror Tried to 'Friend' Defendant*, *supra* note 43.

48. *See* Ayala, *supra* note 44.

49. *Id.*

50. *Id.*

51. Ayala, *supra* note 44; *see also* Associated Press, *Facebook Mistake: Texas Juror Tried to 'Friend' Defendant*, ABCNEWS.COM, Aug. 30, 2011, *available at* http://abcnews.go.com/blogs/technology/2011/08/facebook-mistake-texas-juror-tried-to-friend-defendant (last visited Apr. 4, 2012).

52. *See* Sarah Kessler, *Juror Pleads Guilty After 'Friending' Defendant*, USA TODAY, Sept. 1, 2011, http://content.usatoday.com/communities/technologylive/post/2011/09/juror-friends-defendant-in-trial-gets-community-service/1#.T3xuBu1ZVSo (last visited Apr. 4, 2012).

53. Urmee Khan, *Juror Dismissed from Trial after Using Facebook to Help Make a Decision*, TELEGRAPH, Nov. 24, 2008, http://www.telegraph.co.uk/news/newstopics/lawreports/3510926/Juror-dismissed-from-a-trial-after-using-Facebook-to-help-make-a-decision.html. In 2008, a juror was dismissed from a trial after attempting to poll her "friends" about whether she should vote to convict or acquit the defendant. *Id.* The trial involved charges of child abduction and sexual assault. *Id.* The juror posted details of the trial on her Facebook page, and then asked for advice on whether to find the defendant guilty or innocent. *Id.* "I don't know which way to go, so I'm holding a poll." *Id.* The juror was dismissed from her service and the trial continued and eventually reached a verdict. *Id.*

54. Greene & Spaeth, *supra* note 40 (quoting Robert K. Gordon, *No Tweeting During the Trial, Please*, HUNTSVILLE TIMES, Oct. 20, 2009, http://www.al.com/news/huntsvilletimes/local.ssf?/base/news/125603014432660.xml&coll=1 (last visited Apr. 4, 2012)).

One of the more significant cases of Internet Misconduct arose in *Wardlaw v. Maryland.*[55] In *Wardlaw*, the defendant was on trial for one count of rape, two counts of sexual offense, three counts of assault, two counts of sexual child-abuse, and one count of incest.[56] During the trial, the victim testified that on three occasions she had sex with the defendant.[57] The victim's "therapeutic specialist" also testified during the trial and revealed the victim was diagnosed with "a learning disability, attention deficient hyperactivity disorder, oppositional defiant disorder, . . . and bi-polar disorder."[58] At no point during the trial did anyone testify as to what Oppositional Defiant Disorder was or explain the diagnosis.[59] While the jury deliberated, a juror used the Internet to research Oppositional Defiant Disorder, and then reported the findings to the other members of the jury.[60] The information conveyed to the jury was that lying was a common characteristic of someone with Oppositional Defiant Disorder.[61] This information put into question the veracity of the victim's testimony and the basis of the entire prosecution.[62]

Although the Internet Misconduct in *Wardlaw* occurred during deliberations, Internet Misconduct has also been seen during the earliest stages of the trial process. For example, during jury selection for the Chandra Levy murder trial, a prospective juror Tweeted "Guilty guilty. . . I will not be swayed. Practicing for jury duty."[63] This comment came before the jury was even sworn to.[64] The juror was removed from the venire and later told NBC News that he "Tweeted out of habit."[65] Also, during the criminal trial of Cesar Rios, a member of the jury sought to "friend" on Facebook one of the fire fighters who was a witness in the case.[66] After being dismissed, the juror admitted to the court that her actions were simply out of impulse, realizing immediately that what she did

55. *See* Wardlaw v. Maryland, 971 A.2d 331, 334–39 (Md. Ct. Spec. App. 2009) (holding that the trial judge abused his discretion after not declaring a mistrial when a juror researched the symptoms of Oppositional Defiant Disorder on the Internet).

56. *Id.* at 333.

57. *Id.* at 334.

58. *Id.*

59. *See id.*

60. *Id.*

61. *Wardlaw*, 971 A.2d at 334.

62. *Id.* at 338–39.

63. *Prospective Juror Tweets Self Out of Levy Murder Trial*, NBC4 WASH. (Oct. 22, 2010, 8:18 PM), http://www.nbcwashington.com/news/local/Prospective-Juror-Tweets-Self-Out-of-Levy-Murder-Trial-105553253. html (last visited Apr. 4, 2012).

64. *See id.*

65. *Id.*

66. *See* Kathleen Kerr, *Juror Admits Error*, NEWSDAY, July 31, 2009, at A5.

was wrong.[67] Yet, the juror's comments were underscored by her actions, since it was the firefighter who contacted the prosecution once he realized the identity of the young woman and that she was a juror in that case.[68] Once again, these cases are quintessential examples of jurors who are simply acting on habit and impulse. The desire to know something or someone *immediately* has become engrained upon our psyche.

While these individual instances of Internet Misconduct may paint a picture of "one bad egg" within the venire, conventional wisdom suggests such a belief would be naive. During a federal drug trial in Florida, one of the jurors admitted to the presiding judge that he had engaged in Internet Misconduct by conducting additional research on the Internet.[69] When the judge questioned the other members of the jury, the judge discovered that eight other jurors had also conducted additional research on the Internet.[70] The judge "had no choice but to declare a mistrial," after eight weeks of testimony.[71]

When courts have been presented with Internet Misconduct, it is usually addressed after the fact. However, a Baltimore jury recently went out of its way to defy the court's instructions and in doing so, developed its own moniker. The criminal trial of former Baltimore Mayor Shelia Dixon[72] revealed a new first. Five members of the jury became known as "The Facebook Five" after it was discovered they had "friended" each other on Facebook.[73] The Facebook Five developed personal relationships on the social networking site and continued to post comments about their jury experiences during deliberations, even after receiving instructions from the judge to stop the communications.[74] Although the issue was ultimately moot,[75] the conduct of the Facebook Five cannot be overlooked and underestimated.

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67. *Id.*

68. *Id.*

69. John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 17, 2009, http://www.nytimes.com/2009/03/18/us/18juries.html?pagewanted=all (last visited Apr. 4, 2012).

