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Long Gone! When to Recall Discharged Juries

Maria T. Ciccolini

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LONG GONE! WHEN TO RECALL DISCHARGED JURIES

*Maria T. Ciccolini**

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I. INTRODUCTION

Walter Smith, a 33-year-old who was mentally handicapped, died tragically while living at a Pennsylvania private group home called Greenwich Home for Children, Inc.¹ This home is a Community Rehabilitation Residential Service where mentally handicapped people live and are cared for by professionals. Walter suffered from an eating disorder known as food shoveling, where he would shove excessive quantities of food in his mouth at one time. In addition, he suffered from a hypoactive gag reflex which made him abnormally susceptible to choking. For these reasons, those caring for him needed to take special precautions to prevent him from choking. The professionals at Greenwich were fully aware of his condition and were trained to feed him appropriately. On the day of his death, Walter had been given two peanut butter sandwiches cut up into tiny pieces. While his supervisor had stepped out, he had shoved all of the pieces into his mouth and began choking. Despite efforts to save him, Walter choked to death on the sandwich.

Walter’s parents brought a negligence claim and sought compensatory and punitive damages. Imagine a scenario where the jury had returned a verdict of gross negligence, but had awarded damages consistent with simple negligence rather than with gross negligence. After the verdict was read, the jury was dismissed, and all jurors left the courtroom before the judge or counsel realized the inconsistent verdict.

In the scenario where a jury is dismissed after reaching an inconsistent verdict, a federal judge has newly adopted authority. In the

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1. This anecdote has some facts taken from *Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 4591 (3d Cir. 1990). Other facts are hypothetical and made up by the author. This anecdote will continue in Section III of this Article.

case of *Dietz v. Bouldin*, the United States Supreme Court decided that federal judges can recall juries to amend the error.² The judge must be certain there is no prejudice to the jury, however, and address four factors laid out by the Court.³

This Article will explore those four factors and will ultimately argue for a bright-line rule that balances the risk of prejudice with the burdens of granting a whole new trial. This proposed rule is consistent with the long-standing principle of not recalling a jury once discharged because the risk of prejudice is far too high once the jury disperses and resumes their everyday lives. The proposed rule tightens the wide-latitude of discretion afforded to federal judges by the *Dietz* decision. Judicial discretion is of course inevitable, but its effects can be dangerous if not restrained.⁴

Section II of this Article will discuss the long-standing principle stemming from the English common law that judges should not recall a jury once it has been discharged. It will also explain how this concept translated similarly into the American judicial system, and it will provide substance on how the federal circuit courts have handled this issue in varying ways leading up to *Dietz*. Section III of this Article will discuss the *Dietz* test, and it will also describe the petitioner's argument on appeal about why the jury should not have been recalled in *Dietz*. This section will also set forth the main argument that the Supreme Court test is insufficient to ensure that claimants before the court are granted a fair outcome. I will analyze the factors of the *Dietz* test and apply them to a hypothetical case. The hypothetical will show that there is too great of a chance that the jury will be prejudiced and that the judge would nevertheless use that original jury to amend the verdict. In Section IV a new test is then introduced: a bright-line rule that is more fair and keeps the sanctity of the jury. It balances the potential risk of prejudice with the likely burdens that come with starting a whole new trial with an entirely new jury. The presumption should be that a new trial will be granted *unless* the risk of prejudice is less than the burden of starting a new trial. Additionally, to assess prejudice, judges should use a jury questionnaire to help determine if there was any prejudice. My proposed test will also be applied to the same hypothetical case and indicate how it is a better test for determining prejudice to prevent partial juries. In this section the issue

2. 136 S. Ct. 1885 (2016).

3. *Id.*

4. Sarah M.R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgement*, 64 U. MIAMI L. REV. 947, 948 (2010) ("Discretion . . . can be a slippery and nebulous concept.").

of post-trial motions and objections will also be discussed with the implications of *Dietz*. Section V of this Article will summarize the main points and encourage the Court to adopt a stricter test than what is set forth in *Dietz*.

