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The Runaway Jury of Joaquín 'El Chap' Guzmán; Or Dishonesty Only Our Justice System Could Ratify

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**THE RUNAWAY JURY OF JOAQUÍN ‘EL CHAPO’ GUZMÁN; OR
DISHONESTY ONLY OUR JUSTICE SYSTEM COULD RATIFY**

Sean Strockyj¹

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I. INTRODUCTION

Joaquín Guzmán Loera, known as “El Chapo,” was convicted of an array of drug offenses on February 12, 2019, in a federal court in Brooklyn after an eleven-week trial.² The Second Circuit Court of Appeals upheld the conviction on January 25, 2022.³ The trial earned unprecedented media coverage and was by far the most significant narcotics trial in history.⁴ Eight

¹J.D., 2002, St. John’s University School of Law. The author practices mental health litigation in New York. He has jury trial trial experience in federal and state court in the areas of civil rights, assisted outpatient treatment and municipal negligence. The author dedicates this piece to his father, Roman (1947-2022), who he followed the Guzmán proceedings with.

² El Chapo’s full name, used in the case caption, is Joaquín Archivaldo Guzmán Loera. See United States v. Loera, No. 09-CR-0466, 2019 U.S. Dist. LEXIS 111566 (E.D.N.Y. July 3, 2019) (describing how the jury found Guzmán guilty of ten counts related to widespread drug trafficking activity as a leader of the Sinaloa Cartel).

³ United States v. Loera, 24 F.4th 144 (2d Cir. 2022).

⁴ See *Loera*, 2019 U.S. Dist. LEXIS 111566, at *2, *24-25 (stating “[Guzmán]’s notoriety as

days after the verdict, a *VICE News* story by Keegan Hamilton reported a member of the jury reached out to him and admitted pervasive misconduct, including jurors constantly following the case in the media.⁵ Unless Hamilton invented the malfeasance, Guzmán deserves an evidentiary hearing to explore *VICE*'s account and legitimate consideration to whether he should be granted a new trial.

The height of insolence was the juror relaying how he or she provided a tutorial to fellow panelists on how to “keep a straight face” and lie to the trial judge to convince the court jurors never looked at media reports which alleged Guzmán and a cooperating witness sexually assaulted adolescent females.⁶ A close second in terms of intransigence was a juror using a smartwatch to look up a story concerning a sexual affair of Guzmán's lead attorney right after the trial judge tipped the jury off to it. While lying to federal authorities in formal proceedings and investigations has resulted in prosecution for well-connected public figures,⁷ Guzmán's trial showcases a

leader of the Sinaloa Cartel was omnipresent before and during trial” and “[t]he amount and variety of media coverage published during this trial was unprecedented”); Azi Paybarah, *N.Y. Today: Why El Chapo Ended Up in a Brooklyn Court*, N.Y. TIMES (Feb. 13, 2019), <https://www.nytimes.com/2019/02/13/nyregion/newyorktoday/ny-news-el-chapo-brooklyn-trial.html> [https://perma.cc/XW79-U6HK] (describing the proceeding as “the biggest drug trial in United States history” and “noting it drew celebrities and tourists and reporters from around the world”); Alan Feuer, *Wanted: 12 People Willing to Serve as Jurors in El Chapo Trial*, N.Y. TIMES (Nov. 5, 2018), <https://www.nytimes.com/2018/11/05/nyregion/el-chapo-trial-jury.html> [https://perma.cc/K6EB-GRGK] (describing Guzmán as the “most notorious criminal of the 21st century”) [hereinafter *Jurors Wanted*].

⁵ See Keegan Hamilton, *Inside El Chapo's Jury: A Juror Speaks for the First Time About Convicting the Kingpin*, VICE (Feb. 20, 2019), https://www.vice.com/en_us/article/vbwzny/inside-el-chapos-jury-a-juror-speaks-for-first-time-about-convicting-the-kingpin [https://perma.cc/QQ6W-ZVJU] [hereinafter *Inside El Chapo's Jury*]. Hamilton indicated he recognized the juror from attending the trial regularly. *Id.*

⁶ Two days before deliberations, prosecutors unsealed portions of their investigation file revealing cooperating witness, Alexander Cifuentes Villa, alleged he and Guzmán sexually abused underage females when on the run from the government. See *Loera*, 2019 U.S. Dist. LEXIS 111566, at *6-7. Requests by the *New York Times* and *VICE* led to the unsealing of this material. *Id.*; *Inside El Chapo's Jury*, *supra* note 5. The juror conceded: “I had told them if you saw what happened in the news, just make sure that the judge is coming in and he's gonna ask us, so keep a straight face. So he did indeed come to our room and ask us if we knew, and we all denied it, obviously.” *Id.*; see also Alan Feuer, *El Chapo Drugged and Raped 13-Year-Old Girls, Witness Claims*, N.Y. TIMES (Feb. 2, 2019), <https://www.nytimes.com/2019/02/02/nyregion/el-chapo-trial.html> [https://perma.cc/7X99-8GJ2] [hereinafter *El Chapo Drugged and Raped 13-Year-Old Girls*]. Hamilton reported the juror read the prejudicial material as well as Hamilton's tweet that the judge was going to meet with each juror individually to ascertain if they had seen the story.

⁷ See Kevin Breuminger, *Here's a List of Trump's Ex-Associates Who Have Faced Charges*, CNBC (Aug. 20, 2020), <https://www.cnbc.com/2020/08/20/steve-bannon-arrest-list-of-trumps-ex-associates-who-have-faced-charges.html> [https://perma.cc/3QRN-8VTU]. In the last few years, a number of high-profile individuals associated with former President Trump were prosecuted for lying to FBI agents or Congress, a list which includes General Michael

brand of dishonesty prosecutors and judges are not eager to tackle: jurors who lie while convicting a criminal defendant.

The Sixth Amendment grants defendants the right to a trial before an impartial jury.⁸ This guarantee involves taking traditional measures to prevent jurors from following cases in the media and speaking about the case before deliberations. The prohibitions prevent the jury from hearing information which could unfairly influence their decision-making process. Instructions on these rules are standard and were provided daily to Guzmán's jury.⁹ Evidence from *VICE* showing jurors blatantly disregarding such instructions speaks to whether Guzmán's panel was qualified to impose guilt. The obligation of jurors to follow basic rules is facing a critical test. Unfortunately, at the circuit level, the three judge panel overlooked the wrongdoing and deferred to the determinations of the trial judge denying any relief.¹⁰ This had the effect of ratifying reports of deplorable juror conduct. A petition to the Supreme Court is expected,¹¹ where the high court will have a final opportunity to reaffirm consequences for manifest breaches of these rules.

More than imprisonment, Guzmán endures solitary confinement in a windowless cell for twenty-three hours a day at the supermax facility in

Flynn, Roger Stone, George Papadopoulos, and Michael Cohen. *Id.*; *Celebrities, Athletes, Others Accused of Lying to the Public*, NAT'L. POST (Feb. 22, 2019), <https://nationalpost.com/pmn/entertainment-pmn/celebrities-athletes-others-accused-of-lying-to-the-public> [<https://perma.cc/9K75-RT4A>]. Other well-known public figures prosecuted for lying to the government include Martha Stewart, Lil' Kim, and Tonya Harding. *Id.*

⁸ U.S. CONST. amend. VI. The text of the Sixth Amendment, in relevant part, provides: "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" *Id.*

⁹ See *United States v. Loera*, No. 09-CR-0466, 2019 U.S. Dist. LEXIS 111566, at *5 (E.D.N.Y. July 3, 2019) (noting the Judge stated, "I also admonished the jury daily—and sometimes twice daily—to stay away from any media or news coverage of this case, whether in print or on television or the internet").

¹⁰ *United States v. Loera*, 24 F.4th 144, 161 (2d Cir. 2022) (concluding "[t]he District Court did not exceed its discretion in denying Guzman an evidentiary hearing or a new trial, and neither is warranted now").

¹¹ See Sonia Moghe, *Appeals Court Upholds Conviction of Notorious Drug Kingpin 'El Chapo'*, CNN (Jan. 25, 2022), <https://www.cnn.com/2022/01/25/us/el-chapo-conviction-upheld/index.html> [<https://perma.cc/V8AA-3YCP>] (stating "Guzman's attorney Marc Fernich indicated they are likely to appeal to the Supreme Court").

Colorado.¹² It is an existence well-regarded as psychological torture.¹³ Former supermax warden Robert Hood described, “[i]n my opinion, it’s far much worse than death.”¹⁴ Conducting or assisting a military operation against a state target, as the government did with Pablo Escobar, is its own sphere not subject to court rules.¹⁵ However, if the government is to take someone from their homeland and provide a trial on the merits, there should be a process untainted by unscrupulous jurors who lie at every turn.

This Article begins by providing a brief background of Guzmán’s life and how he was extradited to the United States. It then explains the jury selection process, trial proceedings and the malfeasance reported to *VICE*.

¹² See Kirk Mitchell, *Drug Kingpin El Chapo Arrives at Supermax Prison in Colorado*, DENVER POST (July 19, 2019), <https://www.denverpost.com/2019/07/19/el-chapo-colorado-prison-supermax/#> [<https://perma.cc/FA36-RZ6U>] (describing Guzmán’s arrival to prison); Maria Santana, *One Year after Being Sentenced, ‘El Chapo’ Is Hoping an Appeal Can Get Him Out of Supermax, His Lawyer Says*, CNN (July 22, 2020), <https://www.cnn.com/2020/07/22/us/joaquin-el-chapo-guzman-prison-seeking-appeal/index.html> [<https://perma.cc/XM8U-DEBC>].

¹³ See Gali Katznelson & J. Wesley Boyd M.D., Ph.D., *Solitary Confinement: Torture, Pure and Simple*, PSYCH. TODAY (Jan. 15, 2018), <https://www.psychologytoday.com/us/blog/almost-addicted/201801/solitary-confinement-torture-pure-and-simple> [<https://perma.cc/ZE3C-8LBX>]; Juan E. Méndez, *Interim Rep. of the Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/67/279 (Aug. 9, 2012), <https://digitallibrary.un.org/record/733853> [<https://perma.cc/M9W9-D8P5>] (Méndez is a Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); Mark Bowers, Patricia Fernandez, Megha Shah, & Katherine Slager, *Solitary Confinement as Torture*, UNIV. N.C. SCH. L., IMMIGR./HUM. RTS. CLINIC (2014), <https://law.unc.edu/wp-content/uploads/2019/10/solitaryconfinementreport.pdf> [<https://perma.cc/2B3Y-9FF6>].

¹⁴ See Ray Sanchez & Alexandra Field, *What’s Life Like in Supermax Prison?*, CNN (June 25, 2015), <https://www.cnn.com/2015/06/25/us/dzhokhar-tsarnaev-supermax-prison/index.html> [<https://perma.cc/QHB4-FF99>] (discussing supermax in context of Boston Marathon bomber, Dzhokhar Tsarnaev). Supermax is the nation’s most secure prison and is intended to cut inmates off from the world. *Id.* Hood describes that when an inmate walks in, he is briefly able to see the beauty of the Rocky Mountains, but “that is the last time you will ever see it.” *Id.*; *USP Florence ADMAX*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/flm/> [<https://perma.cc/FM82-6PG8>]. The official name for the facility is USP Florence ADMAX. *Id.*

¹⁵ Before Escobar was killed, he famously stated, “I would rather a grave in Columbia than a jail cell in the U.S.” See Katie Serena, *Inside Pablo Escobar’s Death and the Shootout That Took Him Down*, ALLTHATINTERESTING (Oct. 17, 2021), <https://allthatsinteresting.com/pablo-escobars-death> [<https://perma.cc/39BM-JQT8>]. On December 2, 1993, Escobar was killed as he attempted to escape while running across the rooftops of Medellín. *Id.* Agent Steve Murphy of the Drug Enforcement Agency (“DEA”), who was sent to Columbia in 1991 to assist law enforcement, was onsite and posed with Escobar’s body as it were the prize of a trophy hunt. See Joe Hinton, *‘No Words to Describe How Evil Escobar Was,’ Cop Who Took Out Drug Kingpin Speaks Out*, DAILY STAR (May 20, 2018), www.dailystar.co.uk/news/world-news/steve-murphy-pablo-escobar-killed-17140190.amp [<https://perma.cc/B2RN-MHYS>] (U.K.). Murphy’s experience, along with that of his partner, Javier Peña, served as inspiration for the *Narcos* series on Netflix. *Id.*

Thereafter, this Article describes the post-trial motions and decisions of the Second Circuit and district court denying relief and lays out the critical reasons Guzmán deserves another day in court.

II. GUZMÁN - A BRIEF HISTORY

Guzmán was born in 1957, in the Mexican state of Sinaloa, where marijuana and opium poppy have grown for generations.¹⁶ The mountainous region is along Mexico's west coast and makes up the southwestern portion of the country's "Golden Triangle."¹⁷ Those raised in Sinaloa do not think of growing and processing narcotics in pejorative terms but rather as a way to earn a living.¹⁸ The mountain-dwelling people have been described by the *Wall Street Journal* as "macho, close-mouthed people of tight-knit clans given to intense loyalty, bloody vendettas and honor killings."¹⁹ The mythology of the Old West has persevered in Mexico as those involved in the Sinaloan drug trade are often referred to as "cowboys" who even dress the part.²⁰

¹⁶ Guzmán was one of four brothers born in a mountain hamlet called *La Tuna*, located in the poor county of Badiraguato, a gateway to areas marijuana and poppy have grown for generations. See David Luhnow & Jose de Cordoba, *The Drug Lord Who Got Away*, WALL ST. J. (June 13, 2009), <https://www.wsj.com/articles/SB124484177023110993> [<https://perma.cc/2SJY-G29Z>].

¹⁷ *Id.* Sinaloa stretches into the northern central terrain of Mexico. It is roughly 300 miles southwest of Texas where the climate, soil, and elevation of the Sierra Madre mountains are ideal for growing marijuana and opium. See Jack Anderson & Jan Moller, *Mexico's Golden Triangle of Drugs*, WASH. POST (Sept. 9, 1996), <https://www.washingtonpost.com/archive/local/1996/09/09/mexicos-golden-triangle-of-drugs/477a8aa1-0fed-4b59-8cd4-df4203db3ef9/> [<https://perma.cc/GVV5-VALA>]. Historically, immigrants from China settled in Sinaloa and brought opium poppies with them. *Id.* In drug-world lexicon there is another "Golden Triangle," located in Southeast Asia, which has been producing opium since the beginning of the twentieth century. See U.N. Office on Drugs and Crime, *Fighting Drug Trafficking in the Golden Triangle: A UN Resident Coordinator Blog* (Sept. 20, 2020), <https://news.un.org/en/story/2020/09/1071192> [<https://perma.cc/8KDD-GSP3>]. The other parts of Mexico's Golden Triangle include Durango to the east and Chihuahua to the north. See Anderson & Moller, *supra* note 17.

¹⁸ See Frontline, *Drug Lord: The Legend of Shorty: Season 2015, Episode 13* (PBS television broadcast July 21, 2015). The area where Chapo was raised offers few prospects outside the drug trade. *Id.*

¹⁹ See Luhnow & de Cordoba, *supra* note 16. A Sinaloan saying goes that it is "[b]etter to live like a rey [king] for six years than as a guey [a labouring "ox" or fool] for sixty." *Id.*

²⁰ See Paul Wood, *Inside Mexico's Feared Sinaloa Drugs Cartel*, BBC (May 16, 2014), <https://www.bbc.com/news/magazine-27427123> [<https://perma.cc/H4U8-ZWLH>] (describing the violence associated with the drug trade from the perspective of an aging trafficker who described himself a "a pioneer" and donned a large white cowboy hat during the interview); see also David Ibarra, *Who Are the Sinaloa Cowboys?*, POLICE1 (Dec. 5, 2007), <https://www.police1.com/gangs/articles/who-are-the-sinaloa-cowboys-H2MAya8eOYJYkDgs/> [<https://perma.cc/8C8U-F2YW>]. On this police website, an officer with twenty-years of experience in Southern California, explains drug dealers, referred to as "cowboys" in California, have connections to Sinaloa. *Id.*

Guzmán’s mother, María Consuelo Loera Pérez, bestowed on her son his famous namesake, which means “shorty.”²¹ She also described him in a Frontline interview in 2015 as unusually ambitious.²² Guzmán grew up in such modest surroundings that María would use a wooden crate as a crib.²³ As a child, Guzmán sold fruit.²⁴ Guzmán entered the drug trade through assisting his father in growing marijuana.²⁵ He later worked with drug lord Héctor Luis Palma Salazar in the late 1970s, mapping trafficking routes.²⁶ Guzmán then supervised logistics for Miguel Ángel Félix Gallardo, a leading boss of the 1980’s.²⁷ Guzmán started his own cartel in 1989 after Gallardo’s arrest.²⁸ In the early 1990’s, two other powerful traffickers, Ismael Zambada García (“El Mayo”) and Amado Carrillo Fuentes, aligned themselves with Guzmán, forming the core of the Sinaloa cartel.²⁹ Guzmán’s organization gained control of the hills, valleys, and access roads of the Triangle and possessed qualities that made rebellion rare.³⁰ Guzmán utilized traditional

²¹ See Frontline, *supra* note 18.