70. *Id.*

71. *Id.*

72. *Dixon Jurors Ignore Judge, Continue Facebook Posts*, WBALTV.COM (Jan. 4, 2010, 8:34 AM), http://www.wbaltv.com/r/22117438/detail.html (last visited Apr. 4, 2012); *see* Bradley Shear, *The Facebook Five and Alleged Juror Misconduct in Baltimore Mayor's Trial*, SHEAR ON SOC. MEDIA L. BLOG (Jan. 15, 2010), http://www.shearsocialmedia.com/2010/01/facebook-five-and-alleged-juror.html (last visited Apr. 4, 2012).

73. *See Dixon Jurors Ignore Judge, Continue Facebook Posts*, *supra* note 72.

74. *See id.*

75. Shear, *supra* note 72. In exchange for a guilty plea, Mayor Dixon withdrew her motion to set aside the verdict in light of the jurors' comments and conduct. *Id.*

Another instance of Internet Misconduct even reached the highest court in New Hampshire in 2008. In *Goupil v. Cattell*,[76] the defense moved to set aside the verdict when it discovered the online postings of Juror #2, which occurred before and during the trial.[77] The most damaging of the posts, which occurred prior to jury selection, expressed that the juror had "to listen to the local riff-raff try and convince me of their innocence."[78] Moreover, in *United States v. Bristol-Mártir*,[79] four police officers faced federal charges for narcotics distribution.[80] During the joint trial, one of the jurors took it upon herself to research federal laws and definitions on the Internet.[81] The jury foreman apprised the trial court of this misconduct after the wayward juror "read out loud from a note she had and spoke about the definitions of terms like 'distribution' or 'possess'" to the rest of the jury.[82] Once again, this juror's additional research amounted to misconduct, but also threatened the entire trial by potentially poisoning the other jury members when she shared her research. Her conduct was improper because the instructions and definitions that accompany jury deliberations are either agreed upon by the litigants or decided by the presiding judge.

Perhaps the most striking and disturbing instance of Internet Misconduct occurred in 2010.[83] Hadley Jons was selected to serve on a jury panel in a criminal case in Macomb County, Michigan.[84] Before the prosecution rested its case, Ms. Jons posted on Facebook that she was "actually excited for jury duty tomorrow. It's gonna be fun to tell the

76. Goupil v. Cattell, No. 07-CV-58-SM, 2008 WL 544863 (D.N.H. Feb. 26, 2008).

77. *See id.* at *2–3.

78. *Id.* at *2. *See generally* Clark v. Arizona, 548 U.S. 735, 766 (2006) (stating the defendant is presumed innocent until the government proves each element of the crime beyond a reasonable doubt). This post is particularly alarming since it suggests this juror was blatantly not following the law and was requiring the defendant to prove his innocence to him. *See id.* Generally, the standard within the American judicial system is that the burden of proof rests with the prosecution to prove its case beyond and to the exclusion of every reasonable doubt. *See id.* Failure to adhere to such a standard is usually grounds to remove a person from the venire for "cause." *See id.*

79. United States v. Bristol-Mártir, 570 F.3d 29 (1st Cir. 2009) ("[The] district court's failure to inquire whether juror misconduct influenced other jury [members] violated defendants' right to trial by an unbiased jury.").

80. *Id.* at 33–34.

81. *Id.* at 35–36.

82. *Id.* at 36–37.

83. *See* Jameson Cook, *Facebook Post is Trouble for Juror*, MACOMB DAILY, Aug. 28, 2010, http://www.macombdaily.com/articles/2010/08/28/news/doc4c79c743c66e8112001724.txt (last visited Apr. 4, 2012).

84. *See id.*

defendant they're GUILTY. :P."[85] The post was discovered by the defense, who found the comment while surfing the Internet and entering in the jurors' names.[86] The presiding judge, the prosecution, and the defense attorney were all troubled by Ms. Jons's conduct and her "cavalier" attitude toward her actions.[87]

In the case involving Ms. Hadley Jons, it was the astute defense team that researched the Internet and was able to uncover pertinent information regarding a member of the jury.[88] In other instances, the court was notified of the misconduct by either the juror or the third party to whom the juror was speaking with about the case.[89] With these occurrences in mind, the lingering question, which has yet to be resolved, is what is the burden, if any, on trial attorneys to monitor the Internet for juror misconduct?

III. DOES A BURDEN EXIST UPON TRIAL ATTORNEYS TO MONITOR THE INTERNET?

"The constitutional right of a defendant to the effective assistance of counsel includes the right to an attorney who performs with sufficient competency to fulfill the proper role of an advocate."[90] The bases of a claim for ineffective assistance of trial counsel are virtually boundless.[91] In *Strickland v. Washington*, the United States Supreme Court addressed the question of what constitutes ineffective counsel.[92] In this case, defense

85. *Id.*

86. *See id.* In fact, it was the defense attorney's son who discovered the comment. *See id.* While the defense attorney was actively engaged in the trial, she instructed her son to search the Internet and enter in all of the jurors' names. *See id.*

87. *See id.*

88. *See id.*

89. *See e.g.*, Wardlaw v. Maryland, 185 Md. App. 440, 444–45 (Md. Ct. Spec. App. 2009) (highlighting an instance where a juror notified the court of another juror's improper use of outside research that was later discussed amongst jurors).

90. 22 FLA. PRAC. CRIM. PROC. § 8:14 (2011); *see* Strickland v. Washington, 466 U.S. 668, 684–85 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment . . . ."). The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

91. *See* FLA. PRAC. CRIM. PROC., *supra* note 90 (listing examples of claims, such as the attorney's failure to notify the defendant of a plea offer, failure to assert available defenses, or failure to request helpful jury instructions).