II. THE HISTORIC PRINCIPLE OF NOT RECALLING DISCHARGED JURIES

American jurisprudence relied on the precedent set by the 1600s English common law that prohibits dismissed juries from being recalled to amend their verdict.⁵ In a case questioning the re-summoning of a dismissed jury, the English court held that the same jury cannot be called back to try the same case or same issue in the case.⁶ The English courts also originated the concept of sequestering jurors during their deliberations so that they could be kept free of prejudice.⁷ It was such a critical component of conducting fair trials that if the judge was leaving town and the jury had not yet reached a verdict, the jurors would have to stay together and be taken around with the judge to the other circuits until they had finished deliberating.⁸

A. *The Longstanding Principle*

Subsequently, the first American courts to deal with these issues expressed the same concerns about alleviating prejudice from juries and prohibiting a recall post-discharge. For example, in 1822, the Maine Supreme Court held that only a clerical mistake in the verdict could be amended by the court itself.⁹ However, if the mistake was more substantial, for instance if the wrong party was awarded damages or if the wrong sum was indicated, the only option for the court was to set aside the verdict and call for a new trial.¹⁰ The option of re-calling the jury was never discussed.¹¹ This was similar to an 1842 Ohio Supreme Court decision where the trial court allowed a recall of a discharged jury because

5. Brief for Petitioner at *27, *Dietz v. Bouldin*, 136 S. Ct. 1885 (2016) (No. 15458), 2016 WL 792077 (citing *Loveday's Case*, 8 Coke Rep. 65b, 65b, 77 Eng. Rep. 573 (1608)) [hereinafter Brief for Petitioner].

6. *Id.*

7. BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 375-76 (Wayne Morrison ed., 2001) (1768). *See also* Brief for Petitioner, *supra* note 5 (citing *Commonwealth v. M'Caul*, 3 Va. (1 Va. Cas.) 271, 305-06 (Va. 1812)) (granting a new trial where strict segregation was not maintained even though "there might be and probably was no tampering with any juryman in this case").

8. Brief for Petitioner, *supra* note 5, at *28.

9. *Little v. Larrabee*, 2 Me. 37, 37 (1822).

10. *Id.* at 39-40.

11. *Id.* at 37-41.

the jury had written a verdict on only one of the two counts.¹² Overruling the trial court decision, the court denied the recall of the same jury because it would “jeopardize the jealous guards with which the law has surrounded jurors, to insure the pure administration of justice, and to protect the citizen.”¹³ The court articulated that there could be no case where the jury could make an amendment to the verdict once the jury has been discharged.¹⁴ The same decision was made in 1836 by the General Court of Virginia when a new trial was granted when a mistake was made, despite the fact that only one juror had physically left the courthouse.¹⁵ In fact, the juror had only gone about 50 yards or so and was even accompanied by a sheriff.¹⁶ Even then, the court would not approve of the verdict being changed by that original discharged jury.¹⁷

The judiciary has also dealt with the issue in the modern era, and several jurisdictions have ruled in favor of not reconvening a discharged jury.¹⁸ The Supreme Court of Arkansas ruled on this issue in 2002 when it overturned a trial court’s decision to recall a discharged jury.¹⁹ The state’s highest court held that jurors may only amend verdicts *prior* to being discharged because at that time they still have the power to do so and are not susceptible to any prejudice.²⁰ Though the foreman said the jurors had only spoken to each other (and not anyone else) once discharged, the court reasoned that the jury could not be reconvened.²¹ Only when jurors have stayed as a single body in the presence of the courtroom—where not even the *appearance* of taint can occur—should the jury be reconvened.²²

12. Sargent v. State, 11 Ohio 472-74 (1842).

13. *Id.* at 474.

14. *Id.*

15. Mills v. Commonwealth, 34 Va. 751, 751-52 (1836).

16. *Id.*

17. *Id.* at 752. The discharged jurors actually came back and amended the verdict, but then the judge ruled to set aside the verdict.

18. Moreover, in 2012 the Administration Office of the United States Courts published a handbook for trial jurors in the district courts to use for their own reference. It tells the jurors that once they are dismissed by the judge they can resume their normal daily lives. There is nothing in the handbook that discusses the ability of a federal judge to reassemble the jury after being told they are free to go. ADMIN. OFFICE OF THE U.S. COURTS, HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS, 9-14 (2012), <http://www.uscourts.gov/sites/default/files/trial-handbook.pdf> [<http://perma.cc/WEL7-USZR>]

19. Spears v. Mills, 69 S.W.3d 407, 413 (Ark. 2002). The jury had initially awarded \$0 in damages, and then came back and awarded \$5,900. *Id.* at 410.

20. *Id.* at 413.