²² *Id.*

²³ Michael E. Miller, *How El Chapo’s Tunnel Could Bury the Rival Who Jailed Him, Mexico’s President*, WASH. POST (July 14, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/07/14/how-el-chapos-tunnel-could-bury-the-rival-who-jailed-him-mexicos-president/> [https://perma.cc/V43W-88S3].

²⁴ *Id.* Upon his arrest in 2001, Guzmán described his background as follows, “[a]ll my life I’ve been dedicated to agriculture,” referencing growing and selling corn, sugar, canned goods, and seeds. See Luhnow & de Cordoba, *supra* note 16.

²⁵ See Frontline, *supra* note 18. *The Wall Street Journal* reports Guzmán’s father was a *gomero*, a person who grew poppies for opium. See Luhnow & de Cordoba, *supra* note 16.

²⁶ See Frontline, *supra* note 18. Hector Luis Palma Salazar, or *El Geñero* (“Whitey” or “Blondie”) is still alive, imprisoned in Mexico, and is known for being the perpetrator and victim of violence epitomizing the drug trade. See Luhnow & de Cordoba, *supra* note 16. Namely, his wife was beheaded, and his children were thrown off a bridge, which set in motion a string of revenge killings. *Id.*

²⁷ Guzmán worked through the ranks to become a top lieutenant for Gallardo, another Badiraguato native and former police officer who became Mexico’s top drug lord through attempting to organize the country’s drug territories or “plazas.” See Luhnow & de Cordoba, *supra* note 16. Gallardo was known as *El Padrino*, a similar expression to Godfather. *Id.* Gallardo’s cartel collapsed after his arrest in 1989 and Guzmán and Palma were able to gain control of a major division. *Id.* Seasons 1 and 2 of the Netflix series *Narcos: Mexico*, depicted Guzmán in a supporting role working with Gallardo. *Id.*

²⁸ See Luhnow & de Cordoba, *supra* note 16.

²⁹ See Alan Feuer, *El Chapo’s Cartel: Killings, Jealousy and Shifting Alliances*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/nyregion/el-chapo-trial.html> [https://perma.cc/7QSG-V2B9]. Amando’s brother, Vincente, oversaw a team of assassins for the cartel and Amando died in a botched plastic surgery operation in 1997. *Id.* Amando, a pilot, whose moniker was *El Señor de Los Cielos*, was the focus of season three of Netflix Series, *Narcos: Mexico*. *Narcos: Mexico* (Netflix television broadcast 2017).

³⁰ *Id.* Guzmán prevailed over rivals, notably the Arellano-Felix clan, also known as the *Tijuana Cartel*. *Id.* The breakup of the Gallardo cartel led to decades of violence. *Id.* The most famous example was when Guzmán escaped assassination at Guadalajara airport in 1993. *Id.* Two of Guzmán’s bodyguards and five bystanders were killed, including Juan Jesús

smuggling routes from the road, air, and sea, but his key innovation was transporting drugs into the United States via sophisticated tunnels.³¹

Guzmán's enterprise is reported to have moved unprecedented amounts of cocaine, methamphetamines, and marijuana into the world's largest markets³² and continues to grow.³³ Chicago was a critical hub where law enforcement estimates eighty to ninety percent of product sold in the city was from the Sinaloa cartel.³⁴ Guzmán's connections have been reported

Posades Ocampo, Guadalajara's cardinal. *Id.* Sixteen days later Guzmán was captured close to the Mexican border in Guatemala. *Id.*

³¹ United States v. Loera, No. 09-CR-0466, 2019 U.S. Dist. LEXIS 111566, at *5 (E.D.N.Y. July 3, 2019) (noting drugs were smuggled by “planes, trains, helicopters, boats, semi-submersibles, automobiles, and foot tunnels”); Monte Reel, *Underworld: How the Sinaloa Drug Cartel Digs Its Tunnels*, NEW YORKER (July 27, 2015), <https://www.newyorker.com/magazine/2015/08/03/underworld-monte-reel> [<https://perma.cc/C6TR-ZR62>]. Under Guzmán, the cartel refined the “art of [criminal] underground construction” and “built the first cross-border *narcotúnel*, in 1989.” *Id.* Guzmán used this method “more effectively than any criminal group in history.” *Id.* A single tunnel can take several months and cost a million dollars, with elevators, electricity, ventilation, and exit points. *Id.* Young men needing work have been forced to dig the tunnels at gunpoint. *Id.*

³² See Frontline, *supra* note 18. Such markets include the United States, Canada, Europe, Hong Kong and Australia. *Id.* The cartel started with growing and transporting marijuana and opium but expanded to moving Columbian cocaine in the 1980s and more recently to the manufacture of methamphetamines and fentanyl. *Id.*; see also Audrey Travère and Jules Giradat, *Revealed: How Mexico's Sinaloa Cartel Has Created a Global Network to Rule the Fentanyl Trade*, GUARDIAN (Dec. 8, 2020), <https://www.theguardian.com/world/2020/dec/08/mexico-cartel-project-synthetic-opioid-fentanyl-drugs> [<https://perma.cc/7BDB-66XG>] (describing how mountains were a patchwork of drug plantations but now drug crops are being replaced by clandestine laboratories making synthetic drugs).

³³ See Luis Chaparro, *'El Chapo' Has Been Locked Up for 5 Years, but Business Has Never Been Better for the Sinaloa Cartel*, BUS. INSIDER (June 17, 2021), <https://www.businessinsider.com/sinaloa-cartel-doing-well-5-years-after-el-chapo-caught-2021-6> [<https://perma.cc/243T-E8KF>] (stating “according to official US data, security analysts, and some of his own lawyers, business has never been better”); Julian Resendiz, *Cartels Use COVID-19 as Excuse to Raise Drug Prices, Distribute Food to Poor in Mexico, Report Says*, BORDER REP. (Apr. 19, 2021) <https://www.borderreport.com/hot-topics/border-crime/cartels-use-covid-19-as-excuse-to-raise-drug-prices-distribute-food-to-poor-in-mexico-report-says/> [<https://perma.cc/G28J-PX9P>] (citing a congressional report indicating cartels used social media to advertise providing COVID assistance—complete with relief boxes with El Chapo's image, which promote community relations and attract recruits (JUNE S. BEITTEL & LIANA W. ROSEN, CONG. RSH. SER., IN11535, MEXICAN DRUG TRAFFICKING AND CARTEL OPERATIONS AMID COVID-19 (2021))).

³⁴ See Jason McGahan, *How Captured Mexican Drug Lord 'El Chapo' Turned Chicago into His Home Port*, TIME (Feb. 26, 2014), <https://time.com/9963/el-chapo-joaquin-guzman-sinaloa-cartel-chicago/> [<https://perma.cc/ZRB8-4E6T>]. McGahan wrote Guzmán replaced Al Capone as Chicago's historic Public Enemy #1 in terms of having a role in the city's increasing gang activity and crime rate. *Id.* Cocaine and heroin from Mexico is a main source of income for gangs and product from the Sinaloa cartel dwarfs other suppliers. *Id.* In 2010,

to run to every level of the Mexican government.³⁵ While it is questionable if Guzmán ever set foot in the United States before his extradition,³⁶ targeting his northern neighbor’s drug market subjected him to federal jurisdiction.³⁷

Two prison escapes contribute to Guzmán’s legend. The first was in 2001, when Guzmán was escorted out of Puente Grande prison in a laundry cart.³⁸ In February of 2014, he was recaptured in a raid and sent to Mexico’s maximum-security facility: Altiplano.³⁹ On July 11, 2015, Guzmán stepped into the shower stall of his personal cell and disappeared into a tunnel nearly a mile long and thirty-five feet deep.⁴⁰ The audacity of the escape

the Department of Justice named the Chicago metro as the number one destination for heroin shipments because it is a transportation hub, home to two major airports, six railroad interchanges and within a day’s drive of seventy percent of the nation’s population. *Id.*

³⁵ See Alan Feuer, *The Prosecution Rests Its Case, and El Chapo Decides Not To Testify*, N.Y. TIMES (Jan. 28, 2019), <https://www.nytimes.com/2019/01/28/nyregion/el-chapo-trial.html> [<https://perma.cc/E3T9-ZVUS>] (describing how witnesses accused Guzmán of paying off almost every level of the Mexican police, military, political establishment, including an alleged \$100 million dollar bribe to former president, Enrique Peña Nieto) [hereinafter *Prosecution Rests Its Case*]. See also Luhnow & de Cordoba, *supra* note 16 (reporting Guzmán paid millions to officials working for the Mexican attorney general’s office, top police officials, as well as the head of federal police).

³⁶ See Jorge Calvillo, *California Gave ‘El Chapo’ Guzmán a Driver’s License in 1988: DEA*, LATINOS POST (Feb. 26, 2014), <https://www.latinospost.com/articles/31048/20140226/california-gave-el-chapo-guzm%C3%A1n-a-drivers-license-in-1988-dea-video.htm> [<https://perma.cc/3A64-NE2E>]. There are other reports Guzmán entered into the United States briefly while on the run. See also Jose Luis Montegro and Rory Carroll, *El Chapo Entered US Twice While on the Run after Prison Break, Daughter Claims*, GUARDIAN (Mar. 4, 2016), <https://www.theguardian.com/world/2016/mar/04/el-chapo-entered-us-california-manhunt-prison-break-daughter-says> [<https://perma.cc/GRA7-4PAL>].

³⁷ Guzmán was indicted in New York in 2009 on charges stemming from a series of drug-related killings in Queens in 1993. See Paybarah, *supra* note 4.

³⁸ Guzmán was sentenced to twenty years after being arrested in relation to an attempt on his life at an airport that resulted in the city cardinal’s death and was sent to Puente Grande prison. See Luhnow & de Cordoba, *supra* note 16. Guzmán reportedly continued to run his drug empire and enjoyed comforts including phone access, television, quality food, frequent visitation and numerous conjugal visits. *Id.* The Mexican government’s official story is that Guzmán befriended a maintenance worker, who pushed Guzmán out in the laundry cart. *Id.*

³⁹ See Randal C. Archibold and Ginger Thompson, *El Chapo, Most-Wanted Drug Lord, Is Captured in Mexico*, N.Y. TIMES (Feb. 22, 2014), <https://www.nytimes.com/2014/02/23/world/americas/joaquin-guzman-loera-sinaloa-drug-cartel-leader-is-captured-in-mexico.html> [<https://perma.cc/XMG2-JYN5>]. Mexican marines and police were aided by intelligence from U.S. Customs and Border Protection. *Id.* By this time, Guzmán achieved “near-mythic status” and appeared on the Forbes list of richest people. *Id.*

⁴⁰ See Larry Buchanan, Josh Keller & Derek Watkins, *How Mexico’s Most-Wanted Drug Lord Escaped from Prison (Again)*, N.Y. TIMES (Jan. 8, 2016), <https://www.nytimes.com/interactive/2015/07/13/world/americas/mexico-drug-kingpin-prison-escape.html> [<https://perma.cc/KZY2-EKNK>] (including an interactive map of tunnel).

embarrassed the Mexican government and fascinated the world. Guzmán went into hiding and evaded multiple arrest attempts but was captured six months later in northern Sinaloa.⁴¹

Guzmán is symbolic of challenges in Mexico, who had every right to hold him accountable for crimes spanning decades. Although it undertook an extensive manhunt to capture him, it took about a year to determine Mexico no longer wanted the responsibility of holding him. Guzmán was extradited on January 19, 2017, on the final day of the Obama administration,⁴² with the stipulation he not face the death penalty.⁴³ Guzmán was facing multiple indictments in six federal districts and put on trial in the Eastern District of New York.⁴⁴

III. JURY SELECTION & MAKEUP

Jury selection commenced on November 5, 2019.⁴⁵ In an effort to protect anonymity, Judge Brian Cogan held the process in an empty

⁴¹ Guzmán reached Sinaloa but was successfully tracked. See Azam Ahmed, *How El Chapo Was Finally Captured, Again*, N.Y. TIMES (Jan. 16, 2016), <https://www.nytimes.com/2016/01/17/world/americas/mexico-el-chapo-sinaloa-sean-penn.html> [https://perma.cc/4DP7-2LUW]. A food order might have given away his location. *Id.* Additionally, he was interviewed by Sean Penn, which also may have helped authorities track him. *Id.* Troops stormed his compound and a gun battle raged. *Id.* Guzmán used tunnels to enter a sewer and escape into a street where he and a cartel member commandeered a Volkswagen. *Id.* It broke down and they carjacked another vehicle, but hours later he was captured on a highway headed out of town. *Id.*

⁴² See Peter Orsi, *Timing of Mexico Drug Lord's Extradition Seen as Political*, AP NEWS (Jan. 20, 2017), <https://apnews.com/article/08bd035a176b41c5b5cae119401ad7c9> [https://perma.cc/V4MF-SQ9K]. Orsi quoted Michael Vigil, former head of International Operation for the DEA, saying, "They wanted Obama to take credit. They wanted to send a message to Trump that they won't be bullied." *Id.* Mexican politician Senator Miguel Barbosa said, "[w]e should not celebrate that the Mexican state was not capable of processing the greatest criminal that has ever existed in Mexico and was not capable of guaranteeing his incarceration." *Id.* The *New York Times* reported the Mexican government was "relieving itself of the potential embarrassment of another escape." See also Azam Ahmend, *El Chapo, Mexican Drug Kingpin, Is Extradited to the U.S.*, N.Y. TIMES (Jan. 19, 2017), <https://www.nytimes.com/2017/01/19/world/el-chapo-extradited-mexico.html> [https://perma.cc/3SHJ-2JPL].

⁴³ See Alex Johnson, *Prosecutors Seek Life Sentence for Joaquín 'El Chapo' Guzmán*, NBC NEWS (July 10, 2019), www.nbcnews.com/news/amp/ncna1028601 [https://perma.cc/CP67-TPWK] (noting prosecutors agreed not to seek the death penalty in exchange for Guzmán's extradition).

⁴⁴ The Department of Justice could have put Guzmán on trial in any location where there were indictments against him. Guzmán was indicted in New York in 2009 on charges stemming from a series of drug-related killings in Queens in 1993. See Paybarah, *supra* note 4. The Department of Justice never explained why Brooklyn was selected, but the location was ultimately the decision of Loretta Lynch, former United States Attorney General, who previously served as Brooklyn's top federal prosecutor. See *Prosecution Rests Its Case*, *supra* note 35.

⁴⁵ See *Jurors Wanted*, *supra* note 4.

courtroom at a large table flanked by the prosecution and defense teams as well as by Guzmán and his interpreter.⁴⁶ Five reporters were permitted to represent the media and were given space in a jury box.⁴⁷ Prospective panelists took turns being questioned on their backgrounds and objectivity.⁴⁸ Jury selection was not overly long, taking three and a half days.⁴⁹ Some wanted off the trial for safety concerns and others because of the expected length.⁵⁰ One panelist suffered a panic attack and was sent to the hospital.⁵¹ Selection was reported to be informal, with Guzmán laughing at some of the answers.⁵² It provided a dose of comedy by virtue of a potential juror asking for Guzmán’s autograph and another being familiar with Guzmán because a deli the juror frequented named a sandwich after him.⁵³

Seven women, five men, and six alternates were chosen.⁵⁴ The *New York Times* and *Rolling Stone* reported the panel had liberal views on drugs, with several supporting the legalization of marijuana.⁵⁵ There were at least three immigrants and four Spanish speakers.⁵⁶ Some had relatives in law enforcement, including a woman with brothers in the Department of Homeland Security.⁵⁷ *VICE* reported the make-up consisted of several Black individuals and a general mix of younger and older people.⁵⁸ The

⁴⁶ See Noah Hurowitz, *Inside the El Chapo Jury Selection*, ROLLING STONE (Nov. 8, 2018), <https://www.rollingstone.com/culture/news/el-chapo-trial-jury-selection-753106/> [https://perma.cc/WLG9-PUR5].

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* The pool was drawn from the New York areas of Brooklyn, Queens, and Staten Island, as well as Nassau and Suffolk counties. *Id.* For some level of context regarding a trial involving a world-famous defendant, in the murder trial of OJ Simpson, it took three and a half weeks to secure a jury. See Christine Spolar, *Majority-Black Jury Selected in O.J. Simpson Murder Trial*, WASH. POST (Nov. 4, 1994), <https://www.washingtonpost.com/archive/politics/1994/11/04/majority-black-jury-selected-in-oj-simpson-murder-trial/e070bd2c-20b6-43c8-b6b2-e387f42da053/> [https://perma.cc/EV75-UKRQ].

⁵⁰ *Id.* One prospective juror, in tears, was released after she told the judge she feared working on the trial would frighten her mother, who felt the family would have to sell their home and move. *Id.* Another woman was sent home after she acknowledged googling Guzmán’s name and the term “kill jurors,” and found an article where Guzmán’s lawyers pledged no juror killing would take place. *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* There was also a Michael Jackson impersonator who received press attention. *Id.* To the impersonator, defense attorney Ángel Balarezo joked, “show us the moonwalk.” *Id.* The sandwich named after Guzmán was a bagel with capers, cream cheese and lox, which the juror described as delicious. *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*; *Jurors Wanted*, *supra* note 4.

⁵⁶ See Hurowitz, *supra* note 46.