92. *See Strickland*, 466 U.S. at 671.

counsel was assigned to defend David Leroy Washington, who was accused of committing three counts of capital murder.[93] Mr. Washington, against the advice of counsel, confessed to two of the murders, "waived his right to a jury trial, . . . [and pled] guilty to all charges . . . ."[94] Mr. Washington again rebuffed the advice of his attorney when he waived his right under Florida law to an advisory jury during his capital sentencing hearing.[95] Defense counsel's planned strategy for the sentencing hearing centered on the presiding judge's remarks during Mr. Washington's "plea colloquy."[96] This strategy involved both Mr. Washington's atonement and statements that he acted under extreme stress and mental anguish.[97] Ultimately, the trial judge found a number of aggravating circumstances surrounding Mr. Washington and imposed the death penalty for each of the three murders.[98] Mr. Washington immediately appealed his sentence, asserting that he was denied the assistance of effective counsel.[99]

Ultimately, the United States Supreme Court had the final word on Mr. Washington's petition for a writ of habeas corpus.[100] A divided court denied Mr. Washington's petition and, in doing so, set the modern standard for what constitutes ineffective counsel.[101] The Court determined that when a claim of ineffectiveness is made, "the defendant has the burden of demonstrating *both* (1) that his counsel's performance fell below an objective standard of reasonableness, *and* (2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different."[102] Specifically, *Strickland* provides that

> The performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the

93. *See id.* at 671–72.
94. *Id.* at 672.
95. *Id.*
96. *Id.* at 673.
97. *See id.* at 673–74.
98. *Strickland*, 466 U.S. at 674–75.
99. *Id.* at 675. Mr. Washington contended:
> [C]ounsel was ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts.

Id.
100. *See id.* at 701 (concluding "that the District Court properly declined to issue a writ of habeas corpus" and therefore reversed the judgment of the Court of Appeals).
101. *Id.* at 687–90.
102. FLA. PRAC. CRIM. PROC., *supra* note 90 (citing *Strickland*, 466 U.S. at? 668).

> like . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.[103]

The holding in *Strickland* preserves the ability of counsel to make "tactical decisions" while examining whether or not certain decisions fall behind expected norms of trial practice at the time.[104] *Strickland* is not a standardized rubric; the opinion was written to be adaptable to new standards in the law and new technologies available to counsel. Because *Strickland* can be adapted to new practices and technologies, it remains applicable under the guise of Internet Misconduct.

In this same vein, the issue of ineffective assistance of counsel must be viewed in the light that was objectively reasonable for defense counsel at the time.[105] Do the widespread instances of Internet Misconduct create a burden upon defense counsel to investigate the venire and sworn jury members both before and during the trial? It is this critical juncture where the waters muddy. While the Sixth Amendment requires a *fair* trial, not all defense attorneys are equal.[106] A defense attorney's duty is "to bring to

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103. *Strickland*, 466 U.S. at 688–89.

104. *Id.*

105. *See id.* at 687–88.

106. *See* U.S. CONST. amend. VI. Experience is what separates attorneys. The most obvious example of this is the minimum standards required to qualify as competent counsel in capital murder cases within the state of Florida. *See* FLA. R. CRIM. P. 3.112(f) (2011). Florida Rule of Criminal Procedure 3.112(f) provides lead trial counsel assignments to attorneys who:

> (1)are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and
>
> (2)are experienced and active trial practitioners with at least five years of litigation experience in the field of criminal law;
>
> (3) and have prior experience as lead counsel in no fewer than nine state or federal jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead defense counsel or cocounsel in at least two state or federal cases tried to completion in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder; or alternatively, of the nine jury trials, at least one was a murder trial and an additional five were felony jury trials; and
>
> (4)are familiar with the practice and procedure of the criminal courts of the jurisdiction;
>
> (5)and are familiar with and experienced in the utilization of expert witnesses and evidence, including but not limited to psychiatric and forensic evidence; and
>
> (6)have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases, including but not limited to the investigation and presentation of evidence in mitigation of the death penalty; and

bear such skill and knowledge as will render the trial a reliable adversarial testing process."[107] Furthermore, "[i]neffectiveness is not a question of 'basic, primary, or historical fac[t.]'"[108] "Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, [ineffective assistance of counsel] is a mixed question of law and fact."[109] Herein lies the issue.

Younger, less experienced attorneys are more familiar with the Internet and social networking websites. Conversely, older, more experienced attorneys may be far less familiar with the Internet and social networking websites, but it is they who will undoubtedly have the task of defending clients facing charges with serious consequences. In addition, a private defense attorney may have the ability and financial resources to hire co-counsel or a jury consultant to assist during voir dire and trial. The assistance of a second attorney or juror consultant at the table can give defense counsel the additional resources to monitor the jurors and the Internet. However, defense counsel employed by a public defender's office may not have the available resources of co-counsel. Regardless of whether defense counsel is employed by the public defender or has been retained privately, the opportunity for defense counsel to research the Internet during voir dire or trial may depend on the financial resources of the attorney, the attorney's familiarity with the Internet, and the projected overall length of the trial.

IV. CURRENT METHODS TO CURTAIL INTERNET MISCONDUCT

The reactions from the bench have mirrored the reactions of those attorneys unfortunate enough to have participated in trials where Internet Misconduct occurred. Simply stated, trial judges are equally as shocked that a juror or potential juror could defy his or her civic responsibility and a direct admonition from a judge. When determining whether juror

(7)have attended, within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases.

Id. The requirements to qualify as lead counsel on a capital murder case are thus strict and daunting. *See id.* It is only the most experienced defense attorneys who are charged with defending a client whose life is at stake. *See id.* Nonetheless, the burden upon the defense counsel during a capital murder case is the same as the burden upon the new attorney charged with defending his or her first client on a charge of driving under the influence. *See* 15 FLA. JUR. 2D CRIM. L. - PROC. § 1858 (2012). While the burden upon defense attorneys is uniform, the experience level of each attorney varies. The fairness of the trial is not solely dependent upon the defense counsel's experience, but is also a factor in determining effectiveness. *Strickland*, 466 U.S. at 681.

107. *Strickland*, 466 U.S. at 688 (citing Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

108. *Id.* at 698 (citing Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963)).

109. *Id.* (citing Cuyler v. Sullivan, 446 U.S. 335, 342 (1980)).

misconduct warrants a mistrial,[110] the trial court should continue to follow the precedent set forth in *Remmer v. United States*.[111] In the event that juror misconduct is brought to the court's attention, the court must conduct a two-step inquiry.[112] First, the court must determine whether an instance of misconduct has occurred.[113] "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."[114] Second, the court must determine whether such misconduct has prejudiced the defendant.[115] Internet Misconduct is not so unique as to require a different approach or inquiry to determine if the misconduct was prejudicial. But what should a trial attorney, or a judge, do with a wayward juror?