21. *Id.*

22. *Id.* See Nails v. S&R, Inc., 639 A.2d 660, 667 (Md. 1994) (holding that the jury in a civil case could only amend the verdict due to an inconsistency, ambiguity, or incompleteness up until the jury is discharged); see also Preferred Risk Mut. Ins. Co. v. Stuart, 395 So. 2d 980, 988 (Ala. 1981)

Similarly, a few years after *Spears*, the Supreme Court of Montana held that a Montana trial court erred in reconvening a dismissed jury because two of the jurors had *ex parte* communication about the verdict with counsel.²³ The court further reasoned that juries are to be supervised, and that once the jury is dismissed, it is left to its own devices and is too free to be brought back and change a verdict.²⁴

Most importantly, the Federal Rules of Civil Procedure dictate how and when the jury can be instructed, and nowhere in the rules does it allow a recall of a discharged jury.²⁵ On the contrary, the rules state that “the court may instruct the jury at any time *before* the jury is discharged.”²⁶ The plain language indicates that juries cannot be instructed and are to return to being ordinary citizens once dismissed by the judge.²⁷

B. *The Circuit Split Preceding Dietz v. Bouldin*

Prior to the Supreme Court decision, there was a slight circuit split on the issue of whether judges had the authority to reconvene a discharged jury.²⁸ The majority of the circuit courts that had ruled on the decision held that judges may recall discharged jurors if, in the totality of the circumstances, they were not subjected to outside influences.²⁹ The Fourth Circuit Court of Appeals was the first circuit court to rule on this issue.³⁰

(holding that the trial court erred in recalling the jury because the jury was discharged and the trial judge had retired to its chambers so was not in control of the courtroom when counselor spoke with a juror and realized the jury rendered the wrong verdict); *People v. Hendricks*, 737 P.2d 1350, 1352 (Cal. 1987). In *People v. Hendricks*, the court held that it was gross error for the lower court to recall a jury that had been discharged for over five months, whether properly or not, because the court had lost control over that jury. The court cited *People v. Grider*, 246 Cal. App. 2d 149 (1966) another case where the court had lost control over a jury, only this time the jury had been out of the jury box for a mere nine minutes. *Hendricks*, 737 P.2d at 1359.

23. *Pumphrey v. Empire Lath & Plaster*, 135 P.3d 797, 803 (Mont. 2006) (citing *Estate of Spicher v. Miller*, 861 P.2d 183, 185 (Mont. 1993)) (“[I]f after being discharged and mingling with the public, jurors are permitted to impeach verdicts which they have rendered, it would open the door for tampering with jurors and would place it in the power of a dissatisfied or corrupt juror to destroy a verdict to which he had deliberately given his assent under sanction of an oath. . .”).

24. *Id.* at 803.

25. FED. R. CIV. P. 51.

26. FED. R. CIV. P. 51(b)(3) (emphasis added).

27. *Id.*

28. The circuit courts were split in this way on the issue: the Second, Third, Fourth, Seventh, and Ninth Circuits all agree with a totality of the circumstances approach. On the contrary, the Eighth Circuit held that a bright-line rule is necessary. See *infra* notes 31-50 and accompanying text.

29. *Dietz v. Bouldin*, 794 F.3d 1093, 1097 (9th Cir. 2015), *aff'd*, 136 S. Ct. 1885 (2016).

30. *Summers v. United States*, 11 F.2d 583, 586 (4th Cir. 1926). This decision established an exception to the general rule that discharged juries cannot be recalled. The exception allows for a recall when the discharged jury still had remained an undispersed unit under the control of the court. *Id.*

In this 1926 case, the judge had said, “[y]ou are discharged” to the jury; however, the court held that just speaking those words was not enough to prohibit recalling the jury because the jury was still an “undispersed unit, within the control of the court, with no opportunity to mingle with or discuss the case with others.”³¹ Thus, this court gave more meaning to the jury’s actual conduct than to the judge’s spoken words ordering discharge.³² Similarly, in 1994, the Seventh Circuit Court of Appeals ruled that a jury was still able to be recalled and polled despite being technically discharged.³³ The court’s reasoning was that the jury had not yet left the courthouse; therefore it could still be controlled by the court.³⁴ In fact, the jurors were sitting in the jury room alone and untainted by any outside sources, waiting to be escorted to the parking lot.³⁵

The Ninth Circuit Court of Appeals’ decision of the *Dietz* case was decided in conjunction with these preceding opinions.³⁶ It agreed with the reasoning in the Third Circuit that a momentary release of the jury “did not subject them to outside influence.”³⁷ Though the jurors may be subjected to outside influences once dismissed, the court reasoned that such influence is not *guaranteed* to occur.³⁸ It added a new layer that the other circuit courts before it failed to do—require that the court and counsel (if permitted by the court) consider the jury’s actions from the time they were dismissed to the time they were recalled.³⁹ The court emphasized that this power to recall should be the exception and not the rule, “lest the sanctity of untainted jury deliberations be compromised.”⁴⁰

31. *Id.*

32. *Id.*

33. *United States v. Marinari*, 32 F.3d 1209, 1209-15 (7th Cir. 1994). Another issue in this case was whether or not the case had been made “final.” The court stated there must be a “terminating event” that brings to life the judge’s order that the jury is dismissed. The court, echoing similar thoughts from the *Summers* court, see *supra* notes 30-32 and accompanying text, determined that the jury is discharged when they actually separate or disperse, i.e., are no longer a controlled unit. *Id.* at 1213-14.