⁵⁷ *Id.* This juror had a brother working near a Texas border town and another who worked for the agency as a pilot. *Id.*

⁵⁸ See *Inside El Chapo’s Jury*, *supra* note 5.

panelists reportedly formed friendships but did not share their identities, instead using colorful nicknames such as Crash, Pookie, Doc, Mountain Dew, Hennessy, Starbucks, Aruba, TJ, 666, FeFe, and Loco.⁵⁹ To get to the courthouse, jurors would meet at secret locations where, in groups of five or six, they would enter a van driven by U.S. Marshalls.⁶⁰

IV. TRIAL

For extended periods leading up to the trial, Guzmán was held at the Metropolitan Corrections Center (“MCC”) in a restrictive wing of the most secure facility in Manhattan, where he complained about its notoriously oppressive conditions.⁶¹ To bring Guzmán to court from Lower Manhattan, authorities would regularly shut down the Brooklyn Bridge to allow a motorcade to pass.⁶² The trial was held in a courtroom on the eighth floor of the Brooklyn federal courthouse beginning November 13, 2018 and ending February 12, 2019. Security measures included bomb-sniffing dogs, an initial security check to get into the building, and a second security check to enter the courtroom.⁶³ The courtroom was difficult to access by the general public because the international press lined up overnight, at times in subzero weather, to get a seat.⁶⁴ This led Televisa reporter, Marisa

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See Amanda Ottaway, *Judge Won't Erase Prison Restrictions on "El Chapo"*, COURTHOUSE NEWS SERV. (June 3, 2019), <https://www.courthousenews.com/judge-wont-erase-prison-restrictions-on-el-chapo/> [<https://perma.cc/9JZ6-J9PY>]. MCC is the facility Jeffrey Epstein reportedly hung himself. See Dareh Gregorian, *'El Chapo' Called the Site of Jeffrey Epstein's Apparent Suicide 'Torture'*, NBC NEWS (Aug. 10, 2019), <https://www.nbcnews.com/news/the-prison-system/el-chapo-called-site-jeffrey-epstein-s-apparent-suicide-torture-n1041141> [<https://perma.cc/FD5B-8WP6>]. Guzmán complained at sentencing stating, “I’ve been forced to drink unsanitary water. I’ve been denied access to fresh air and sunlight. The only air I have in my cell comes through in the air vent [and the noise hurts my ears.]” *Id.* “It has been psychological, emotional and mental torture,” he continued. *Id.*

⁶² See Alan Feuer, *Gridlock on the Brooklyn Bridge? Blame El Chapo*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/nyregion/el-chapo-brooklyn-bridge-trial.html> [<https://perma.cc/KXQ8-MWYX>] (labeling it an “only-in-[NY] transportation nightmare”). As MCC is in southern Manhattan and the courthouse in downtown Brooklyn, the locations are separated by the narrow East River. *Id.* The Times reported that every few months in the period leading to the trial, when Guzmán was called to court, the police would close the Brooklyn Bridge to permit a motorcade of armed cars. *Id.* For the trial, it appears Guzmán was usually held at MCC on the weekends and was held in Brooklyn, within the cells in the courthouse, for most weekdays during the eleven weeks of the trial.

⁶³ See Sonia Moghe, *What You Didn't See at El Chapo's Trial*, CNN (Feb. 18, 2019), www.cnn.com/2019/02/13/us/what-you-didnt-see-at-el-chapo-trial/index.html [<https://perma.cc/HB4Y-6PMC>] [hereinafter *What You Didn't See*].

⁶⁴ Emily Palmer of the New York Times wrote about the experience of reporters covering the trial lining up before midnight and braving temperatures as low as fifteen degrees. See Emily Palmer, *Before El Chapo's Sentencing, a Campout for Reporters*, N.Y. TIMES (July

Céspedes, to develop her own system to regulate the line.⁶⁵ There was an overflow room that provided limited ability to view trial participants on screens.⁶⁶ Alejandro Edda (who played Guzmán in *Narcos: Mexico*) proved exceptions could be made to the challenge of making it into the courtroom, as the actor had little difficulty getting a seat on the day the prosecution wrapped up their case.⁶⁷ One man with no connection to Guzmán was so allured by the trial that he pretended to be a member of Guzmán’s family to get a seat and wound up being arrested for having an open warrant.⁶⁸

There were forty-four days of trial and fifty-six prosecution witnesses.⁶⁹ The *New York Times* characterized the government’s case as an “operatic cast of cooperating witnesses” from Guzmán’s past, which seemed “out of a Dickens novel.”⁷⁰ The presentation provided a revealing look at the drug trade. Judge Cogan’s decision detailed how witnesses described Guzmán’s international drug-trafficking activities. This included running cocaine, marijuana, meth, and heroin by using planes, trains, helicopters, boats, semi-submersibles, automobiles, and tunnels.⁷¹ On the second day of the trial, Jesús Zambada García, a high-level cartel figure who served as an accountant, offered comprehensive insight into the financing, logistics, and key personnel involved in moving drugs from Central America to Mexico

21, 2019), <https://www.nytimes.com/2019/07/21/reader-center/el-chapo-verdict-sentencing-campout.html> [https://perma.cc/A5LC-HA66]. Just before sentencing Palmer described how “[t]wenty-two journalists gathered before midnight in sleeping bags and folding chairs outside the courthouse, just as we’d done during the drug lord’s trial.” *Id.* Court staff allowed only the first twenty-two to procure seats. *Id.* Other seats in the courtroom were reserved for invitees of the defense, in-court reporters, and the government. *Id.* Palmer described that a community developed between journalists from the U.S., UK, Mexico, Spain and Argentina. *Id.*

⁶⁵ Court officials made official rules regarding admission to the courtroom but “*La Lista*,” was stewarded by Céspedes and marked an informal order. *Id.* Court executive, Eugene Corcoran, estimated between 225-250 reporters were in the courthouse for sentencing. *Id.*

⁶⁶ *Id.*; see also *What You Didn’t See*, *supra* note 63. Moghe reported the video was “grainy” and you could not see the reactions of the people involved in the case, including the jury, attorneys, Guzmán, and witnesses. *Id.*

⁶⁷ See Bruce Fretts, *He Plays El Chapo on Netflix. He Just Came Face to Face with El Chapo Himself*, N.Y. TIMES (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/nyregion/el-chapo-trial-narcos.html> [https://perma.cc/U3PY-JBZ7]. Edda was accompanied by Eric Newman, the Netflix showrunner. *Id.* Guzmán was told Edda was in the gallery and Guzmán turned around, smiled, and waved. *Id.* Edda stated, “I was shocked in a way. He has a very intense look. His eyes say a lot.” *Id.*

⁶⁸ See Emily Saul and Larry Celona, *Man Claiming to be El Chapo’s ‘Family’ Hauled Out of Courtroom*, N.Y. POST (Feb. 7, 2019), <https://nypost.com/2019/02/07/man-claiming-to-be-el-chapos-family-hauled-out-of-courtroom/> [https://perma.cc/J25J-VSPF].

⁶⁹ See *Prosecution Rests Its Case*, *supra* note 35.

⁷⁰ *Id.*

⁷¹ See *United States v. Loera*, No. 09-CR-0466, 2019 U.S. Dist. LEXIS 111566, at *2 (E.D.N.Y. July 3, 2019). He described the jury also viewed texts, recordings, and weapons as evidence. *Id.*

and then to the United States.⁷² Another critical witness was Vincente Zambada Niebla, the son of Guzmán's partner and former heir to the cartel.⁷³ Vincente testified as to smuggling routes, how money was laundered, turf wars and bribes.⁷⁴ He also relayed stories about the cartel's operations in Mexico, Honduras, Belize, as well as suppliers, distributors, bodyguards, and assassins.⁷⁵ Other witnesses included Guzmán's chief Colombian cocaine supplier, various distributors, a personal secretary, an IT expert who built an encrypted cell phone network, and one of Guzmán's mistresses.⁷⁶ There was also a parade of law enforcement witnesses, including an Ecuadorean prosecutor, Colombian police, Dominican military, and various agents from the Federal Bureau of Investigation ("FBI"), DEA, and Homeland Security.⁷⁷ The jury saw surveillance photos, videos, text messages, narcotics, and weaponry which included a grenade launcher.⁷⁸

The defense relied on attacking prosecution witnesses during cross-examination and called just one witness of their own, an FBI agent, who testified for thirty minutes.⁷⁹ The case was submitted to the jury on February 4, 2019.⁸⁰ It took six days to obtain a verdict.⁸¹ The jury submitted a number

⁷² See Tom Hays, *Cartel Member Testifies Against 'El Chapo' at US Trial*, AP NEWS (Nov. 14, 2018), apnews.com/article/4af48498b8ea41079ba7c74b50af4821 [https://perma.cc/TNV2-JDW6]. His brother, Ismael "El Mayo," is also a Sinaloa cartel leader. *Id.* Jesús testified it was common to smuggle drugs hidden inside canisters filled with fuel, and as cocaine works its way north, its value compounds. *Id.* "A kilo purchased in Colombia for \$3,000 would fetch \$20,000 in Los Angeles, \$25,000 in Chicago and \$35,000 in New York City." *Id.* Jesús ran a warehouse in Mexico City processing eighty to one hundred tons a year, generating billions. *Id.* The trial's first witness, retired U.S. Customs Agent Carlos Salazar, spoke about sophistication of drug tunnels and advanced hydraulic systems. *Id.*

⁷³ See Alan Feuer, *At El Chapo's Trial, A Son Betrays His Father, and the Cartel*, N.Y. TIMES (Jan. 3, 2019), <https://www.nytimes.com/2019/01/03/nyregion/el-chapo-trial.html> [https://perma.cc/2J8W-TAVS]. The *Times* described this testimony as a dramatic betrayal, though Vincente was in custody by reason of a Mexican army operation in 2009 and later extradited to the U.S. *Id.* Throughout the testimony, Vincente referred to Guzmán as *Compadre Chapo*, which is a term of endearment. See Noah Hurowitz, *El Chapo Trial: Son of 'El Mayo' Offers Most Revealing Testimony Yet*, ROLLING STONE (Jan. 5, 2019), <https://www.rollingstone.com/culture/culture-news/el-chapo-el-mayo-vincente-zambada-testimony-775219/> [https://perma.cc/P3ZM-8USL].

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Prosecution Rests Its Case*, *supra* note 35.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See *Inside El Chapo's Jury*, *supra* note 5.

⁸⁰ See Kevin McCoy, *Jurors in El Chapo's Federal Trial End First Day of Deliberations with No Verdict*, USA TODAY (Feb. 4, 2019), <https://www.usatoday.com/story/news/nation/2019/02/04/joaquin-el-chapo-guzman-drug-trafficking-sinaloa-cartel-jury-deliberations/2769530002/> [https://perma.cc/C258-472H].

⁸¹ See *United States v. Loera*, No. 09-CR-0466, 2019 U.S. Dist. LEXIS 111566, at *8 (E.D.N.Y. July 3, 2019).

of substantive questions and asked for lengthy read-backs of testimony.⁸² Ultimately, Guzmán was found guilty on all counts.⁸³

V. MISCONDUCT

The day following the verdict, a recalcitrant juror reached out to *VICE* via email, which resulted in a two-hour video chat.⁸⁴ The juror corroborated his or her legitimacy with information about the trial and selection process.⁸⁵ The juror reached out to at least one other panelist but told Hamilton that nobody else wanted to speak on the record.⁸⁶ Hamilton recognized the juror from covering the trial and agreed to keep the juror’s identity confidential.⁸⁷ *VICE* published the revelations on February 20, 2019.⁸⁸ This section describes the various ways the juror reported that he and other members of the panel disregarded their oaths and the court’s instructions.

In a candid admission, the juror stated, “You know how we were told we can’t look at the media during the trial? Well, we did.”⁸⁹ The juror acknowledged multiple members of the panel routinely checked Hamilton’s Twitter feed as well as trial updates from other journalists.⁹⁰ The juror told Hamilton, “[w]e would constantly go to your media, your Twitter... I personally and some of the other jurors that I knew.”⁹¹

The conduct drawing the most concern was the juror acknowledging that panelists became aware of media reports alleging Guzmán sexually abused women as young as thirteen.⁹² These reports made international

⁸² *Id.* at *9. The jury asked for the full testimony of five cooperating witnesses and three law enforcement officers and requested the playback of one audio recording about meth trafficking. *Id.*

⁸³ *Id.*

⁸⁴ See *Inside El Chapo’s Jury*, *supra* note 5.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* The judge informed jurors they were free to share their experiences, but strongly advised against it, and further noted once any juror opened themselves to media exposure, the court could provide no measure of protection to the anonymous panel. *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* Hamilton described reporters were not permitted recording devices, phones, or laptops inside the courtroom but were allowed these items in the building, which allowed reporters to share trial updates. *Id.* This included updates on proceedings where the jury was not present. *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*; see *El Chapo Drugged and Raped 13-Year-Old Girls*, *supra* note 6. Two days before deliberations, prosecutors unsealed documents with various claims against Guzmán. *Id.* “The most disturbing were accusations that the crime lord once raped one of his mistresses and routinely raped girls as young as thirteen-years-old, sometimes drugging them by placing ‘a powdery substance’ into their drinks.” *Id.* Guzmán’s lawyer, A. Eduardo Balarezo, responded, “It is unfortunate that the material was publicly released just prior to the jury beginning deliberations.” *Id.* The material was released upon application by the *New York*

headlines after Judge Cogan unsealed court documents containing the allegations on the cusp of deliberations.⁹³ The juror became aware of these revelations and learned the trial judge was going to meet with the panel to ask whether they were exposed to the story.⁹⁴ The juror guided fellow panelists on how to deceive the judge by telling them to deny seeing the story and “keep a straight face” and lie.⁹⁵ The juror indicated five panelists involved in deliberations, and two alternates were aware of the reports.⁹⁶ Asked why the panel “didn’t fess up,” the juror explained, “I thought we would get arrested,” and “I thought they were going to hold me in contempt.”⁹⁷ The juror also conceded he or she did not want to be “that person” and “rat out” fellow jurors.⁹⁸ The panel also violated the prohibition from speaking about the case amongst one another.⁹⁹ The juror conceded,

Times and *VICE*. *Id.* Cooperating witness and drug-runner, Alex Cifuentes, made the allegations. *Id.*

⁹³ See *El Chapo Drugged and Raped 13-Year-Old Girls*, *supra* note 6.

⁹⁴ See *Inside El Chapo’s Jury*, *supra* note 5.

⁹⁵ *Id.*

⁹⁶ *Id.* The juror stated, “If it was true, it was obviously disgusting, you know, totally wrong.” *Id.* The juror said the topic was discussed for about five minutes. *Id.* The juror also said the allegations “didn’t change nobody’s mind for sure. We weren’t really hung up on that. It was just like a five-minute talk and that’s it” *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* Judge Cogan gave this instruction once and sometimes twice daily. See *United States v. Loera*, No. 09-CR-0466, 2019 U.S. Dist. LEXIS 111566, at *5 (E.D.N.Y. July 3, 2019). Standard preliminary instructions for jurors in federal court are contained in Model 1.3 for the neighboring Third Circuit and read as follows:

First, I instruct you that during the trial and until you have heard all the evidence and retired to the jury room to deliberate, you are not to discuss the case with anyone, not even among yourselves. If anyone should try to take to you about the case, including a fellow juror, bring it to my attention promptly. There are good reasons for the ban on discussions, the most important being the need for you to keep an open mind through the presentation of evidence. I know that many of you use cell phones, smart phones...and other portable electronic devices...and other tools of technology, to access the internet and communicate with others. You must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case...or use these devices to communicate electronically by messages or posting of any kind

Second, do not read or listen to anything related to this case that is not admitted into evidence. By that I mean, if there is a newspaper article or radio or television report relating to this case, do not read the article or watch or listen to the report. In addition, do not try to do any independent research or investigation on your own on matters relating to the case or this type of case. Do not do any research on the internet, for example. You are to decide the case upon the evidence presented at trial. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

“we broke that rule a bunch of times.”¹⁰⁰ A range of subjects about the case was discussed by the jurors, sometimes through whispering or mouthing words to each other and writing notes.¹⁰¹

The juror also conceded the panel combined breaking the rule prohibiting following the case in the media with the rule prohibiting them from discussing the case. On January 12, 2019, the *New York Post* reported Guzmán’s lead attorney, Jeffrey Lichtman, was having an affair with one of his former clients, a celebrity vegan restaurateur.¹⁰² It was an embarrassing revelation, primarily because it included the publication of racy text messages.¹⁰³ Judge Cogan responded by meeting with the jury to ask whether anyone had been exposed to reporting about persons involved in the case.¹⁰⁴ The intent was not to give the jury a signal that someone engaged in behavior that would reflect poorly on one of the trial’s main participants. The juror told *VICE* nobody in the panel heard of the story before the judge referred to it.¹⁰⁵ Nevertheless, another juror took the inquiry as a tip and quickly used a smartwatch to discover and share the gossip.¹⁰⁶

The juror also admitted there was an allure to being part of history. He or she noted, “It’s a once-in-a-lifetime thing. This is the case of the century. Do I want to live it . . . or do I want to watch it on the screen?”¹⁰⁷ Lastly, the juror kept his or her handwritten notes in violation of the judge’s orders.¹⁰⁸

VI. POST-TRIAL MOTION & DECISIONS

In response to the *VICE* revelations, Guzmán’s attorneys filed a motion under Federal Rule of Criminal Procedure 33(a) for an evidentiary

3d Circ. Model Jury Instr. (Civ.) 1.3, <https://www.rid.uscourts.gov/sites/rid/files/documents/juryinstructions/otherPJI/3rd%20Circuit%20Model%20Civil%20Jury%20Instructions.pdf> [<https://perma.cc/3TEY-Q56N>].