Courts have been attempting to discourage Internet use during the pre-trial instructions to the jury.[116] Twenty-seven states have included language within their jury instructions that specifically admonishes the use of the Internet to either research or discuss matters of the trial.[117] Additionally, trial judges have exercised a wide rage of discretion when addressing an issue of Internet Misconduct. However, while more states continue to revise their jury instructions to remove any ambiguity regarding Internet use, the number of cases where Internet Misconduct occurs continues to grow.

Recall Jonathan Hudson, the juror in the Texas civil case who

110. A mistrial is "[a] trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings." BLACK'S LAW DICTIONARY, *supra* note 12, at 1093. If the defense moves for the mistrial, typically, the prosecution is not barred from re-litigating the case. United States v. Jorn, 400 U.S. 470, 485 (1971).

111. *See* Remmer v. United States, 350 U.S. 377, 379 (1956) (holding that a trial judge must inquire into whether an instance of juror misconduct has prejudiced the defendant). In *Remmer*, after three weeks of testimony, a juror was contacted at his home by a man named Satterly. *Id.* at 380. During this meeting, Mr. Satterly made the following comment: "I know Bones Remmer very well. He sold Cal-Neva for $850,000 and really got about $300,000 under the table which he daresn't touch. Why don't you make a deal with him?" *Id.* The juror reminded Mr. Satterly that he was on the jury and could not discuss the case. *Id.* The juror notified the judge about these comments. *Id.* Ultimately, the United States Supreme Court granted Mr. Remmer a new trial, believing that the evidence revealed such a state of facts that no person could say they were not affected, in their freedom as a juror, to disregard the comments. *Id.* at 381–82.

112. *See id.* at 379.

113. *See id.*

114. *Id.*

115. *See id.* at 377.

116. *See supra* note 38 and accompanying text.

117. *See id.*

"friended" the defendant and discussed the case on his Facebook page and who pled guilty to four counts of contempt.[118] He was assessed a fine of $275 and required to write a five page essay about the constitutional right to a fair trial.[119] Recall also the *Wardlaw* case, where the trial court failed to conduct the necessary inquiry required by *Remmer*.[120] When it was discovered that the juror in *Wardlaw* was researching information on the Internet, the trial judge denied the defendant's motion for a mistrial and attempted to correct the misconduct by further instructing the jury on this issue.[121] On appeal, the case was remanded for a new trial, since "the juror's Internet research, improperly . . . influenced the jury's deliberative process to the prejudice of the [sic] [defendant] or the state."[122] Lastly, recall the case of Ms. Hadley Jons, where the trial judge did conduct the necessary inquiry required by *Remmer*.[123] The trial judge excused Ms. Jons from her service and required her to write an essay on the Sixth Amendment.[124]

But perhaps the most severe punishment for Internet Misconduct was given to Ms. Joanne Fraill of the United Kingdom.[125] Ms. Fraill derailed a $10 million trial "involving police corruption, a $32,000 BMW and [Soccer] Premier League match tickets" after contacting the defendant on Facebook.[126] Ms. Fraill reached out to the defendant, attempting to

118. *See supra* note 52.

119. Dana McCauley, *Jurors Using Social Media are Endangering Criminal Trials*, HERALD SUN (Sept. 16, 2011, 11:14 AM), http://www.heraldsun.com.au/news/more-news/facebook-jurors-put-criminal-trials-at-risk/story-fn7x8me2-1226138760202 (last visited Apr. 4, 2012).

120. *See* Wardlaw v. Maryland, 971 A.2d 331, 334–37 (Md. Ct. Spec. App. 2009) (finding that the trial court abused its discretion in denying the defendant's motion for mistrial after a juror conducted Internet research into the victim's Oppositional Defiant Disorder and determined that the disorder would make the victim inclined to lie).

121. *See id.* The presiding judge stated:

> Well my instruction with regard to [the additional research and] its impropriety and the fact that [the research is] not to be considered by any of the jurors including the one who did the research I firmly believe will leave no doubt whatsoever in their minds about the fact that it was inappropriate and that they're not to consider it any way shape or form in their deliberations.

Id. at 334.

122. *See id.* at 339.

123. *See* Cook, *supra* note 83 (discussing the possible charges of contempt for ex-juror Hadley Jons and the problem of social media and juror misconduct).

124. *See id.*; Ed White, *Juror Hadley Jons Punished for Posting Verdict on Facebook*, HUFFPOST TECH (Sept. 2, 2010, 9:44 AM), http://www.huffingtonpost.com/2010/09/02/hadley-jons-juror-punishe_n_703877.html (last visited Apr. 4, 2012).

125. *See* Sonia van Gilder Cooke, *U.K. Juror Admits to Contacting Defendant on Facebook*, TIME NEWSFEED, June 14, 2011, http://newsfeed.time.com/2011/06/14/u-k-juror-admits-to-contacting-defendant-on-facebook/ (last visited Apr. 4, 2012).

126. *Id.*

"friend" her during the jury's deliberations.[127] She also researched legal and factual issues about the defendant on the Internet.[128] The defendant reported these incidents to the court.[129] Eventually, Ms. Fraill admitted to her egregious misconduct and was sentenced to eight months in jail.[130] However, this was not the first instance of Internet Misconduct for the United Kingdom.[131]

While judges in the United Kingdom have shown no reservations in sending a juror to jail for Internet Misconduct, judges in the United States have taken a less punitive approach. In the United States, a juror who directly disobeys an order from a judge is subject to civil contempt charges.[132] Although, it seems as if judges in the United States are less likely to punish jurors for their misdeeds, this attitude amongst judges could be attributed to understanding the symbiotic relationship the justice system has with the public.

Members of the criminal law community seem divided over how to address a juror once it is determined the juror engaged in Internet Misconduct. The obvious reaction is to threaten jurors with criminal charges should they actively attempt to sabotage a trial.[133] After all, once jurors are sworn, they take an oath that should bind them to the law, and there are repercussions for intentionally breaking both the oath and the law that they swore to uphold.[134] However, any initiative to criminalize the conduct of a juror should be brought before a state legislature and subjected to the appropriate debate.[135]

Scholars have suggested the idea of day-fines, whereby the juror would be assessed a fine based on the cost of the trial to the county, state, or federal government and depending on the venue and the juror's net daily income.[136] Judges have suggested that before deciding the punishment for

127. *See id.*; McCauley, *supra* note 119.