¹⁰⁰ See *Inside El Chapo’s Jury*, *supra* note 5.

¹⁰¹ *Id.* Some of this prohibited conduct occurred during rides home together. *Id.* The topics discussed ranged and included guesses about media coverage and the identities of prospective witnesses. *Id.*

¹⁰² See Dana Schuster, *Sarma Melngailis Had a Steamy Affair with Her Married Lawyer*, N.Y. POST (Jan. 12, 2019), <https://nypost.com/2019/01/12/sarma-melngailis-had-an-x-rated-relationship-with-her-married-lawyer/> [<https://perma.cc/E7KW-QEE3>]. The *Post* came into possession of a trove of text messages and emails between Melngailis and Lichtman, who secured Melngailis a favorable sentence of four months in prison on a charge of grand larceny and tax fraud. *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* Though Lichtman is a leading defense attorney, known for successfully defending John Gotti Jr., the Game, and Fat Joe, he is in no sense a household name. See LAW OFFS. OF JEFFREY LICHTMAN, <https://jeffreylightman.com/results/> [<https://perma.cc/YWY5-TG82>].

¹⁰⁵ See *Inside El Chapo’s Jury*, *supra* note 5.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; See *United States v. Loera*, No. 09-CR-0466, 2019 U.S. Dist. LEXIS 111566, at *12 (E.D.N.Y. July 3, 2019).

hearing and a new trial.¹⁰⁹ Such motions are submitted to the trial judge. The motion proffered that if a hearing confirms *VICE*'s account, Guzmán was deprived of his guarantees under the Sixth Amendment because jurors lied so frequently and were therefore rendered impartial.¹¹⁰ The prosecution responded, “[c]onsidering the nature of the alleged media exposure (which did not relate to the charged crimes), the Court’s repeated instructions as to the [jury] . . . the jury’s diligence at trial, and the overwhelming evidence . . . the alleged media exposure did not prejudice the defendant.”¹¹¹ The government also labeled the claims “vague” and “conclusory,” and argued the allegations of an “anonymous” source should not be credited.¹¹² Guzmán’s reply focused on the jury’s failure to follow the court’s instructions and Guzmán’s inability to pursue a remedy because of the concealment of misconduct.¹¹³

The post-trial motion led to a forty-five-page decision denying an evidentiary hearing and new trial.¹¹⁴ As discussed in the following section, Judge Cogan acknowledged the juror misconduct but minimized it. He did not find much significance in the jurors being dishonest as a group nor with the *VICE* juror’s individual conduct. Judge Cogan did not analyze constitutional interests in any depth but focused on Federal Rule of Evidence 606(b)(1), which prohibits courts from examining mental processes in reaching verdicts.¹¹⁵ A juror can, however, under FRE 606(b)(2)(A), testify to whether extraneous information was brought to their

¹⁰⁹ See Memorandum Supporting Guzmán’s Fed. R. Crim. P. 33 Motion for a New Trial Upon an Evidentiary Hearing, *United States v. Loera*, No. 09-CR-0466, 2019 WL 2615550 (E.D.N.Y. Mar. 26, 2019) [hereinafter Memorandum Supporting Guzmán]. Federal Rule 33(a) provides, “Upon Defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.” FED. R. CRIM. P. 33(a).

¹¹⁰ See Memorandum Supporting Guzmán, *supra* note 109, at 4 (citing *United States v. Moten*, 582 F.2d 654, 664 (2d Cir. 1978)) (describing every “defendant has a right to a trial by an impartial jury, unprejudiced by extraneous influence”); see also *United States v. Ianniello*, 866 F.2d 540, 541–42 (2d Cir. 1989) (holding outside influences threaten Sixth Amendment rights). Guzmán’s counsel also argued his rights under the Sixth Amendment confrontation clause were violated through the jury viewing the unsubstantiated allegations of sexual assault, thereby denying Guzmán the opportunity to confront unknown accusers referenced in the media reports. See Memorandum Supporting Guzmán, *supra* note 109, at 13.

¹¹¹ See Memorandum in Opposition to Defendant’s Motion for a New Trial, *United States v. Loera*, No. 09-CR-466, at 5 (E.D.N.Y. Apr. 29, 2019), <https://s3.documentcloud.org/documents/5983026/Prosecutors-respond-to-El-Chapo-s-motion-for-a.pdf> [<https://perma.cc/7QRE-JAJK>].

¹¹² *Id.* at 35, 40, 46, 47, 48.

¹¹³ See Memorandum Supporting Guzmán, *supra* note 109.

¹¹⁴ See *United States v. Loera*, 24 F.4th 144 (2d Cir. 2022).

¹¹⁵ Federal Rule of Evidence (“FRE”) 606(b)(1) provides parameters on what a juror can testify to when misconduct is alleged. It states, “During an inquiry into the validity of a verdict . . . a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment.” FED. R. EVID. 606(b)(1).

attention.¹¹⁶

The verdict was appealed on ten grounds.¹¹⁷ At oral argument before the Second Circuit, jury malfeasance was the issue explored most comprehensively.¹¹⁸ Nonetheless, the matter was given short shrift in the written decision— under five pages of conclusory analysis in the circuit’s forty-four page decision.¹¹⁹ This was unexpected considering the jury issue warranted such sizeable attention.¹²⁰ The Second Circuit held Judge Cogan did not exceed his discretion in finding no impropriety of sufficient magnitude to warrant an evidentiary hearing.¹²¹ The circuit then described that Judge Cogan accepted the allegations in *VICE* as true and “thoroughly” examined each basis denying a new trial.¹²² Significantly, the court

¹¹⁶ Federal Rule of Evidence 606(b)(2)(A) states a juror may testify about “extraneous prejudicial information brought to the jury’s attention.”

¹¹⁷ Guzmán made the following claims on appeal: (1) his indictment should have been dismissed under the doctrine of speciality; (2) he was denied his Fifth and Sixth Amendment rights to a fair trial and effective assistance of counsel, primarily because of the conditions of his pretrial detention; (3) the murder conspiracy charge should have been dismissed; (4) the government violated the Fourth Amendment and Rule 41 of the Federal Rules of Civil Procedure when it obtained electronic data from computer servers located in the Netherlands and the state of Washington; (5) the District Court exceeded its discretion in various evidentiary rulings; (6) Guzmán’s lead lawyer had a *per se* conflict of interest; (7) Guzmán was prohibited from presenting a defense of government bias; (8) the jury charge on unanimity was erroneous; (9) a new trial should have been granted based on juror misconduct; and (10) the case should have been remanded for a hearing on whether the government and district court engaged in improper *ex parte* proceedings. *See Loera*, 24 F.4th 144.

¹¹⁸ *See USA v. Beltran Leyva (Guzman Loera)* (Oct. 25, 2021), audio file of oral argument before the Second Circuit, <https://www.ca2.uscourts.gov/decisions/isysquery/bd5668f1-c7a6-4bce-b402-7afcf0294c6e/1/doc/19-2239.mp3> [<https://perma.cc/PGH7-ZDLG>] [hereinafter Oral Argument]. Guzman was represented by Marc Fernich, Esq., and after his three-minute introduction, the panel steered questions to Guzman’s pretrial detention. *Id.* Seventeen minutes into the argument the court turned to the jury issue, which lasted until the thirty-three minute mark and also occupied the majority of the government’s time. *Id.* Fernich argued the juror conduct demonstrated structural error. *Id.* When the panel voiced that it would be a burden to explore finding who the *VICE* juror was, Mr. Fernich responded it would be a worthy effort and suggested that if five or six jurors were demonstrated to have no respect for the oath it would be run counter to fairness considerations. *Id.*

¹¹⁹ *Loera*, 24 F.4th at 160–62.

¹²⁰ *See* David K. Li, ‘*El Chapo*’ Juror Says Panelists Regularly Broke Judge’s Order Against Viewing Media on Case, NBC NEWS (Feb. 20, 2019), <https://www.nbcnews.com/news/us-news/el-chapo-juror-says-panelists-regularly-broke-judge-s-order-n973641> [<https://perma.cc/6H2J-U49S>]; Melissa Chan, *El Chapo’s Lawyers Are Pushing For a New Trial After Report Jurors Read News Stories About Him*, TIME (Feb. 20, 2019), <https://time.com/5533916/el-chapo-retrial-vice-news-juror/> [<https://perma.cc/F5R4-BQ5X>]; Deanna Paul, ‘*El Chapo*’ Is Facing Life in Prison. Here’s Why He May Get A New Trial, WASH. POST (Feb. 22, 2019), <https://www.washingtonpost.com/nation/2019/02/22/el-chapo-was-facing-life-prison-heres-why-he-may-get-new-trial/> [<https://perma.cc/D7BK-A73K>].

¹²¹ *Loera*, 24 F.4th at 159.

¹²² *Id.* at 39–40.

determined the jurors were not prejudiced by any extrajudicial information.¹²³ Further, the panel found no “structural error” and described “none of the allegations in the *VICE* News article shows that any juror was not impartial, harbored bias against Guzman, or was otherwise unfit to serve.”¹²⁴ The circuit avoided addressing the misconduct *VICE* reported and said nothing about the importance of jurors honoring their oaths. This was disappointing as the Court of Appeals sets standards for trial conduct and is expected to condemn disgraceful behavior. Given the circuit failed to explore the behavior exposed by *VICE*, this piece will focus on Judge Cogan’s rationale, which they deferred to.¹²⁵

A. Judge Cogan Found No Grounds for an Evidentiary Hearing

A trial court is required to hold a post-trial hearing when reasonable grounds for investigation exist.¹²⁶ Reasonable grounds, as interpreted by various Second Circuit cases, is a high bar defined as “clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial.”¹²⁷ There is hesitancy to bring jurors back to court, but a hearing remains an avenue to address conduct that crosses a line.¹²⁸ Judge Cogan examined the following areas in denying an evidentiary hearing: (1) juror exposure to media coverage; (2) lies about exposure; (3) bringing home personal notes; (4) premature deliberations; and (5) information concealed during *voir dire*.¹²⁹

Judge Cogan acknowledged eight jurors saw the article alleging Guzmán drugged and sexually assaulted minors.¹³⁰ However, he did not explore the extent to which this incident was discussed. He felt proscribed under FRE 606(b) from asking if the exposure affected the verdict and concluded such inquiry would result in a “fishing expedition,” a talismanic

¹²³ *Id.*

¹²⁴ *Id.* at 40. Structural defects are fundamental errors that affect the entire framework in which the trial proceeds. *See Arizona v. Fulminate*, 499 U.S. 279, 310 (1991) (stating that an error is structural when it is of sufficient consequence that the criminal process “cannot reliably serve its function as a vehicle for determination of guilt or innocence”) (internal quotations omitted). Structural errors defy analysis by “harmless error” standards. *Id.* at 309.

¹²⁵ *Loera*, 24 F.4th at 162 (concluding “[t]he District Court did not exceed its discretion in denying Guzmán an evidentiary hearing or a new trial, and neither is warranted now”).

¹²⁶ *See United States v. Loera*, No. 09-CR-0466, 2019 U.S. Dist. LEXIS 111566, at *10–11 (E.D.N.Y. July 3, 2019) (quoting *United States v. Stewart*, 433 F.3d 273, 303 (2d Cir. 2006); *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983); *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) (stating probing jurors “for potential instances of bias, misconduct or extraneous influence” after they have reached a verdict is justified only when reasonable grounds for investigation exist).

¹²⁷ *Id.* (citing *Stewart*, 433 F.3d at 302–03) (involving celebrity Martha Stewart).

¹²⁸ *See Moon*, 718 F.2d at 1234.

¹²⁹ *Loera*, 2019 U.S. Dist. LEXIS 111566, at *18.

¹³⁰ *Id.* at *23.

phrase he consistently used to deny relief.¹³¹ The judge assumed the jurors who were not referenced were unaware of the allegations, relying on the presumption “absent evidence to the contrary, we presume that jurors remain true to their oath and conscientiously observe the instructions and admonitions of the court.”¹³² The court saved analysis of any impact on those seeing reports of Guzmán abusing minors for the section denying retrial.

Addressing Attorney Lichtman’s affair, Judge Cogan calculated seven members of the jury saw the article¹³³ and decided a hearing would not reveal anything of significance.¹³⁴ Judge Cogan found no need to investigate if additional panelists were exposed to this material, as he wished to prevent a “fishing expedition” for unknown malfeasance.¹³⁵ Judge Cogan posited all he could do at a hearing was ask jurors if they were exposed to the article.¹³⁶ He did not see fit to explore what motivated the jury to look up the information with such impunity.

Judge Cogan also declined to explore the extent to which jurors were exposed to media coverage. He felt any such effort would be too cumbersome given the “unprecedented panoply of news coverage.”¹³⁷ Additionally, he found such an exercise would involve a “textbook definition of a fishing expedition.”¹³⁸ He concluded bare statements of being exposed do not give reasonable grounds for investigation.¹³⁹ Judge Cogan acknowledged the possibility of jurors lying to him regarding exposure but did not levy much critique.¹⁴⁰ He wrote, “I know that they might have lied to me. But that does not mean defendant gets to dig for unrelated incidents of when those or other jurors might have disregarded their oath or my instructions and lied to me about it.”¹⁴¹

Judge Cogan held that a hearing was not necessary to explore why the juror who spoke to *VICE* brought home his or her personal notes.¹⁴² Rather, Judge Cogan found the notes were the panelist’s own and attached little significance to the juror disregarding instructions to keep them in the

¹³¹ *Id.* at *18, 20, 24, 26, 47.

¹³² *Id.* at *23–24 (citing *United States v. Cox*, 324 F.3d 77, 87 (2d Cir. 2003) (quoting *United States v. Rosario*, 111 F.3d 293, 300 (2d Cir. 1997))).

¹³³ *Id.* at *19–20.

¹³⁴ *Id.* at *21–22.

¹³⁵ *Id.* at *20 (stating “what one group of seven jurors did implies nothing about what the other jurors did”).

¹³⁶ *Id.* at *22.

¹³⁷ *Id.* at *24.

¹³⁸ *Id.* at *18. Judge Cogan further posited granting a hearing on all the media exposed would be an “ocean-wide fishing expedition.” *Id.* at *26.

¹³⁹ *Id.* at *25 (citing *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983) (finding newspapers being left in jury room did not give rise to a sufficient predicate to conduct a post-verdict hearing)).

¹⁴⁰ *Id.* at *28.

¹⁴¹ *Id.*

¹⁴² *Id.* at *28–29.

courthouse.¹⁴³

Nor did Judge Cogan believe a hearing was required to explore whether the jury engaged in premature deliberations.¹⁴⁴ He described the pivotal query in this regard as whether the jury discussed guilt or innocence.¹⁴⁵ He determined the article did not reference deliberations or evidence in a substantive way.¹⁴⁶ Instead, he described *VICE* referencing less nefarious discussions on trial participants and media reports.¹⁴⁷ He further determined there was no prejudicial communication demonstrating a requirement to explore further.¹⁴⁸ He considered whether discussions of the sexual assault allegations amounted to premature deliberations but concluded these were insignificant communiqués.¹⁴⁹ Judge Cogan stated that while the panel may have violated their oath, there was no substantial impropriety.¹⁵⁰

Lastly, Judge Cogan denied Guzmán the opportunity to explore inaccuracies and biases during *voir dire* in light of revelations that the *VICE* juror was impressed about the historic nature of the trial.¹⁵¹ The standard in the Second Circuit for a hearing on false *voir dire* statements is that “if any significant doubt as to a juror’s impartiality remains in the wake of objective evidence of false *voir dire* responses, an evidentiary hearing generally should be held.”¹⁵² Despite the argument that the juror’s taking home of his or her notes was relatable to commercial interests, especially when considered with his or her comments about the case being a “once-in-a-lifetime thing,” Judge Cogan was confident objectivity was not compromised.¹⁵³ He inferred panelists provided accurate responses, expressing, “I have no doubt that each juror was impartial.”¹⁵⁴

B. Motion for New Trial Denied

Judge Cogan went on to reject three arguments for a new trial, namely: (1) whether the jury was exposed to prejudicial news coverage, (2) whether jurors engaged in premature deliberations, and (3) whether jurors lied to him.¹⁵⁵ For purposes of deciding the application for a new trial, the

¹⁴³ *Id.*

¹⁴⁴ *Id.* at *29–34.

¹⁴⁵ *Id.* at *30–31.

¹⁴⁶ *Id.* at *31.

¹⁴⁷ *Id.* at *31–32.

¹⁴⁸ *Id.* at *30.

¹⁴⁹ *Id.* at *32–33.

¹⁵⁰ *Id.* at *31.

¹⁵¹ *Id.* at *34–36.

¹⁵² *Id.* at *36–37 (citing *United States v. Stewart*, 433 F.3d 273, 306 (2d Cir. 2006)).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at *34–37.

¹⁵⁵ *Id.* at *37–66.

allegations in *VICE* were presumed true.¹⁵⁶

1. *Media Exposure*

Judge Cogan acknowledged that a new trial is warranted when a jury is rendered impartial under the Sixth Amendment through being affected by prejudicial media exposure.¹⁵⁷ Prejudice is presumed when a jury is exposed to extra-record information.¹⁵⁸ This presumption can be rebutted through showing the information was harmless.¹⁵⁹ When assessing harmlessness, a court considers the nature of the information and its effect on the hypothetical average juror.¹⁶⁰ Judge Cogan found all presumptions of prejudice afforded Guzmán sufficiently rebutted.