128. *See* van Gilder Cooke, *supra* note 125.

129. *See id.*

130. BBC News UK, *Facebook Juror Sentenced to Eight Months for Contempt* (June 16, 2011, 9:53 ET), http://www.bbc.co.uk-13792080 (last visited Apr. 4, 2012).

131. Van Gilder Cooke, *supra* note 125.

132. *See* 17 CORPUS JURIS SECUNDUM CONTEMPT § 46 (2011).

133. Telephone Interview with Tania Alavi, Criminal Defense Attorney, Alavi, Bird & Pozzuto P.A. (Jan. 1, 2012); Interview with Heidi Perlet, Criminal Defense Attorney, Perlet & Shiner, P.A. (Feb. 1, 2012).

134. *See id.*

135. Telephone Interview with Tania Alavi, *supra* note 133.

136. Clark et al., *supra* note 32, at 1 ("Day fines were initially developed in Europe."). The author states:

> Judges could employ a scale that ranks offenses from one to ten according to their severity and assign a fine unit by each one. The dollar amount of the fine is figured

the juror, the inquiry should begin with the intent of the juror viewed within the context of what misconduct actually occurred.[137] Once the intent and the conduct have been determined, the court should then take the appropriate action to dismiss the juror, if necessary, and find a way to educate him or her on his or her misdeeds.[138] The more egregious the conduct and impact on the trial, the more likely a juror would receive a harsher response from the court.

Trial court judges should be careful when disciplining a juror so that the punishment handed down does not have a chilling effect on jury service in general.[139] It is already a problem to have those summoned for jury duty to show up in the first place.[140] If those summoned were aware that a simple Tweet, text, or Google search could land them in jail, we could see a drastic decline in the overall number of available jurors.

The best way to address the issue of Internet Misconduct is to stop the misconduct before it occurs. The initial reaction by the courts to modify the jury instructions has not curtailed the conduct it seeks to address. The duty to develop new tactics and policies to address the problem of Internet Misconduct, while preserving the jury system, lies with the criminal law community.

V. STOPPING JUROR TEMPTATION

The issue of Internet Misconduct is not a defense or prosecution oriented problem. While the ramifications for the opposing sides are different, it is in the best interest of both sides and the court to find solutions to the growing problem. After conducting interviews of lawyers and judges within the criminal law community, there does not seem to be a panacea for the issue of Internet Misconduct. All of the persons interviewed expressed great concern regarding Internet Misconduct, but also showed faith in the jury system itself and believed that the issue should

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by the number of fine units by a proportion of a juror's net daily income while adjusting for marital status, number of dependents and bills. Thus, a juror who maintained a blog during a seven day trial (fine unit seven) and has a net daily income of $120 is fined $840. In contrast, a juror who posted twice (fine unit two) on Facebook and has a net daily income of $60 is fine $120.

Id.

137. Interview with Judge Peter Blanc, Chief Judge, Palm Beach County, Florida (Jan. 18, 2012); Interview with Judge Barry Cohen, County Court Judge, Palm Beach County, Florida (Dec. 20, 2011); Interview with Heidi Perlet, *supra* note 133.

138. *See* Interview with Judge Peter Blanc, *supra* note 137; Interview with Judge Barry Cohen, *supra* note 137.

139. Interview with Judge Peter Blanc, *supra* note 137; Interview with Carrie Haughwout, Public Defender, Palm Beach County, Florida (Jan. 12, 2012).

140. Interview with Judge Peter Blanc, *supra* note 137.

be addressed by the justice system as a whole.[141] Even though opinions regarding *how* to curtail Internet Misconduct and *what* to do when confronting a wayward juror differed among the group of interviewees, four concepts remained constant among the group. Internet Misconduct is best addressed through voir dire, restricted access to one's cell phone, re-examining the oath of the juror, and increasing the understanding of the jury instructions through simplicity, clarity, and repetition.

A. DEFENSE COUNSEL AND THE COURT SHOULD ADDRESS THE ISSUE IN VOIR DIRE

After reviewing the numerous instances of Internet Misconduct and speaking with members of the criminal law community, it appears defense counsel and the court should, at a minimum, consider addressing the issue of Internet Misconduct during voir dire.[142] While there are many examples of Internet Misconduct,[143] we are only aware of those instances where the conduct was either discovered by an attorney, or reported to the court by the juror. One could assume that if more attorneys would look for Internet Misconduct within the venire or the selected jury, we would have more examples of a juror using the Internet for an improper purpose.[144]

Voir dire is the only time the lawyers and the judge have to speak with the venire.[145] It is in this critical stage where the potential jurors must be educated by the court and the lawyers regarding *what* their service entails and *why* the rules of the court are so important. Although attorneys

141. *See* Telephone Interview with Tania Alavi, *supra* note 133 (stating that go phones may help to limit juror Internet Misconduct); Interview with Anonymous Attorney, Criminal Defense Attorney, West Palm Beach, Florida (Dec. 7, 2011); Telephone Interview with Flynn Bertisch, Criminal Defense Attorney, Salnick, Fuchs & Bertisch, P.A. (Jan. 1, 2012) (recommending that the oath be more narrow, jurors surrender their phones during deliberations, and as a punishment, require the juror to serve jury duty again); Interview with Judge Peter Blanc, *supra* note 137 (mentioning that simplifying the jury instructions and repeating the instructions may help combat juror Internet Misconduct); Interview with Judge Barry Cohen, *supra* note 137 (suggesting that jurors be required to take double oaths and pay a higher fine in order to deter juror misconduct); Interview with Carrie Haughwout, *supra* note 139 (suggesting that the juror phones be taken away during the trial and deliberation); Interview with Heidi Perlet, *supra* note 133.

142. *See* Telephone Interview with Tania Alavi, *supra* note 133; Interview with Anonymous Attorney, *supra* note 141; Telephone Interview with Flynn Bertisch, *supra* note 141; Interview with Judge Barry Cohen, *supra* note 137.

143. *See supra* Part II.

144. A search for "jury duty" on Twitter reveals more than 200 Tweets regarding jury duty within a two hour span (search conducted Feb. 13, 2012, 9:25 PM), https://twitter.com/#!/search/realtime/Jury%20Duty.

145. Ray Moses, *Jury Selection in Criminal Cases*, http://criminaldefense.homestead.com/JurySelection.html (last visited Apr. 1, 2012).

should consider discussing the Internet during voir dire, more instruction should come from the presiding judge in the case to help educate the jury.

When speaking with Carrie Haughwout, a criminal defense attorney, she stated that "during a recent murder trial, the judge took the time to explain the rules of the court and the rules of evidence. He even said 'we are Americans, and Americans need explanations.'"[146] The explanation given in that trial likely helped the jury members understand the reasons for the rules of evidence.[147] The fact that the instruction came from the judge could have added to its effectiveness, and when coupled with an explanation, removed the curiosity from the jury to conduct additional research about the case.[148] Many others agreed with this notion, adding that increased clarity and simplicity in the rules could assist in curtailing the jury's curiosity.[149]

What topics are discussed during voir dire results from a strategic and tactical decision made by the attorneys. However, given the growing likelihood of Internet Misconduct, defense attorneys should be prepared to discuss Internet use, social networking, technical backgrounds, and prior media coverage. Without question, attorneys are more concerned about Internet Misconduct during longer trials for sensationalized cases that invoke a highly charged emotional response from the public.[150] In the past, trial courts have kept juries for such cases impartial through sequestration,[151] but sequestration is increasingly unpopular given its costs to the court and the hardship placed on the members of the jury.

For example, in the Casey Anthony trial, one of the most widely publicized trials to date, the presiding judge made the decision to sequester

146. Interview with Carrie Haughwout, *supra* note 139.

147. *Id.*

148. *Id.*

149. Interview with Anonymous Attorney, *supra* note 141; Telephone Interview with Flynn Bertisch, *supra* note 141; Interview with Judge Peter Blanc, *supra* note 137; Interview with Carrie Haughwout, *supra* note 139; Interview with Heidi Perlet, *supra* note 133.

150. *See* Telephone Interview with Tania Alavia, *supra* note 133; Interview with Anonymous Attorney, *supra* note 141; Telephone Interview with Flynn Bertisch, *supra* note 141; Interview with Carrie Haughwout, *supra* note 139. Judge Barry Cohen differed in his concern, focusing not on highly publicized, sensationalized cases, but with violent crimes that were not in the paper. *See* Interview with Judge Barry Cohen, *supra* note 137. Judge Cohen indicated that he felt jurors might be more inclined to do something improper when the news media and attention was not directly on them. *Id.*

151. *See* Ralph Artigliere, Jim Barton & Bill Hahn, *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, 84 FLA. B.J. 8 (2010), *available at* http://www.floridabar.org/divcom/jn/jnjournal01.nsf/8c9f13012b9 6736985256aa900624829/d9a2f95a71f304778525769b006dd8d5!OpenDocument (explaining that sequestration is one way to eliminate outside influence on jurors).

the jury.[152] The level of sequestration the court imposed was unprecedented.[153] The members of the jury were secluded to a hotel, had access to pre-screened news reports, were monitored when using the Internet, telephone, and watching television, and were given pre-selected movies to watch during recesses.[154] However, not all trial judges go to such lengths.

The Dalia Dippolito trial received national media coverage, but the jury that was selected from Palm Beach County was never sequestered.[155] Ms. Dippolito was charged in Palm Beach County, Florida with solicitation for the murder of her husband.[156] The lawyers in this case used voir dire, instead of sequestration, to see if jurors had formed any prior opinions regarding Ms. Dippolito and to see if any of them had seen the videos on YouTube regarding the case.[157] While inquiring into pre-formed opinions of potential jurors is a regular tactic by defense counsel, when done within the context of Internet use demonstrates to both the court and lawyers that defense counsel must have a working knowledge of the Internet and the many different mediums it has available.[158]

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152. Jose Baez, Crim. Def. Att'y, Panelist at St. Thomas University School of Law Panel Discussion: In the Spotlight: High Profile Cases, Media and the Law (Nov. 3, 2011).

153. *Id.*

154. *Id.*

155. Telephone Interview with Flynn Bertisch, *supra* note 141; *see* William Ryan Moore, *Hired Gun: Fort Lauderdale Moore Discusses Murder-for-Hire Allegations in Boynton Beach*, FLA. CRIM. LAW. BLOG (May 4, 2011), http://www.floridacriminallawyerblog.com/2011/05/hired_gun_fort_lauderdale_crim.html (last visited Apr. 4, 2012).

156. *See* Alexia Campbell, *Courthouse Prepares for Media Frenzy at Dippolito Murder-For-Hire Trial*, SUN SENTINEL, Apr. 25, 2011, http://articles.sun-sentinel.com/2011-04-25/news/fl-dippolito-trial-media-20110423_1_ dalia-dippolito-michael-dippolito-man-and-surveillance-cameras (last visited Apr. 4, 2012).

157. Telephone Interview with Flynn Bertisch, *supra* note 141. The videos in question were actually presented as evidence by the prosecution during the trial. They are still available on YouTube and consist of the actual solicitation by Ms. Dippolito and her reaction during the police sting. *See* Video Clip: Boynton Beach Police Inform Dalia Dippolito that Her Husband is Dead (YouTube Aug. 6, 2009), http://www.youtube.com/watch?v=jl4Cg5LZLTM; Video Clip: Woman Hires Hit Man to Kill Husband Pt. 1 of 3 (YouTube Dec. 31, 2009), http://www.youtube.com/watch?v=pRri2FQrSA1&feature=related.

158. Attorneys are required to continue their education through courses designed to apprise them of the latest laws and rulings from the appeals courts. *See* Fla. Bar Rule 6-10.3 (2010). The Florida Bar Association should offer a class to educate lawyers who are unfamiliar with the Internet on its basic principles and mediums offered. *See* Fla. Bar, Continuing Legal Educ.--Programs: Tentative Schedule of 2011–2012 Courses (2012), http://www.floridabar.org/tfb/tfbmember.nsf/ed6e4bcb92a8fe1b852567090069f3c2/ef275b8b68d1c99f85256b2f006ca497?opendocument#Live%20Courses (indicating that the Florida Bar does not offer a Internet course). The class could even be focused on the Internet and its use as a topic during voir dire.