Judge Cogan conceded the allegations Guzmán sexually abused young women were prejudicial and potentially inflammatory.¹⁶¹ However, he found them no more gruesome than evidence the jury was exposed to concerning Guzmán running a criminal empire.¹⁶² This included Guzmán ordering the torture and killing of rivals through his *sicarios*.¹⁶³ He stated that when the record overwhelmingly suggests that a hypothetical, average jury would convict on the basis of admissible evidence, the defendant “cannot show prejudice, regardless of what that information may be.”¹⁶⁴ He regarded the jury’s discussions about Guzmán’s reported child abuse as insignificant colloquy referencing the possibility of Guzmán’s being involved.¹⁶⁵

Regarding the article on Jeffrey Lichtman, Judge Cogan found the jury researching the story implied nothing about the panel which shaped their opinions to potentially prejudice Guzmán.¹⁶⁶ Further, he found the story did not relate to the crimes charged and was not widely disseminated nor

¹⁵⁶ *Id.* at *38.

¹⁵⁷ *Id.* at *40.

¹⁵⁸ *Id.* at *38, 40 (first citing *Loliscio v. Goord*, 263 F.3d 178, 185 (2d Cir. 2001); then citing *United States v. Farhane*, 634 F.3d 127, 168 (2d Cir. 2011); then citing *Remmer v. United States*, 347 U.S. 227, 229 (1954); and then citing *United States v. Greer*, 285 F.3d 158, 173 (2d Cir. 2002)).

¹⁵⁹ *Id.* at *40 (citing *Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2d Cir. 1994)).

¹⁶⁰ *Id.* (citing *Farhane*, 634 F.3d at 169); *see also* *United States v. Calbas*, 821 F.2d 887, 896 n.9 (1987) (describing that a trial court’s post-verdict determination of extra-record prejudice must be an objective one, focusing on the information’s probable effect on a hypothetical average juror).

¹⁶¹ *Id.* at *41.

¹⁶² *Id.* at *41–42.

¹⁶³ *Id.* (“[A]llegations of sexual abuse are no more gruesome and prejudicial as the overwhelming amount of evidence . . . about defendant threatening, torturing, and murdering people, about defendant ordering others to torture and murder people, about defendant outfitting his army of *sicarios* with heavy artillery . . . and about defendant’s use of that infantry to further his drug business.”). *Id.*

¹⁶⁴ *Id.* at *48–49.

¹⁶⁵ *Id.* at *43.

¹⁶⁶ *Id.* at *22 n.6.

sensationalized.¹⁶⁷ He wrote the average juror would recognize a defendant has no control over his attorney's conduct and that such conduct would have no effect on the hypothetical juror.¹⁶⁸

With respect to the panel's general exposure to media accounts, Judge Cogan held there were no specific tweets or coverage identified as prejudicial beyond the sexual assault allegations and the conduct of Guzmán's attorney.¹⁶⁹ He inferred that any other exposure to media was to information they already knew and would not be determinative in a hypothetical juror's decision.¹⁷⁰ In this section, Judge Cogan levied perfunctory criticism of the jury by acknowledging the alleged intentional exposure is "certainly undesirable, and constitutes a violation of oaths as jurors."¹⁷¹ Nevertheless, he found Guzmán's constitutional rights were not affected regardless of whether the media exposure was accidental or sought out.¹⁷²

2. *No Premature Deliberations*

The court also rejected the argument that discussions of the sexual assault allegations amounted to premature deliberations.¹⁷³ Judge Cogan wrote, "[N]ot every comment a juror may make to another juror about the case is a discussion about the defendant's guilt or innocence . . . within a common sense definition of deliberation."¹⁷⁴ He highlighted the juror who spoke to *VICE* acknowledged the allegations might not be true and that the panel was not "hung up" on them.¹⁷⁵ The court also noted the sexual assault allegations had nothing to do with the criminal activity alleged.

Judge Cogan found the remaining discussions *VICE* referenced did not qualify as deliberations but were unprejudicial communications unrelated to any calculation of guilt.¹⁷⁶ In this regard, he referenced the jury being aware of Lichtman's personal affair, the jury being put off by Lichtman's aggressive questioning, and the jury having general conversations about the case, including discussing cooperating witnesses with disreputable backgrounds and general media coverage.¹⁷⁷

¹⁶⁷ *Id.* at *50–51.

¹⁶⁸ *Id.* at *51.

¹⁶⁹ *Id.* at *52.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at *53.

¹⁷² *Id.* at *53–54.

¹⁷³ *Id.* at *54–58. Five empaneled jurors and two alternates discussed the sexual abuse reports. *Id.* at *55.

¹⁷⁴ *Id.* at *56 (quoting *United States v. Baker*, 899 F.3d 123, 132 (2d Cir. 2018)).

¹⁷⁵ *Id.* at *55–58.

¹⁷⁶ *Id.* at *57.

¹⁷⁷ *Id.* at *57–58.

3. *Juror Lies*

Lastly, Judge Cogan did not deem the jury lying to him to be of sufficient import to require a new trial.¹⁷⁸ He described the *VICE* article referencing two potential lies. The first was during *voir dire* and regarded the *VICE* juror’s desire to sit on the case. Second was the responses of various panelists regarding media exposure when asked whether they came across the sexual assault allegations made public.¹⁷⁹

With respect to *voir dire*, a party alleging unfairness based on undisclosed bias must demonstrate responses were false and also that the correct response would have provided a valid basis for a cause challenge.¹⁸⁰ Judge Cogan found the juror’s statements indicating excitement to sit on the case as benign references to its historic status.¹⁸¹ He found no reason to doubt the juror’s assertion he or she could be impartial and decide the case based on the evidence.¹⁸²

At the end of the opinion, the judge quickly dismissed arguments voicing concerns that multiple jurors lied to him when asked about media exposure.¹⁸³ He excused the lies because they related to fears the *VICE* juror expressed about being arrested or held in contempt.¹⁸⁴ He found significant that the article did not suggest jurors lied because of any actual or implied biases.¹⁸⁵

Given the rarity by which district courts grant new trials pursuant to Rule 33, it was not remarkable Judge Cogan denied the application for a retrial.¹⁸⁶ However, denying an evidentiary hearing that would have developed the appellate record raised a host of constitutional and practical concerns. First, when a juror of a historic trial runs to a reporter the day after the verdict and concedes an unrelenting tide of lies, public policy begs for the situation to be addressed through rigorous constitutional analysis, something profoundly missing in the decisions from the district and circuit courts. Second, judicial economy principles suggest a hearing is necessary to preserve information jurors can reveal while their memories are fresh.

The appeal to the Second Circuit involved multiple issues, including

¹⁷⁸ *Id.* at *58–66.

¹⁷⁹ *Id.* at *59.

¹⁸⁰ *Id.* at *59.

¹⁸¹ *Id.* at *60–61.

¹⁸² *Id.* at *61–63.

¹⁸³ *Id.* at *65.

¹⁸⁴ *Id.* at *65–66.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at *14 (quoting *United States v. Costello*, 255 F.2d 876, 879 (2d Cir. 1958)) (“It is well settled that motions for new trials are not favored and should be granted only with great caution.”). Nevertheless, Rule 33 of the Federal Rules of Criminal Procedure describes how a court may vacate any judgment and grant a new trial if the interest of justice requires. FED. R. CRIM. P. 33(a).

the issue of jury malfeasance.¹⁸⁷ Jury misconduct is the only issue focused on in this article. The goal of this Article is to illustrate the brazen juror malfeasance reported in *VICE* cannot be tolerated.

VII. GUZMÁN DESERVES A FURTHER DAY IN COURT

Justice Anthony Kennedy, shortly before retiring in 2017, authored *Peña-Rodríguez v. Colorado*, a decision overturning a jury verdict through piercing the veil of deliberations. He articulated the principle that strikes at the heart of the integrity of the jury system and which should guide analysis of Guzmán's appeal.¹⁸⁸ The revered swing-justice wrote, "Like all human institutions, the jury system has its flaws, yet experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and are honest."¹⁸⁹ It follows that when a juror concedes not following instructions in the host of ways reported to *VICE*, impartiality and fitness have been intolerably compromised.

Judge Cogan began his opinion by describing the measures taken to ensure an impartial jury, including planning every stage,¹⁹⁰ intense security, providing juror anonymity, and instructing jurors, once and sometimes twice daily, to avoid media coverage.¹⁹¹ Unfortunately, the substance of the decision rendered such measures formalities more than anything protecting

¹⁸⁷ See *supra* note 117 (describing ten grounds of appeal). Guzmán's attorney filed a 245-page appeal in a trial that generated a 7,109-page transcript. See Keegan Hamilton, *El Chapo Claims VICE's Interview with a Juror Should Get Him a New Trial*, *VICE* (Sept. 9, 2020, 10:37 AM), <https://www.vice.com/en/article/n7wyp8/el-chapo-claims-vices-interview-with-a-juror-should-set-him-free> [<https://perma.cc/E954-KSD8>].

¹⁸⁸ *Peña-Rodríguez v. Colorado*, 137 S. Ct. 855, 860 (2017). Justice Kennedy, starting the opinion, wrote:

The jury is a central foundation of our justice system and our democracy. Whatever its imperfection in a particular case, the jury is a necessary check on governmental power. The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases. Over the long course its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The jury is a tangible implementation of the principle that the law comes from the people. *Id.*

¹⁸⁹ *Id.* at 861. Miguel Angel Peña-Rodríguez, a racetrack employee, was charged with sexually assaulting teenage sisters in the bathroom of a Colorado horse-racing facility. *Id.* After a three-day trial, the jury found Rodríguez guilty of unlawful sexual contact and harassment. *Id.* One juror reportedly said during deliberation that in the juror's "experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe that they could do whatever they wanted with women." *Id.* at 862. He further stated, "I think he did it because he's Mexican and Mexican men take whatever they want." *Id.*

¹⁹⁰ *United States v. Loera*, No. 09-CR-0466, 2019 U.S. Dist. LEXIS 111566, at *2-3 (E.D.N.Y. July 3, 2019). This included attorneys reviewing the questionnaires of 923 people who responded, screening them, and conducting three and a half days of *voir dire* in a partially closed court. *Id.* at *2-4.

¹⁹¹ *Id.* at *5.

the accused. This section argues the reasons Guzmán deserves an evidentiary hearing as well as thoughtful consideration to whether a new trial should be granted. They are: (1) Guzmán deserves redress from being characterized as a child molester; (2) Judge Cogan failed to acknowledge the panoply of deplorable jury conduct; and (3) a court exploring credible reports of pervasive misconduct at an evidentiary hearing is not a fishing expedition.

A. Guzmán’s Reputation Was More El Patrón than Child Molester

It was manifestly unjust to deny an evidentiary hearing with respect to the jury’s exposure to allegations whose mere reference brands a scarlet letter.¹⁹² This is especially true when the source was cooperating witness, Alex Cifuentes, a Columbian drug-runner whose credibility is undermined by his belief in conspiracy theories regarding the Illuminati, an apocalypse, UFOs and Witchcraft.¹⁹³ The court documents released on the eve of deliberations show that the prosecution successfully moved to preclude any mention of these bizarre dispositions along with Cifuentes’s allegations that he and Guzmán sexually assaulted young girls.¹⁹⁴ When Cifuentes’s allegations were made available (a questionable decision by Judge Cogan given the risk of the previously sealed material filtering to the jury), the jury was exposed to damning headlines like those from the *New York Times*: “El Chapo Drugged and Raped 13-Year-Old Girls, Witness Claims.”¹⁹⁵

¹⁹² In Nathaniel Hawthorne’s *The Scarlet Letter*, a red letter “A” was emblazoned across Hester Prynne’s chest to identify her as an adulteress, a way to shame and condemn. See Susan Svruga, *A ‘Scarlet Letter’ for Students Implicated in Sex Assaults: D.C. Bill Sparks Debate*, WASH. POST (July 25, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/07/20/a-scarlet-letter-for-students-implicated-in-sex-assaults-d-c-bill-sparks-debate/> [<https://perma.cc/3ZP5-G3U3>] (discussing ways colleges are dealing with allegations of assaults, one leaving possibility of innocent students’ transcripts being labeled with a sexual offender stamp); see also Ron Martz, *A New Scarlet Letter for Harassment Charges*, GAINSVILLE TIMES (Dec. 3, 2017), <https://www.gainesvilletimes.com/opinion/ron-martz-new-scarlet-letter-harassment-charges/> [<https://perma.cc/6GHZ-ST2P>] (arguing when it comes to alleged child abuse, social media mobs care not one whit about proof or due process).

¹⁹³ See Kegan Hamilton, *A Key Witness Against Chapo Believes in Aliens, the Illuminati, and Witchcraft*, VICE (Feb. 11, 2019), <https://www.vice.com/en/article/pankdm/a-key-witness-against-chapo-believes-in-aliens-the-illuminati-and-witchcraft> [<https://perma.cc/BYF5-FZWX>] (linking motion papers) [hereinafter *Key Witness*]. The prosecution conceded Alex Cifuentes held “unorthodox interests and beliefs.” *Id.* Cifuentes was part of a prolific Colombian trafficking family, who gave the jury an intimate perspective of Guzmán’s operation. *Id.* He averred that Mexico’s former president Enrique Peña Nieto procured a \$100 million dollar bribe from Guzmán’s operation. *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See *El Chapo Drugged and Raped 13-Year-Old Girls*, *supra* note 6; see also Kristine Philips, *El Chapo Raped Girls as Young as 13 and Called Them His ‘Vitamins,’ Witness Says*, WASH. POST (Feb. 3 2019), <https://www.washingtonpost.com/nation/2019/02/03/el->

Unless jurors dug deep into the reports, they would not be aware the source was someone who adopted such unconventional views.¹⁹⁶ It was a clear handicap for the defense to suffer a trial with little ability to prevent the jury's access to such material and it is an even greater problem that the court system chose not to explore the impact of this material.

Prejudice is the touchstone of entitlement to a new trial when improper jury influences are at issue.¹⁹⁷ Ultimately, Judge Cogan found Guzmán's conduct in running a cartel so "gruesome" that he concluded reports of drugging and raping young women would not "prejudice a hypothetical jury."¹⁹⁸ In doing this, he minimized what it means to be characterized as a child molester. Despite the determination Guzmán could not be prejudiced, for which he provided little caselaw nor citation to scientific authority, the opposite sentiment is more in accord with historical and contemporary norms.

To the hypothetical panel in metropolitan New York, heading the world's largest drug cartel bears little resemblance to the reputation of a child molester. Pedophiles prey on the most vulnerable and even in prison are the ultimate pariahs.¹⁹⁹ It can be a badge of honor for prisoners to punish, extrajudicially, those who harm children.²⁰⁰ In contrast, criminal heads like Guzmán are glorified antiheroes. From his rise from poverty to his innovations in a trade which feeds an insatiable desire, Guzmán's story resonates and has drawn fascination from the Mexican and American populace.²⁰¹ In 2015, the *New York Times* ran the headline "*Public Enemy?*"

chapo-raped-girls-young-called-them-his-vitamins-witness-says/ [https://perma.cc/W8YV-RLJW]; Noah Hurowitz, *Unsealed Documents: El Chapo Accused of Drugging, Raping Young Girls*, ROLLING STONE (Feb. 2, 2019), https://www.rollingstone.com/culture/culture-news/el-chapo-rape-girls-allegation-789183/ [https://perma.cc/W3P5-TP54].

¹⁹⁶ See *Key Witness*, *supra* note 193. It can be inferred that the jury gave serious consideration to what Cifuentes said given the jury asked for a full read-back of his lengthy testimony during deliberations. *Id.*

¹⁹⁷ See *United States v. Abrams*, 137 F.3d 704, 709 (2d Cir. 1998) (quoting *United States v. Resko*, 3 F.3d 684, 694 (3d Cir. 1993)). The late Chief Justice William H. Rehnquist described, "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (involving a juror who failed to disclose he applied to work in the district attorney's office prosecuting the case).

¹⁹⁸ *United States v. Loera*, No. 09-CR-0466, 2019 U.S. Dist. LEXIS 111566, at *41-45 (E.D.N.Y. July 3, 2019).

¹⁹⁹ See Hollie McKay, *Pedophiles in Prison: The Hell that Would Have Awaited Epstein if He'd Stayed Behind Bars*, FOX NEWS (Aug. 21, 2019), https://www.foxnews.com/us/jeffrey-epstein-pedophiles-prison-hell [https://perma.cc/M2SD-QVCE]. McKay described various sex offenders being beaten, stabbed, strangled, or drowned by reason of their crimes. *Id.* One inmate described murdering a pedophile as a public service. *Id.*

²⁰⁰ *Id.*

²⁰¹ The glorification of the outlaw is by no means a modern phenomenon and has been a part

At Home in Mexico, ‘El Chapo’ Is Folk Hero No. 1.”²⁰² The *Times* went on to describe Guzmán as part Robin Hood: a source of reverence, respect, and mirth.²⁰³ Guzmán holds such popularity that the “*narco* ballad,” a genre of music about the exploits of drug traffickers, has long centered on him.²⁰⁴ In the same vein, *Narcos: Mexico* portrays Guzmán as having an unexpected and estimable rise.²⁰⁵ Alejandro Edda, who plays Guzmán, is quoted in the *Hollywood Reporter*, “I have never judged him. There are a lot of poor people who don’t want to be poor . . . There are Chapos in every one of us. We’re all underdogs.”²⁰⁶ Sean Penn did not risk his life to travel to the Sinaloa mountains while Guzmán was on the run to interview someone with the reputation of Jeffrey Epstein. Penn traveled to meet

of American culture since at least the Old West. See Kent L. Steckmesser, *Robin Hood and the American Outlaw: A Note on History and Folklore*, 79 J. AM. FOLKLORE 348 (1966). This phenomenon only grew with the advent of the early media age, Prohibition, and the Depression. From James Cagney starring in “The Public Enemy,” in 1931, Warren Beatty playing Clyde Barrow in 1967, Al Pacino playing Tony Montana in 1983, and Bryan Cranston playing Walter White, outlaws have secured a place in the hearts and minds of the American public.

²⁰² See William Neuman & Azam Ahmed, *Public Enemy? At Home in Mexico, ‘El Chapo’ Is Folk Hero No. 1*, N.Y. TIMES (July 17, 2015), <https://www.nytimes.com/2015/07/18/world/americas/safe-haven-for-drug-kingpin-el-chapo-in-many-mexicans-hearts.html> [<https://perma.cc/KZT3-5BD4>]. The article describes the “glee” three Mexican brothers experienced when informed of Guzmán’s escape. *Id.* One carried a sign to a local parade, “El Chapo is more of a president than Peña Nieto.” *Id.* Locals describe how the economy depends on Guzmán and how other gangs were much worse. *Id.* A systems engineer from Mexico City said, “The drug dealers do more for the people than the government does,” and “[i]f you live in a dealer’s territory he treats you well.” *Id.* Such sentiments are observable across the country and social strata. *Id.*

²⁰³ *Id.*

²⁰⁴ See Jasmine Garsd, *Narcocorridos: Telling Truths, or Glorifying an Escaped Drug Lord?*, NPR (July 16, 2015, 12:03 PM), <https://www.npr.org/sections/latino/2015/07/16/423198482/narco-ballads-praising-el-chapo-or-portraying-the-corrupt-truth> [<https://perma.cc/K9VX-GY8W>]. These ballads are a narrative style of Mexican music dating back to the Mexican revolution, which facilitated the reports of battles. *Id.* Presently, the exploits of drug lords are narrated in song and are both popular and reviled. *Id.* There is an appeal of listening to poor men made rich in country where poverty and corruption are rampant. *Id.*

²⁰⁵ See *Narcos: Mexico* (Netflix) (Seasons 1 and 2). Guzmán is introduced in Season 1 as a driver and assistant to Felix Gallardo. One critic writes the bad guys in *Narcos* are far more intriguing than the good guys and the show focuses on rise of the underdog, brotherly love, and the creation of surreal amounts of wealth. See Rohini Nair, *Narcos: Mexico Review – Netflix’s Global Hit Delivers Another High with Fourth Instalment*, FIRSTPOST (Nov. 20, 2018 18:20:55 IST), <https://www.firstpost.com/entertainment/narcos-mexico-review-netflixs-global-hit-delivers-another-high-with-solid-fourth-instalment-5582361.html> [<https://perma.cc/9SNH-UDSY>].

²⁰⁶ Jackie Strause, *How ‘Narcos: Mexico’ Star Alejandro Edda Became El Chapo in Season 2*, HOLLYWOOD REP. (Feb. 19, 2020, 10:50 AM), <https://www.hollywoodreporter.com/tv/tv-news/narcos-mexico-how-alejandro-edda-became-el-chapo-season-2-1279944/> [<https://perma.cc/CWB6-QWH9>].

someone with the complex reputation he described as follows:²⁰⁷

Since he joined the drug trade as a teenager, Chapo swiftly rose through the ranks, building an almost mythic reputation: First, as a cold pragmatist known to deliver a single shot to the head for any mistakes made in a shipment, and later, as he began to establish the Sinaloa cartel, as a Robin Hood-like figure who provided much-needed services in the Sinaloa mountains, funding everything from food and roads to medical relief. By the time of his second escape from federal prison, he had become a figure entrenched in Mexican folklore.²⁰⁸

It is no stretch to posit New York jurors are likely to share the reputation Penn attributed. The juror who spoke to *VICE* recognized, “I think he was just living a life that he only knew how to live since he was young.”²⁰⁹ Simply, Guzmán’s reputation is not categorically dishonorable to the hypothetical juror. Moreover, in looking at the hypothetical juror, the judicial system must acknowledge who that juror is. He or she is the everyman who answers his summons and performs a public service—even if begrudgingly. The ordinary juror is also one who questions the credibility of a witness with a propensity for conspiracy theories. When participating in *voir dire* the ordinary juror does so honestly and has a basic respect for his or her oath and the court’s instructions. The hypothetical juror is not expected to act lawlessly at every turn. Yet Judge Cogan’s determination that Guzmán is incapable of being prejudiced enabled him, as well as the circuit, to provide cover to indefensible jury conduct.

B. The Opinion Fails to Address Consistent Breaches of Juror Obligations

After the guilty verdict, Judge Cogan lauded the jury’s meticulous attention to detail, “remarkable” approach to deliberations, and proclaimed their efforts made him “quite frankly, proud to be an American.”²¹⁰ The quote evidences respect for the process as opposed to the result. Unfortunately, the failure to acknowledge and investigate the legion of ways the jury disregarded their obligations belies the accolades.

Punishing jurors for malfeasance is a relative rarity. Courts are hesitant to impose sanctions, likely because they do not want to further discourage

²⁰⁷ See Sean Penn, *El Chapo Speaks: A Secret Visit with the Most Wanted Man in the World*, ROLLING STONE (Jan. 10, 2016, 1:57 AM), <https://www.rollingstone.com/politics/politics-news/el-chapo-speaks-40784/> [<https://perma.cc/L4ES-BY8J>]. Penn references his piece as the first known interview with Guzmán outside a police interrogation room. *Id.*

²⁰⁸ *Id.* Penn further revealed, “unlike many of his counterparts who engage in gratuitous kidnapping and murder, El Chapo is a businessman first.” *Id.*

²⁰⁹ See *Inside El Chapo’s Jury*, *supra* note 5.

²¹⁰ See Tom Hays, *Notorious Drug Lord Joaquín “El Chapo” Guzmán Convicted*, ASSOCIATED PRESS, (Feb. 12, 2019), <https://apnews.com/article/north-america-drug-cartels-us-news-ap-top-news-smuggling-9ddb7be679e64a77b34431b7ffd22317> [<https://perma.cc/WUS5-X2G2>].

participation in a civic duty that members of the public often regard as a chore.²¹¹ The Supreme Court in *Tanner v. United States* announced its reluctance to scrutinize irresponsible behavior amidst allegations jurors were drinking and using drugs throughout the trial, for fear the system could not survive such efforts at perfecting it.²¹² Yet when conduct completely undermines impartiality, courts will condemn the behavior and at times, impose consequences on those who so undermine the administration of justice. Jurors, for example, have been incarcerated over their conduct when it involves having an improper relationship with a defendant, such as accepting a bribe or failing to reveal a familiar relationship.²¹³ A draconian judge can impose jail time for lies during *voir dire*, as Broward County judge, Eileen O’Conner, did to a teenager who did not disclose previous

²¹¹ See Amanda McGee, Note & Comment, *Juror Misconduct in the Twenty-First Century: The Prevalence of The Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 323 (2010) (“When citizens are summoned . . . they tend to treat that responsibility more as of a chore than a privilege.”).

²¹² See *Tanner v. United States*, 483 U.S. 107 (1987). *Tanner* involved mail fraud and conspiracy to defraud the government amidst a road construction project. *Id.* One juror, Daniel Hardy, relayed he felt “the jury was on one big party.” *Id.* at 109–11. He alleged seven jurors drank alcohol during the lunch recess, four of them consuming “a pitcher to three.” *Id.* at 115. Others were alleged to have had mixed drinks or wine on several occasions. *Id.* Hardy conceded he and three others would also smoke marijuana regularly. *Id.* Two other jurors reportedly used cocaine multiple times. *Id.* at 116. Hardy also reported one juror sold marijuana to another and brought drug paraphernalia into the courthouse. *Id.* The court did not allow jurors to be interviewed under Federal Rule of Evidence 606(b) but did allow an evidentiary hearing permitting others in the courtroom to testify as to whether they noticed problematic conduct. *Id.* The defense counsel testified that he noticed one of the jurors “in sort of a giggly mood” at trial, but never brought it to anyone’s attention. *Id.* at 113. Though the issue of a couple of jurors “taking long naps” had been brought up during the trial, the court found significant that nobody involved in the trial referenced such a problem again. *Id.* at 113–14.

²¹³ One notable case from the District of Columbia involved a juror sentenced to six years because she did not reveal she knew a defendant from middle school and kept in touch with the defendant’s family during the trial. See Henri E. Cauvin, *Juror Gets Prison for Obstruction: Woman, Who Knew Defendant, Plotted to Force a Mistrial*, WASH. POST (July 15, 2006), <https://www.washingtonpost.com/archive/local/2006/07/15/juror-gets-prison-for-obstruction-span-classbankheadwoman-who-knew-defendant-plotted-to-force-a-mistrialspan/a8907125-3726-4b5c-848e-5c28d7a1b57b/> [https://perma.cc/4M5H-MFU9]. Here, Jovanda Blackson lied her way onto a murder and racketeering trial of a childhood friend and signaled she would not convict. *Id.* She also embraced the defendant’s wife during a court break and continued to speak to her by phone. *Id.* Blackson plead guilty to conspiracy, contempt, and obstruction of justice and received a heavy sentence despite no prior criminal record. *Id.* A case from the Third Circuit involved a juror who accepted flowers, a few notes, and a phone call from a defendant in a narcotics case, which resulted in a six-month sentence and a \$46,850 fine. *United States v. Hand*, 863 F.2d 1100 (1988). The juror pled guilty to contempt of court and was a cooperating witness in a subsequent trial against the same defendant. *Id.* John Gotti was able to bribe a juror, through underlings, in one of his trials, and the juror, George Pape, was caught and sentenced to three years. See GENE MUSTAIN & JERRY CAPECI, *MOB STAR: THE STORY OF JOHN GOTTI* 354 (2002).

arrests.²¹⁴ For breaches involving researching the case in the media, which is an old problem being conducted in a modern way,²¹⁵ the possible consequences include: declaring a mistrial if the breach is of sufficient magnitude, holding jurors in civil contempt (which can consist of a verbal admonishment or a modest fine), or having errant jurors pay astronomical court-related expenses.²¹⁶

The Second Circuit case of *United States v. Parse* brought a juror,

²¹⁴ Stacey Forbes was sentenced in 2005 to four months for contempt for failing to disclose past arrests on his jury questionnaire. See Molly McDonough, *Rogue Jurors*, A.B.A.J. (Oct. 24, 2006, 9:31 AM), https://www.abajournal.com/magazine/article/rogue_jurors [<https://perma.cc/5D9K-XSS4>]. Forbes told the judge the questions confused him and although he had arrests, he had no convictions at the time. *Id.* The sentence was upheld on appeal. *Id.* The NAACP helped the Forbes family file an ethics complaint against the judge based on her failure to disclose items in her judicial application, and the sentence was explored as racist. See Curt Anderson, *Judge Probed After Contempt Sentence*, WASH. POST (Sept. 4, 2005), <https://www.washingtonpost.com/archive/politics/2005/09/04/judge-probed-after-contempt-sentence/1b8abl78-2d99-4308-94ac-9a1a35a1052b/> [<https://perma.cc/AF5W-A78H>].

²¹⁵ See McGee, *supra* note 211, at 302 (describing juror misconduct via internet as “a more advanced form of the traditional instances of misconduct”). The Fourth Circuit, sitting *en banc*, had a chance to examine the issue of jurors following news tweets in an appeal from the criminal trial of the former Chief Justice of West Virginia’s Supreme Court, Allen Loughry, who was convicted in 2018 for misuse of funds relating to the restoration of a courthouse. See Alison Frankel, *4th Circuit Skips Chance to Provide Social Media Guidance in W. Va. Justice’s Case*, REUTERS (May 21, 2021, 4:00 PM), <https://www.reuters.com/business/legal/4th-circuit-skips-chance-provide-social-media-guidance-w-va-justices-case-2021-05-21/> [<https://perma.cc/N7G5-W5C9>]. The panel vigorously debated a juror’s use of Twitter during the trial but did not issue a substantive decision on the subject. *Id.* A one-sentence decision affirming the conviction noted Judge Loughry was not entitled to a hearing because he did not offer credible evidence of the juror’s exposure to a reporter’s tweets. *Id.*

²¹⁶ In New Jersey, a mistrial was declared after a juror was held in criminal contempt for conducting research while serving on a criminal jury and sharing the findings with others and fined \$11,227, which represented costs associated with empaneling the jury. See U.S. Attorney’s Office, District of New Jersey, *Juror Fined \$11,000 for Conducting Outside Research During Criminal Trial and Causing Mistrial*, U.S. DEP’T OF JUST. (June 29, 2021), <https://www.justice.gov/usao-nj/pr/juror-fined-11000-conducting-outside-research-during-criminal-trial-and-causing-mistrial> [<https://perma.cc/K22Q-4T7P>]. In a well-publicized case where thirty-six partygoers died at a warehouse party in Oakland after a fire broke out, two jurors were held in contempt after one sought input from a fire expert and shared what she learned. See *Ghost Ship Warehouse Founder to Be Retried on Manslaughter Charges in 2016 Fire That Killed 36 in Oakland*, KTLA (Oct. 4, 2019), <https://ktla.com/news/local-news/man-to-be-retried-on-manslaughter-charges-in-2016-oakland-warehouse-fire-that-killed-36/> [<https://perma.cc/8JBF-4ZKA>]. One juror received an admonishment and another a modest \$500 fine. *Id.* A juror in Indiana was held in contempt, fined \$1,000, and a mistrial declared in a case of auto theft and weapons possession when the juror researched relayed information about the defendant having a separate case involving a shooting. See Ken de la Bastide, *Juror Fined \$1,000 for Contempt of Court; Mistrial Declared*, HERALD BULL. (Mar. 17, 2021), https://www.heraldbulletin.com/news/juror-fined-1-000-for-contempt-of-court-mistrial-declared/article_4557352c-8751-11eb-859f-c717bbe71b5e.html [<https://perma.cc/9CR3-5GVW>].

Catherine M. Conrad, close to the line of a criminal charge based on a lack of veracity during *voir dire* and highlighted conduct that will not be tolerated in the jurisdiction where Guzmán’s trial was held.²¹⁷ The case, which the trial court described as the largest tax fraud prosecution in U.S. history,²¹⁸ illustrates what can be revealed when a hearing is granted on the basis of credible misconduct. In *Parse*, Conrad reached out to the prosecution with a congratulatory letter.²¹⁹ Conrad also voiced disappointment she could not get her fellow panelists to convict David Parse, a Deutsche Bank broker, on all counts.²²⁰ The prosecution turned the letter over to the trial judge, William Pauley, who brought Conrad back to court to investigate whether she was impartial.²²¹ Conrad initially invoked the Fifth Amendment and was granted immunity with respect to her lies during *voir dire* but not for false statements at the post-trial hearing.²²² The hearing revealed Conrad lied unrelentingly about her education, living arrangements, and both her as well as her husband’s criminal past.²²³ This included not revealing she was an attorney who had her license suspended.²²⁴ Conrad also conceded that she felt most attorneys are career criminals in a case where the defendants held law licenses.²²⁵ Essentially, Conrad admitted she lied to make herself more

²¹⁷ See *United States v. Parse*, 789 F.3d 83 (2d Cir. 2015).

²¹⁸ *Id.* at 101, 123 (citing *United States v. Daugerdas*, 867 F. Supp. 2d 445, 467 (S.D.N.Y. 2012)).

²¹⁹ *Id.* at 90. Conrad wrote that the prosecution “did an outstanding job on behalf of Our Government.” *Id.* She concluded her letter by indicating she learned a federal case “is REALLY a ‘federal case’, and I feel privileged to have had the opportunity to observe la creme de la creme--KUDOS to you and your team!!!” *Id.* The trial court held this language proved she saw herself not as a fact-finder, but as a partisan. *Id.* at 93 (Straub, J., concurring) (quoting *Daugerdas*, 867 F. Supp. 2d at 471).

²²⁰ *Id.* at 90, 120. Conrad wrote she put up “the good fight” in effort to convict Parse on all counts but had to “throw in the towel.” *Id.* She was the sole hold out on a conspiracy charge for two days. *Id.* at 90.

²²¹ *Id.* at 91. A preliminary hearing, in which Conrad refused to appear, was scheduled so the court could advise Conrad to show up with an attorney to a later evidentiary hearing. *Id.*

²²² *Id.* (granting Conrad immunity upon motion of the government).