State Bar Associations should look to educate attorneys unfamiliar with the Internet on its basic principles and its offered mediums through Continuing Legal Education courses. Such courses are routinely required to apprise attorneys of the latest laws, rulings, and ethics issues from the appeals courts.[159] The classes could even be focused on the Internet and its use as a topic during voir dire. Regardless, there are many experienced attorneys who are unfamiliar or uncomfortable with the Internet and social networking due simply to a generational gap. Continuing Legal Education courses are the best way to get all attorneys up to speed on the Internet and how it may be affecting their trials.

B. DISALLOWANCE OF CELL PHONES IN THE JURY ROOM

While the contemporary juror may have reservations or separation anxiety with the concept of being without his or her cell phone or electronic device,[160] trial judges should collect them regardless when the jury retires to deliberate.[161] This practice is being taught to new judges during judicial education seminars held in Florida.[162] All attorneys and judges interviewed agreed that a cell phone or electronic device has no business being in the jury room during deliberations.[163]

C. MODIFY THE OATH OF THE JUROR

Part of the problem with Internet Misconduct is that, many times, the curious juror does not know or realize his or her conduct is harmful.[164] The

159. *See supra* note 106. Attorneys responsible for representing defendants charged with a capital crime are required to attend at least twelve hours of CLE courses within the last two years. *Id.* Those courses must also be dedicated to the defense of capital cases. *Id.*

160. *See* Greene & Spaeth, *supra* note 40, at 39.

> This electronic communication seems to have an unusual, addictive hold on many. Commenting on the August 6, 2009, social network crash, former ASTC president Douglas Keene observed, "Some 'users' panicked as much as you might have expected from drug addicts. Users were 'jittery,' 'naked,' 'freaked out.'" For such compulsive users, it may be much easier to refrain from discussing the case over dinner than to lay off their technology.

Id.

161. *See* Telephone Interview with Tania Alavi, *supra* note 133; Interview with Anonymous Attorney, *supra* note 141; Telephone Interview with Flynn Bertisch, *supra* note 141; Interview with Judge Peter Blanc, *supra* note 137; Interview with Judge Barry Cohen, *supra* note 137; Interview with Carrie Haughwout, *supra* note 139; Interview with Heidi Perlet, *supra* note 133.

162. *See* Interview with Judge Peter Blanc, *supra* note 137.

163. *See supra* note 161. While most jurors will assert that their cell phone is needed for emergency purposes, jurors still have the ability to give their emergency contacts the phone number for the presiding judge's chambers.

164. *See* Greene & Spaeth, *supra* note 40, at 39.

intent of the juror is to get as much information as possible in order to make the best decision. Pivotal to setting the stage for compliance is the oath jurors take once they are sworn.

> Florida Rule of Criminal Procedure 3.360, Oath of Trial Jurors, states: "Do you solemnly swear (or affirm) that you will well and truly try the issues between the State of Florida and the defendant and render a true verdict according to the law and the evidence . . . ?"[165] The current oath of the juror simply seeks to bind a juror to the law and the rules of evidence but lacks any clarity or explanation of what such law and rules mean.

One solution to this problem is to modify the current oath to include language that affirms the juror will not discuss the case or conduct additional research. In addition, the oath should be simplified so jurors know exactly what they are swearing or affirming to. A modified, more simple oath may read:

Do you swear or affirm that you will truly decide the issues between the State of Florida and the defendant? [Response]. Do you swear or affirm that you will not conduct additional research for this case and/or discuss this case with anyone? [Response] Do you swear or affirm you will deliver a true verdict according to the law and the evidence presented in court? [Response]

These additions to the oath dealing with Internet Misconduct, although they add to the length of the oath, clarify what juror conduct is or is not acceptable.

Another proposition can be that the court consider having each juror swear to the oath individually, instead of as a group.[166] Such a practice would impress upon each juror that he or she alone is responsible for his or her actions. These modifications to the oath directly inform jurors of what they are to do in deciding the case and what they are prohibited from doing in the deciding the case. By giving jurors a greater understanding of what the oath entails, the effectiveness and reliability of the trial are further insured.

D. INCREASE THE UNDERSTANDING OF THE INSTRUCTIONS THROUGH CLARITY AND REPETITION

As noted earlier, at least twenty-seven states currently have a jury instruction that directly admonishes a juror's use of the Internet to either

165. FLA. R. CRIM. P. 3.360 (2011).
166. *See* Interview with Heidi Perlet, *supra* note 133.

conduct research or comment about the case.[167] If jurors do not understand the instructions regarding what conduct is permissible and impermissible, then it begs the question: what else are they not understanding and misinterpreting?[168] "We simply cannot assume that jurors even realize that this is not appropriate unless it is clearly specified and reinforced by the courts."[169] Courts should look to address Internet Misconduct through both clarified jury instructions, which will make them easier to read, and repeated warnings from the bench to not engage in impermissible behavior.[170]

Some critical information to consider in the wording or re-wording of jury instructions is the Gunning-Fog Index, which measures the readability of written works.[171] The score on the Gunning-Fog Index corresponds to the associated reading level (i.e., a score of 12 indicates a reading level for the 12th grade).[172] USA Today,[173] one of the most widely circulated newspapers in the United States, has an average reading level at the 10th grade.[174] Yet Florida's Oath of Trial Jurors measures a 15 on the Gunning-Fog Index, which indicates that college education and perhaps some level of graduate education is required to understand its lexicon.[175] In addition,

167. *See supra* note 38.

168. *See* Interview with Carrie Haughwout, *supra* note 139.

169. Greene & Spaeth, *supra* note 40.

170. *See* Interview with Anonymous Attorney, *supra* note 141 (acknowledging making requests to a judge to admonish jurors about Internet use); Telephone Interview with Flynn Bertisch, *supra* note 141 (recommending the burden be placed on the court during voir dire to explain the prohibition of Internet access); Interview with Judge Peter Blanc, *supra* note 137 (explaining that the remedy for juror misconduct should be greater emphasis on jury instructions and an explanation of simplified instructions each morning); Interview with Judge Barry Cohen, *supra* note 137 (affirming the reading of instructions to jurors concerning social networking during trial); Interview with Carrie Haughwout, *supra* note 139 (stating that jury instructions should be reformulated and simplified); *see also* Telephone Interview with Tania Alavi, *supra* note 133 (asserting that current pretrial jury instructions are not particularly sufficient in preventing juror Internet access).