²²³ Conrad said her highest level of education was a bachelor’s degree, when it was a law degree, and informed the court she had been a stay-at-home wife, although she had practiced law until New York authorities suspended her law license. *Id.* at 88 (citing *Daugerdas*, 867 F. Supp. 2d at 452). She also lied about where she lived because giving the false address increased the transportation expenses the court would pay. *Id.* Conrad did not disclose various arrests in New York and Arizona, including for DWI, harassment, disorderly conduct, and shoplifting, despite being asked if she was a defendant in a criminal case. *Id.* at 88–89 (citing *Daugerdas*, 867 F. Supp. 2d at 454–55). Conrad also described her husband as retired after owning “bus companies” without mentioning he was convicted of nine criminal offenses and spent seven years in prison. *Id.* at 90 (citing *Daugerdas*, 867 F. Supp. 2d at 455).

²²⁴ *Id.* at 88–89 (quoting *Daugerdas*, 867 F. Supp. 2d at 453). Conrad concealed she was subject to an attorney disciplinary proceeding in New York where her license was suspended for professional misconduct relating to not appearing for her client and failing to properly represent a client. *Id.*

²²⁵ *Id.* at 92 (quoting *Daugerdas*, 867 F. Supp. 2d at 456).

marketable as a juror.²²⁶

Both the district court and Second Circuit concluded Conrad to be untrustworthy and biased, rendering strong admonitions against her behavior. District Court Judge Pauley acknowledged the brazenness of Conrad's lies and her inability to distinguish truth from falsehood.²²⁷ He found the extent of the lies to be "breathtaking,"²²⁸ determining she added a "destructive uncertainty to the fact-finding process."²²⁹ Each of these rebukes were cited by the circuit,²³⁰ showing the gatekeepers of acceptable conduct in Guzmán's jurisdiction are not prone to tolerate overarching juror dishonesty. In addition, Conrad was found to exhibit "a fundamental contempt of the judicial process."²³¹ Judge Pauley held Conrad, and those like her, have "no business sitting on a jury in judgment of others."²³² The circuit agreed and quoted from Conrad's suspension order, remarking that she showed a "shocking disregard for the judicial system."²³³

In contrast, Judge Cogan was relatively muted when discussing the conduct of the *VICE* juror. Instead of focusing on the pattern of behavior, he minimized it by analyzing two "potential" lies—one in *voir dire* about the *VICE* juror's desire to sit on the case and the other relating to multiple panelists' responses when the judge inquired if they heard of the child sex allegations.²³⁴ Despite the steadfast trial rule that jurors must not engage in discussions of a case before deliberation,²³⁵ Judge Cogan concluded the persistent failure to disclose researching and talking about the case could not be considered "lies," as the jury was never directly asked about such conduct.²³⁶ He also used equivocal language each time he neared critique of the panel. He described, "I know that they *might* have lied to me. But that does not mean defendant gets to dig for unrelated incidents"²³⁷ He further stated, "the jurors *might* have talked about the case, but the *VICE*

²²⁶ *Id.* at 91-93 (noting Conrad "conjured up a personal profile that she thought would be attractive").

²²⁷ *Id.* at 100 (quoting *Daugerdas*, 867 F. Supp. 2d at 474).

²²⁸ *Id.* at 92 (quoting *Daugerdas*, 867 F. Supp. 2d at 468-69).

²²⁹ *Id.* at 100 (quoting *Daugerdas*, 867 F. Supp. 2d at 474).

²³⁰ *Id.* at 92, 100.

²³¹ *Id.* at 101 (quoting *Daugerdas*, 868 F. Supp. 2d at 475).

²³² *Id.* (quoting *Daugerdas*, 867 F. Supp. 2d at 476).

²³³ *Id.* (quoting *In re Conrad*, 48 A.D.3d 187, 188 (N.Y. App. Div. 2007)).

²³⁴ *United States v. Loera*, No. 09-CR-0466, 2019 U.S. Dist. LEXIS 111566, at *59 (E.D.N.Y. July 3, 2019).

²³⁵ *United States v. Haynes*, 729 F.3d 178, 191 (2d Cir. 2013).

²³⁶ *See Loera*, 2019 U.S. Dist. LEXIS 111566, at *59 n.22. Judge Cogan described the jurors reportedly violated their oaths and did not tell him about it through engaging in conversations about the case before deliberations and also through accessing media coverage against instructions. *Id.* He stated these "do not . . . constitute lies." *Id.* He concluded that "lies" were information purposefully concealed in response to questions from the court. *Id.* He acknowledged the jurors, "as one would expect," did not announce that they were violating their oath. *Id.*

²³⁷ *Id.* at *28 (emphasis added).

article does not suggest that these conversations were prejudicial”²³⁸ He continued that “[a]ssuming the truth of the *VICE* allegations, the jurors’ conduct is certainly undesirable, and constitutes a violation of their oath as jurors. But their exposure to extra-record information does not rise to the level of implicating defendant’s constitutional rights”²³⁹ His lukewarm critique and labeling the prospect of a hearing as a “speculative exercise”²⁴⁰ made it seem as though he was casting doubt on Hamilton’s reporting when his credibility in providing in-depth reports about the trial and drug trade has never been challenged. Indicating the juror “might” have lied is not giving the situation its due and waters down what truth to a court means.

The Second Circuit was even more disappointing because they presumed the *VICE* revelations as true for purpose of determining the motion for a new trial and did not address, let alone levy any critique against, the way jurors approached their oaths in one of the country’s most symbolic trials.²⁴¹ The circuit sadly omitted an exploration for truth when that should have been their top priority. The whole point of extradicting the most notorious trafficker in history to the United States and having him tried in New York, which fashions itself as the Capital of the World,²⁴² was to show the process of holding Guzmán accountable was honest and meaningful. Our high courts must hold our citizenry to their oaths to faithfully stand between a defendant and conviction. That did not happen. Instead, the circuit used the malleable concepts of prejudice and discretion to uphold a conviction where the deepest of constitutional precepts was at play. Not sufficiently addressing the pattern of dishonest behavior is demoralizing. Thus far, our system has proved little better those of regimes far different from ours.

Undesirable only begins to describe Guzmán’s jury. The *VICE* juror and his cohorts appear no better in terms of trustworthiness than Catherine Conrad. Most egregiously, the *VICE* juror appears to have instructed other jurors how to deceive the judge with relation to following the case in the media,²⁴³ a component which was barely analyzed. Even Conrad never attempted to get other jurors to lie to the court. Further, Judge Cogan was tepid in his approach to the allegation the jury had used his query about the

²³⁸ *Id.* at *31 (emphasis added).

²³⁹ *Id.* at *53 (emphasis added).

²⁴⁰ *Id.* at *20. He described that no investigation is warranted “because what one group of seven jurors did implies nothing about what the other jurors did, nor does it give rise to a right of defendant to inquire about what other jurors might have done or known based purely on his speculation.” *Id.* at *25.

²⁴¹ *United States v. Loera*, 24 F.4th 144, 160–62 (2d Cir. 2022).

²⁴² See Sam Roberts, *When the World Called for a Capital*, N.Y. TIMES (Sept. 14, 2017), <https://www.nytimes.com/2017/09/14/nyregion/when-the-world-called-for-a-capital.html> [<https://perma.cc/L8MJ-G3LP>] (noting the placement of the United Nations is a major factor of New York’s influence).

²⁴³ See *Inside El Chapo’s Jury*, *supra* note 5.

article regarding Guzmán’s attorney to break their oaths.²⁴⁴ Judge Cogan’s focus on the content of the piece, namely Litchman having an affair with a wealthy client, had the effect of masking the real issue: how the jury reacted to the inquiry of whether they were aware of a news story about someone in the case. In a memorable example of obstinance, a juror used a smartwatch minutes after being alerted to the possible story and shared the gossip with other jurors.²⁴⁵ Further, the characterization of the *Post* article as not widely disseminated or sensationalized was baffling.²⁴⁶ The *Post* is well known to the jury pool in Brooklyn and infamous for its headlines in the mold of British tabloids.²⁴⁷ In terms of circulation, it is one of the most recognized papers in New York City and consistently in the top ten nationwide.²⁴⁸ To posit the story was not sensationalized is mistaken when the whole point of the headline, “Sarma Melngailis Had a Steamy Affair with Her Married Lawyer,” was to sensationalize.²⁴⁹ One can easily imagine the snickers made about defense counsel and attendant loss of face in the eyes of the jury. The incident deserved some level of exploration.

The Supreme Court should take the opportunity to boldly hold there is something repellent to a jury receiving a court instruction meant to ensure fair proceedings and use it as a cue to research information about the case. The most rudimentary of expectations is that jurors do not use discussions from the trial judge as signals to break their oaths. Judge Pauley wrote, and the circuit cited him for the proposition, “[t]he sanctity of an oath is central to the sound administration of justice. An oath impresses on one’s conscience the duty to testify truthfully.”²⁵⁰

Justice Kennedy, in *Peña-Rodriguez*, described that the jury system reaches fair and impartial verdicts when jurors are honest and follow the court’s instructions.²⁵¹ Further, in *United States v. Thomas*, the Second Circuit held a juror will not be permitted to serve who “refuses to follow the

²⁴⁴ See Schuster, *supra* note 102; *Loera*, 2019 U.S. Dist. LEXIS 111566, at *19–22.

²⁴⁵ See *Loera*, 2019 U.S. Dist. LEXIS 111566, at *19–20.

²⁴⁶ *Id.* at *50–51.

²⁴⁷ See *Tabloid Journalism*, BRITANNICA, <https://www.britannica.com/topic/tabloid-journalism> [https://perma.cc/T7EC-MNGE] (containing description of English tabloids and noting the Daily Mirror was the first modern tabloid); see also *A&E Investigative Reports: Tabloid! Inside the New York Post*, (A&E television broadcast Dec. 8, 1999). The *Post* is often regarded as the oldest continuously running paper in the U.S. and was founded by Alexander Hamilton. See Wolfgang Saxon, *The New York Post Has a Long History*, N.Y. TIMES (Nov. 20, 1976), <https://www.nytimes.com/1976/11/20/archives/the-new-york-post-has-a-long-history-from-alexander-hamilton.html> [https://perma.cc/5DNB-N7LS].

²⁴⁸ See *Average Weekday Print Circulation of Selected Newspapers in the United States from October 2020 to March 2021*, STATISTA (Oct. 1, 2021), <https://www.statista.com/statistics/272790/circulation-of-the-biggest-daily-newspapers-in-the-us/> [https://perma.cc/CC9Y-FDQF].

²⁴⁹ See Schuster, *supra* note 102.

²⁵⁰ *United States v. Parse*, 789 F.3d 83, 118 (2d Cir. 2015) (quoting *United States v. Daugerdas*, 867 F. Supp. 2d 445, 448 (S.D.N.Y. 2012)).

²⁵¹ See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017).

court’s instructions on the law and who . . . threatens to ‘undermine[] the impartial determination of justice’²⁵² While *Thomas* dealt with a juror dismissed for nullifying court instructions, the case highlights how disregarding instructions is antithetical to the administration of justice.

Instead of calling the conduct of Guzmán’s jury out, Judge Cogan focused on how he could trust the panel based upon his reliance on their oath that they could put aside anything they knew about Guzmán and decide the case on the evidence.²⁵³ He cited previous circuit authority for the proposition that “absent evidence to the contrary, we presume that jurors remain true to their oath and conscientiously observe instructions and admonitions of . . . the court.”²⁵⁴ He also wrote, “I have no doubt that each juror was impartial in this case.”²⁵⁵ With credible evidence that the majority of the panel had no ability to follow their oaths, it is puzzling how the judge could accept they could be trusted to fairly weigh a man’s fate. Justice Cogan sidestepped the lack of veracity when what was needed was the type of condemnation written by Judge Pauley in *Parse* and Justice Kennedy in *Peña-Rodríguez*. The impact of the decision is that if glaring misconduct is not discovered before the finish line of a guilty verdict, jurors can get away with behavior that is criminal itself.

C. An Evidentiary Hearing Would Not Be a Fishing Expedition

The term “fishing expedition” was used six times in the opinion to deny Guzmán a hearing.²⁵⁶ Rather than any type of fishing expedition, the juror running to *VICE* the day after the trial and revealing the extent of malfeasance is more akin to The White Whale jumping atop Captain Ahab’s *Pequod* and smashing any veneer Guzmán received a fair trial.

There is a line of Supreme Court cases, including *Peña-Rodríguez* and *Tanner v. United States*,²⁵⁷ which outline historical reasons courts are loathe to have jurors brought back to court for explorations of misconduct. According to Justice Kennedy, these include: according a level of traditional “sanctity” to comments made during deliberations, avoiding having jurors

²⁵² See *United States v. Thomas*, 116 F.3d 606, 617 (2nd Cir. 1997). The court stated, [s]urely a juror is “unable or disqualified,” for purposes of this rule, who is intent on nullifying the applicable law and thereby violating his oath to “render a true verdict *according to the law and the evidence*.” Similarly, we conclude that a juror who is determined to ignore his duty, who refuses to follow the court’s instructions on the law and who thus threatens to “undermine[] the impartial determination of justice based on law” . . . is subject to dismissal during the course of deliberations under Rule 23(b). *Id.* (first quoting FED. R. CRIM. P. 24(c); and then quoting *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988)).

²⁵³ See *United States v. Loera*, No. 09-CR-0466, 2019 U.S. Dist. LEXIS 111566, at *23–24 (E.D.N.Y. July 3, 2019).

²⁵⁴ *Id.* (citing *United States v. Cox*, 324 F.3d 77, 87 (2d Cir. 2003) (quoting *United States v. Rosario*, 111 F.3d 293, 300 (2d Cir. 1997)).

²⁵⁵ *Id.* at *37.

²⁵⁶ *Id.* at *17, *18, *20, *24, *26, *47.

²⁵⁷ 483 U.S. 107 (1987).

brought back after their service, and providing finality to verdicts.²⁵⁸ This principle is often referred to as the “no-impeachment rule.”²⁵⁹ Justice Samuel Alito, in his vigorous dissent to the exploring of racial animus in *Peña-Rodriguez*, described jurors entering a “locked” space that should be closely guarded.²⁶⁰ He expressed that jurors are ordinary people who are expected to speak and act as ordinary people do.²⁶¹ Alito wrote how liberal post-verdict approaches will prompt losing parties, their friends, and supporting attorneys to contact and question jurors.²⁶² This, in turn, can lead to something the high court has long guarded against: the harassment of jurors, arm-twisting, and outright coercion.²⁶³ Alito felt the majority decision would undermine the public policy promoted in the finality of verdicts and erode the citizenry’s willingness to participate.²⁶⁴ These values are simply not at play in cases such as *Parse* and *Guzmán*, where problematic jurors brought their own conduct into the light. Even the staunchest supporters of the no-impeachment rule are hard-pressed to excuse jurors who advertise to the media that they were unwilling to follow rules which are pillars that uphold the legitimacy of legal proceedings.

The Second Circuit in *United States v. Moten* held that some exploration is mandatory “where reasonable grounds for investigation exist”²⁶⁵ The issue is not whether the defendant is able to prove his case conclusively but rather whether a showing is sufficiently strong to warrant an investigation to discover the truth.²⁶⁶ The duty to investigate arises upon concrete allegations of specific instances of inappropriate conduct that constitute competent and relevant evidence.²⁶⁷ While trial judges enjoy

²⁵⁸ See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 861, 865–66 (2017).

²⁵⁹ *Id.* at 861. In *Peña-Rodriguez* the Court decided deliberations can be examined when allegations of racial animus are a significant factor in a vote. *Id.* at 869–70.

²⁶⁰ *Id.* at 875 (Alito, J., dissenting).

²⁶¹ *Id.*

²⁶² *Id.* at 884.

²⁶³ *Id.* at 885 (citing *McDonald v. Pless*, 238 U.S. 264, 267 (1915) (refusing to explore how civil jury in dispute of legal fees came to result—the foreman suggested that each juror should write down what he thought the plaintiffs were entitled to recover, that the aggregate of these amounts should be divided by twelve, and that the quotient should be the award)).

²⁶⁴ *Id.* at 884–85.

²⁶⁵ See *United States v. Moten*, 582 F.2d 654, 667 (2d Cir. 1978) (holding defendant in drug trial has right to impartial jury unprejudiced by extraneous influence in case where juror may have tried to approach a defendant); see also *United States v. Ianniello*, 866 F.2d 540 (2d Cir. 1989) (hearing required where jurors alleged judge and a marshal spoke to them about speeding up deliberations and reaching a verdict); *United States v. Vitale*, 459 F.3d 190, 197 (2d Cir. 2006) (post-trial jury hearing required when district court refused hearing into bias after revelation of professional relationship between juror and prosecutor’s husband).

²⁶⁶ *Moten*, 582 F.2d at 666–67.

²⁶⁷ See *Ianniello*, 866 F.2d at 543; accord *United States v. Schwarz*, 283 F.3d 76, 98–99 (2d Cir. 2002) (holding jury’s exposure to news of co-defendant’s admission of committing crime was clear evidence of inappropriate behavior and was sufficiently serious to warrant further inquiry).

broad flexibility to deny claims of jury misconduct,²⁶⁸ cases involving media publicity or other outside influences constrain their leeway and favor an avenue of relief.²⁶⁹ It is therefore hard to see how the following quote from the *VICE* juror does not fulfill that standard, “[w]e would constantly go to your media, your Twitter . . . I personally and some of the other jurors that I knew.”²⁷⁰ The remedy, as indicated by the Supreme Court in *Smith v. Phillips*, for allegations of partiality stemming from outside influence is a hearing with prejudice presumed.²⁷¹

In keeping with Federal Rule of Evidence 606, the evidentiary hearing that should be afforded Guzmán should not allow inquiries into mental impressions as to the verdict and should start with attempting to find the juror who spoke to *VICE*, which would be a worthy effort involving a relatively modest amount of man-hours considering Guzmán is spending countless hours in solitary.²⁷² Just as in *Parse*, any jurors brought back could be granted transactional immunity. Such a hearing could confirm the details of the *VICE* story. The court should then explore the extent of extrajudicial material the jury was exposed to and with what frequency it was discussed. It would also be prudent to ask the juror, “what weight did you give my instructions,” and possibly “what were you thinking?” An important question to explore is why the *VICE* juror believed he or she would be subject to contempt for his or her conduct if it were uncovered during the pendency of the case but felt completely free to publish his or her transgressions afterward. The court should further ask why the juror’s notes

²⁶⁸ See *United States v. Baker*, 899 F.3d 123, 131 (2d Cir. 2018) (upholding denial of hearing based on letter of juror to defendant’s attorney regarding unspecified discussion between jury during court breaks as well as one juror reportedly saying he knew defendant was guilty from the first time he saw him).

²⁶⁹ *United States v. Stewart*, 433 F.3d 273, 306 (2d Cir. 2006) (“[I]f any significant doubt as to a juror’s impartiality remains in the wake of objective evidence of false *voir dire* responses, an evidentiary hearing generally should be held.”); *United States v. Thai*, 29 F.3d 785, 803 (2d Cir. 1994). The Martha Stewart decision involved a juror who spoke to the press and was then discovered to have lied during *voir dire* in various ways. *Stewart*, 433 F.3d at 303–04. There was an allegation that a juror, Chappell Hartridge, answered questions in *voir dire* untruthfully in the following areas: (1) an arrest for assault of a former girlfriend; (2) civil suits against him and members of his family; (3) his son’s conviction for attempted robbery; (4) an accusation of embezzlement in his capacity as a Little League treasurer; and (5) termination for cause from employment with Citibank. *Id.* at 304. The circuit went out of its way to note that while it “might have ruled differently on the hearing request in the first instance,” it was not an abuse of discretion for the lower court to refuse to hold a hearing. *Id.* at 306.

²⁷⁰ See *Inside El Chapo’s Jury*, *supra* note 5.

²⁷¹ 455 U.S. 209, 215 (1982).

²⁷² See Oral Argument, *supra* note 118. Guzmán’s attorney suggested bringing jurors back to court or having them sign affidavits regarding whether they spoke to *VICE* and to provide them transactional immunity. *Id.* When the panel suggested doing so would be based on hearsay, Mr. Fernich responded the statements were against interest as demonstrated by the *VICE* juror fearing being held in contempt. *Id.* Fernich argued if it turns out five or six actually lied to judge that would amount to structural error. *Id.*

were brought home and if it related to financial incentives. It would also be wise to question a second juror, specifically the one who looked up the story with his or her watch, and explore why he or she felt so free to research the case. In questioning at least two jurors, it would confirm the extent of the breaches and would be an honest effort to determine whether the jury was impartial.

The recent trial of political operative Roger Stone is instructive on whether hearings should be granted in a high-profile case in our social media age. Once it was revealed that a juror in Stone's case provided non-revealing *voir dire* answers in failing to acknowledge negative comments the juror posted about Stone on social media, the trial judge conducted a limited hearing of the juror.²⁷³ Though the district judge upheld the verdict, the hearing preserved the matter for appeal.²⁷⁴ This preservation is important to defendants who must rely on appellate resolution rather than a commutation or pardon.²⁷⁵

Even more recently, a juror in another high-profile case in the neighboring district Guzmán was tried conceded disturbing conduct to the press and a documentary filmmaker after the conviction of Ghislaine Maxwell.²⁷⁶ The juror, Scotty David, revealed how he discussed being sexually assaulted in deliberations and how this experience convinced other panelists to accept memory issues with the sexual assault victims who testified.²⁷⁷ During one of David's interviews with *Reuters*, a reporter pointed

²⁷³ See *United States v. Stone*, Crim. Action No. 19-0018 (ABJ), 2020 U.S. Dist. LEXIS 67359, at *18-19 (D.D.C. Apr. 16, 2020). On January 25, 2019, the day of Stone's arrest, Hart posted a tweet referencing multiple Trump associates, including Stone, being indicted in relation to investigations concerning Russian election interference in 2016. *Id.* at *65. Hart opined the indictments were "brought to you by the lock her up peanut gallery." *Id.* Furthermore, on January 30, 2019, Hart re-tweeted a Bakari Sellers observation that questioned the idea the overnight FBI arrest and raid of Stone's Florida home could be considered excessive when it proceeded with a dozen agents with combat gear. *Id.*

²⁷⁴ *Id.* at *114-15.

²⁷⁵ See Sonam Sheth, *Trump Grants a Full Pardon to Republican Strategist Roger Stone, Who Was Convicted of 7 Felonies*, BUS. INSIDER (Dec. 23, 2020, 6:51 PM), <https://www.businessinsider.com/trump-pardons-convicted-felon-roger-stone-2020-12> [<https://perma.cc/PHK9-F8X8>]. President Trump granted Stone a commutation of sentence when it became clear he would have to report to prison. *Id.* Stone received a full pardon shortly before Trump left office. *Id.*

²⁷⁶ See Bevan Hurley, *Scotty David: Ghislaine Maxwell Juror Says 'Brutal' Trial Deliberations Left Them in Tears While Socialite Was 'Like a Stone'*, YAHOO SPORTS (Jan. 18, 2022), <https://sports.yahoo.com/scotty-david-ghislaine-maxwell-juror-200812109.html> [<https://perma.cc/V9CH-PE7N>]; Tom Winter & Corky Siemaszko, *Ghislaine Maxwell Juror Says His Personal Sexual Assault Story Helped Convince Jury of Her Guilt*, NBC NEWS (Jan. 5, 2022), <https://www.nbcnews.com/news/us-news/ghislaine-maxwell-juror-says-personal-sexual-assault-story-helped-conv-rchal1079> [<https://perma.cc/A76W-TAVD>].

²⁷⁷ See Luc Cohen, *Some Ghislaine Maxwell Jurors Initially Doubted Accusers, Juror Says*, REUTERS (Jan. 5, 2022), <https://www.reuters.com/world/us/some-ghislaine-maxwell-jurors-initially-doubted-accusers-juror-says-2022-01-05/> [<https://perma.cc/D9MT-W6YT>]. David,

out how he failed to disclose such incidents during *voir dire*.²⁷⁸ The juror responded that he did not recall being asked about sexual abuse during pre-trial questioning nor on the screening questionnaire.²⁷⁹ Prosecutors recognized the juror overtly denied having a history of such abuse in the questionnaire and took the rare step of affirmatively asking for a post-trial evidentiary hearing and Maxwell’s attorneys sought an immediate retrial.²⁸⁰ Judge Alison Nathan held the hearing on March 8, 2022, where the juror appeared with an attorney and was compelled to give testimony after being granted transactional immunity.²⁸¹ The juror averred his error was a mistake, alleging feeling rushed by the court atmosphere and stressed by a breakup.²⁸² Judge Nathan denied the application for a new trial, finding the error was not intentional.²⁸³ For the prosecution, it was nothing less than serendipitous to get a juror on the panel who would overlook a question regarding sexual abuse in the selection process only to champion his history, in a Paramount+ documentary, as a critical blow vanquishing a despised defendant.²⁸⁴ While the ease with which Judge Nathan accepted the juror’s explanation will be explored at the circuit level, at least she recognized some type of hearing was warranted.

From *Tanner*’s rigidity in 1987 to *Peña-Rodriguez* cracking open the door with respect to juror malfeasance in 2017, there is a trajectory of the Supreme Court being willing to explore disturbing jury conduct. Within the Second Circuit, there has been a similar trend. There have been cases like *Martha Stewart*’s in 2006, where the circuit made comments it did not have to, namely that it would have been appropriate to have a evidentiary hearing when juror lies were brought to light through a juror going to the media and

described as a 35-year-old Manhattan resident, stated, “When I shared that . . . they were able to come around on the memory aspect of the sexual abuse.” *Id.* David indicated he was using his first and middle name to identify himself. *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ See Winter & Siemaszko, *supra* note 276.

²⁸¹ See Benjamin Weiser & Rebecca Davis O’Brien, *Ghislaine Maxwell Juror Says He ‘Didn’t Lie’ to Get on Jury*, N.Y. TIMES (Mar. 8, 2022), <https://www.nytimes.com/2022/03/08/nyregion/ghislaine-maxwell-trial-juror.html> [<https://perma.cc/M7T9-LY3B>].

²⁸² *Id.*

²⁸³ See Benjamin Weiser, *Juror’s Error Did Not Affect Ghislaine Maxwell Verdict, Judge Rules*, N.Y. TIMES (Apr. 1, 2022), <https://www.nytimes.com/2022/04/01/nyregion/ghislaine-maxwell-trial-juror-ruling.html> [<https://perma.cc/BTM8-3P6L>]. Maxwell’s attorneys argued that had the juror told the truth, he would have been challenged and excluded for cause. *Id.*

²⁸⁴ See Paramount+, *Ghislaine, Partner In Crime*, YOUTUBE (Apr. 5, 2022), <https://www.youtube.com/watch?v=bprozEjhjv4> [<https://perma.cc/87ZN-MH62>]. In the trailer, David states, “Some jurors did have serious credibility issues with some of these victims. I felt like it was very important that I shared my sexual abuse story. I feel like that helped other people come to the conclusion that just because some memories are fuzzy doesn’t mean that they’re not telling the truth . . . After I spoke my story the room was dead silent.” *Id.*

undermining their credibility.²⁸⁵ In the *Parse* decision from 2012, the circuit went a step further in reversing a slew of convictions when a juror could not comprehend her duty of candor. In *Maxwell*, even the prosecution recognized a hearing was necessary when a juror ran to the press to relay their concerning conduct.²⁸⁶ This path, favoring exploration of sufficiently problematic conduct should, at the very least, allow Guzmán another day in court.

VIII. CONCLUSION

Joaquín “El Chapo” Guzmán made an indelible name for himself, and few deny why he is a household name. In the middle of the epic manhunt, Guzmán revealed to Sean Penn, “I supply more heroin, methamphetamine, cocaine, and marijuana than anybody else in the world.”²⁸⁷ The petition for certiorari to the Supreme Court will test whether Guzmán makes a separate contribution to the American justice system as what appears missing was a legitimate contest before any semblance of an impartial jury. Exploring the extent of misconduct reported to *VICE* would not be a fishing expedition, but rather would protect the integrity of the adversary system. In 1987, the Supreme Court labeled it a questionable proposition as to whether our system of trial by jury can endure attempts to perfect it through explorations of jury misconduct.²⁸⁸ The better question is: if our courts ratify the conduct reported by *VICE*, is our system worth preserving? In an era increasingly focused on judicial reform, this case will lend considerable voice to whether juror oaths and obligations mean what they should or are just formalities that can be ignored when jurors do the prosecution’s bidding.

Despite the historic limitations imposed on post-verdict inquiries, there are few greater examples of fulfilling the standard of clear evidence of impropriety than a juror running to the press and admitting frequently following the case in the media, using court instructions as a tip to look up media stories, and tutoring other jurors how to lie to the judge. Furthermore, this case highlights how constant juror breaches of reading innocuous media reports inevitably leads to finding something truly prejudicial. If a hearing is not held, Guzmán’s trial will serve as precedent allowing courts to forgive any transgression by jurors who follow media reports of cases they sit on. Judge Cogan’s decision established that if a court can characterize evidence as overwhelming (which can be done in virtually every case a jury has found guilt beyond a reasonable doubt, even one which

²⁸⁵ *United States v. Stewart*, 433 F.3d 273, 306 (2d Cir. 2006). In *Stewart*, the court upheld the denial of a hearing but in what was, perhaps meant to be a guide for future cases, suggested hearings in circumstances where jurors expose their own misconduct in the media, should be granted in the first instance. *Id.*

²⁸⁶ *See Weiser & O’Brien*, *supra* note 281.

²⁸⁷ *See Penn*, *supra* note 207.

²⁸⁸ *Tanner v. United States*, 483 U.S. 107, 120–21 (1987).

took six days to decide),²⁸⁹ defendants will be hobbled from showing prejudice. Plainly, if a court ratifies the conduct of jurors who look up media allegations that a defendant is a child molester with impunity, there is little else that could be more prejudicial. Providing Guzmán a further day in court is more for the probity of our system than providing relief from Guzmán’s life of solitude.²⁹⁰ Even if a new trial is to be conducted, there is little worry of Guzmán walking out the courthouse doors into the Brooklyn sun a free man. With a surprise acquittal or hung jury, Guzmán is likely to be tried in another jurisdiction and, with an unlikely string of wins, could be sent back to the Mexican authorities.

This case brings both timeless and modern technologic principles into play. In terms of timelessness, there remains the rule jurors must avoid the media, especially in high-profile cases, where coverage is unrelenting. The Sixth Amendment right to an impartial jury means one in which every juror is capable and willing to decide the case solely on the evidence.²⁹¹ It should be reaffirmed that jurors who deliberately lie impair the right to an impartial trial and are subject to consequences, including being held in contempt, facing fines, and the threat of prosecution.²⁹²

As for the modern, the type of media the mysterious juror reached out to is revealing. It was not traditional media, such as the *New York Times* but the internet-based *VICE*, popular with a younger audience comprising an increasing percentage of juror pools. The access jurors have to prohibited material with a smartphone establishes the ease of prejudicing defendants when rules are not followed. This terrain begs to be explored at the appellate and Supreme Court level beyond the two “potential” lies Judge Cogan identified. In 2021, the Fourth Circuit explored the issue of jurors following reporter tweets at oral argument in a corruption case of a West Virginia judge, but the decision did not even reference the social media landscape.²⁹³

One final aspect of Judge Cogan’s decision is worthy of reflection for

²⁸⁹ Sonia Moghe, *El Chapo Jury Deliberations Will Stretch Into a Second Week. Here’s Why Jurors May be Taking Their Time*, CNN (Feb. 8, 2019) (noting “[s]ome say the length of jury sessions, over four days so far, makes acquittal look more and more likely”), <https://www.cnn.com/2019/02/08/us/el-chapo-guzman-trial-jurors-deliberation-week/index.html> [<https://perma.cc/ZVY4-GB2E>]; Ruth Brown, *Why is the El Chapo Jury Taking So Long?*, N.Y. POST (Feb. 11, 2019), <https://nypost.com/2019/02/11/why-is-the-el-chapo-jury-taking-so-long/> [<https://perma.cc/8MC2-M62G>] (noting the case is “taking longer than many expected”).

²⁹⁰ See *What You Didn’t See*, *supra* note 63 (noting “[d]ays in court meant human contact for Guzmán” and describing he would start most trial by waving at his wife, which was the only interaction he was permitted with her).

²⁹¹ See *United States v. Parse*, 789 F.3d 83, 99 (2d Cir. 2015) (citing *United States v. Daugerdas*, 867 F. Supp. 2d 445, 470 (S.D.N.Y. 2012) (quoting *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554 (2011))).

²⁹² *Id.* at 111 (first citing 18 U.S.C. § 1621 (perjury); then citing 18 U.S.C. § 401 (criminal contempt); and then citing 18 U.S.C. § 3663 (restitution claims)).

²⁹³ See McGee, *supra* note 211.

the inequity it fully symbolizes. In what is likely a first, Judge Cogan excused juror misconduct based on the jurors' fear of legal repercussions for lying to the court.²⁹⁴ Judge Cogan described the jurors' lies related to the jurors' fears of getting in legal trouble and not of any display of partiality against Guzmán.²⁹⁵ The *VICE* article details Hamilton asked why the juror "didn't fess up" to seeing the reports of Guzmán sexually assaulting minors.²⁹⁶ In response, the juror explained, "I thought we would get arrested," and elaborated, "I thought they were going to hold me in contempt."²⁹⁷ This concedes knowledge the juror's conduct was both wrongful and illegal. The juror also revealed his stance that one does not rat on their fellow wrongdoers. This outlook is to be expected of one of Guzmán's *sicarios* rather than of a citizen performing their civic duty. The failure to dig into this attitude should not be glossed over.

Revealingly, the juror told Hamilton, "I'm either brave or stupid It could go either way."²⁹⁸ If the juror understood what he or she was doing, it was a diabolical act of genius only a fiction writer could imagine; namely, that a lay juror could go to the press, lay out the host of ways he or she and the rest of the runaway jury broke fundamental rules in the most significant drug trial the world has ever witnessed, and face no repercussions. The funny thing is—that is exactly what happened.

²⁹⁴ See *United States v. Loera*, No. 09-CR-0466, 2019 U.S. Dist. LEXIS 111566, at *37 n.11, *65–66 (E.D.N.Y. July 3, 2019).

²⁹⁵ *Id.* In the portion of the decision denying a new trial, Judge Cogan stated, "The article does not support that the jurors lied because they harbored any biases against defendant or in favor of the Government Rather, the juror told *VICE* that they lied because they were afraid they would be arrested or held in contempt of court for seeking out media coverage of the case." *Id.*

²⁹⁶ See *Inside El Chapo's Jury*, *supra* note 5.

²⁹⁷ *Id.*

²⁹⁸ *Id.*