171. *See* ROBERT GUNNING, THE TECHNIQUE OF CLEAR WRITING xiv (McGraw-Hill Book Co. rev. ed. 1968).

172. *Id.* at 37–40; Dan Perry, *Laws are Better When Easy to Read*, LEDEGER.COM (Mar. 12, 2005, 12:01 AM), http://www.theledger.com/article/20050312/COLUMNISTS0201/503120304 (last visited Apr. 4, 2012). The formula to determine the readability of written works is distilled to the following: Reading Level (Grade) = (average number of words in sentences + number of words of three or more syllables) x 0.4. Perry, *supra*.

173. *See* Joseph Plambeck, *Newspaper Circulation Falls Nearly 9%*, N.Y. TIMES, Apr. 27, 2010, at B2, *available at* http://www.nytimes.com/2010/04/27/business/media/27audit.html (discussing circulation numbers in relation to other newspapers).

174. Plain Language at Work Newsletter (May 15, 2005), http://www.impact-information.com /impactinfo/newsletter/plwork15.htm (last visited Apr. 4, 2012).

175. *See* FLA. R. CRIM. P. 3.360; GUNNING FOG INDEX, http://gunning-fog-index.com. This figure was given through the online index calculator. *See* GUNNING FOG INDEX, *supra*. All

the Gunning-Fox Index puts the Florida Standard Jury Instruction for Reasonable Doubt at a reading level of 17.[176] Applying the same index to portions of the Florida code reveals reading levels ranging from 14 to 18.[177] Simply put, the Florida Standard Jury Instructions, along with the Florida Statutes, require advanced levels of reading in order to fully comprehend their intended meaning. This is not surprising, given that Florida's jury instructions are developed by Florida Bar Association committees. More succinctly stated, lawyers and judges create the jury instructions.

If a juror does not understand the instructions provided to him or her, it is not surprising that he or she would seek out additional information in order to make a decision in a case. Curiosity is a powerful driving force. "Jurors are . . . astute, and if they . . . are left with unanswered questions, the temptation to 'cheat' . . . may be hard to resist."[178] In an attempt to alleviate the impulsive action of outside research or actions on social networking sites, State Bar Associations should revise their standard jury instructions by making them more readable. The committees that develop the instructions should include educators who are specifically tasked with making the instructions more understandable to the average reader. By making the instructions more readable, the clarity, and therefore understanding, of the message from the court is clear to the jurors. If jurors are more aware of *what* the law is and *what* their duty entails, then they are less likely to research the Internet for undefined words or post on social networking sites about the case.

Finally, trial lawyers for both the prosecution and the defense should look to repeat the directives of the court about using the Internet or commenting on the case each time the court is in recess.[179] Such a practice

figures for this article have been rounded to the nearest whole number. The modified oath proposed in this article measures a 12. *See* GUNNING FOG INDEX, *supra*.

176. FLA. STAT. ANN. STANDARD JURY INSTRUCTIONS IN CRIM. CASES § 3.7 (West 2011); GUNNING FOG INDEX, *supra* note 175.

177. Perry, *supra*, note 172.

178. Greene & Spaeth, *supra* note 40, at 40.

179. *See* FLA. STAT. ANN. STANDARD JURY INSTRUCTIONS IN CRIM. CASES QUALIFICATIONS INSTRUCTION (West 2011) (providing instructions regarding a juror's use of cell phones, computers, and other electronic devises); Ralph Artigliere, *Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial*, 59 DRAKE L. REV. 621, 643 (noting that "important instructions on juror conduct" benefit from repetition and emphasis). The problem of Internet Misconduct is not a defense or prosecution oriented problem. *See* Daniel William Bell, *Juror Misconduct and the Internet*, 38 AM. J. CRIM. L. 81, 84 (2010) (discussing how independent Internet research could result in application of other jurisdictions' instructions, laws, or legal definitions, which equally affects both parties). The ramifications for the opposing sides are different, but the issue neutral. *See* Lee, *supra* note 13, *at* 193 (illustrating how Internet use makes it more likely a juror will discover prejudicial information). A juror who engages in Internet Misconduct may just as easily be oriented toward the defense as they could the

would impress upon the jury the seriousness of the issue and repetition would ensure the effectiveness of the instructions.

VI. CONCLUSION

The problem of Internet Misconduct must be addressed by the entire criminal law community. The solution is not found in one objective, but in a combination of initiatives that seek to clarify the rules and responsibilities of a juror while preserving the jury system. The risk of continuing with the current status quo is significant. First, the risk of increased financial costs to the courts is substantial when considering the potential for mistrials and re-trials due to Internet Misconduct.[180] Secondly, and most important, it is the duty of the courts and the attorneys to preserve the right to a fair trial. The initiatives proposed within this article will help preserve the jury system without additional costs to the courts and will not alienate the individual juror. Jurors can remain connected to their cell phone and mobile devices if the necessary safeguards are in place.

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prosecution. *See* John G. Browning, *The Online Juror*, 93 JUDICATURE 231, 233 (2010) (noting that jurors may be "Googling" pretrial and thus, have predispositions about the parties). However, whereas a defendant has the right to a new trial should an issue of impropriety arise with the trial, the prosecution does not have such a right. *See* U.S. CONST. amend. V (proscribing that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"). If a defendant is found not guilty, and an instance of Internet Misconduct is discovered after the fact, the prosecution does not have a vehicle to re-try the case. *See* Green v. United States, 355 U.S. 184, 188 (1957) (stating that a fundamental principle of the criminal justice system is that the government cannot secure a new trial for a defendant even if an acquittal appears "erroneous"). Prosecutors and defense attorneys alike have equal interests in ensuring the fairness of the trial.

180. *See, e.g.*, Cooke, *supra* note 125 (discussing the $10 million trial which collapsed after Ms. Joanne Fraill decided to "friend" the defendant on Facebook). The total trial expenses for this defendant could conceivably cost $20 million after the subsequent re-trial is concluded. *See* John Scheerhout, *Drug Suspects May Now Face Third Retrial Thanks to the Facebook Juror*, MANCHESTER EVENING NEWS, June 15, 2011, *available at* http://menmedia.co.uk/manchestereveningnews/news/s/1423680_drug-suspects-may-now-face-third-retrial-thanks-to-the-facebook-juror (last visited Apr. 4, 2012).