34. *Id.* at 1214.

35. *Id.* The Second Circuit Court of Appeals in 2010 came to a similar conclusion that juries that had been discharged but that had not yet dispersed could be recalled in order to re-read the verdict form which was inconsistently read the first time. *United States v. Rojas*, 617 F.3d 669, 669-79 (2d Cir. 2010). The Third Circuit Court of Appeals also decided that a jury that was dismissed and had exited the courtroom but that was immediately brought back was an appropriate action of the judge because the members did not “interact with any outside individuals, ideas, or coverages of the proceedings.” *United States v. Figueroa*, 683 F.3d 69, 73 (3d Cir. 2012).

36. *Dietz v. Bouldin*, 794 F.3d 1093, 1093-1102 (9th Cir. 2015), *aff’d*, 136 S. Ct. 1885 (2016).

37. *Figueroa*, 683 F.3d at 73.

38. *Dietz*, 794 F.3d at 1099.

39. *Id.*

40. *Id.* at 1100.

The Eighth Circuit is the lone circuit court to hold that there must be a bright-line rule determining whether or not judges can recall dismissed juries.⁴¹ In *Wagner v. Jones*, the court found that the district judge erred in recalling a jury that was discharged after the court declared the case a mistrial.⁴² The court was unaware that the jury had reached a verdict on Count I of the claim, and wrongly thought that both Count I and Count II were undecided.⁴³ The bright-line rule of this court is that once a jury has been dismissed, it “can no longer render, reconsider, amend, or clarify a verdict.”⁴⁴ Not only did the court find that this bright-line rule was more aligned with precedent, but the court also found that it actually ensures that the verdict is not tainted by outside prejudice.⁴⁵ Furthermore, the court determined that the amorphous rules, such as the rule later determined in *Dietz*, “leaves much to chance.”⁴⁶ The bright-line rule anticipates that jurors are more or less likely to be prejudiced by outside influences if the design of the courthouse is structured a certain way and if there are many people mingling outside the courtroom.⁴⁷ The Eighth Circuit also noted that the district judge who recalled the jury had not made it clear to the jurors why they were being recalled—to rescind the mistrial.⁴⁸ Most importantly, because the jury was discharged, there were no instructions given to the jurors that they could not speak to one another or to any other people about the case.⁴⁹

Despite the fact that the Ninth Circuit took the same position that the majority of the circuit courts had, the ruling of the Eighth Circuit and other cases like *Wagner* (that reject the exception in *Summers*) shed light on the concerns that have now become more serious with the Supreme Court’s resolution of the circuit split.⁵⁰

41. *Wagner v. Jones*, 758 F.3d 1030, 1030-37 (8th Cir. 2014).

42. *Id.*

43. *Id.* at 1033.

44. *Id.* at 1035.

45. *Id.*

46. *Id.*

47. *Id.* at 1035-36.

48. *Id.* at 1036.

49. *Id.* The court notes that there is a “marked difference between an admonished jury” that leaves the courthouse supervision knowing it still has to come back and decide a verdict, and one that leaves the courthouse supervision “under the impression that the case is over and their duties complete.” *Id.* at 1035 n.9.

50. See *Mohan v. Exxon Corp.*, 704 A.2d 1348, 1352 (N.J. Sup. Ct. App. Div. 1998) (“Once the jury is beyond the control of the court and relieved from the adherence to and strictures of court instruction (in this case for four days), the jury is no longer a functioning entity capable of resurrection at the call of a judicial officer.”); see also *Pumphrey v. Empire Lath & Plaster*, 135 P.3d 797, 804 (Mont. 2006) (“We adopt the rule that a jury lacks any authority to revisit, alter or amend its verdict—including via juror polling—after the trial court has discharged the jurors and any of them have left

III. *DIETZ V. BOULDIN* AND THE PREJUDICE TEST FOR DECIDING TO RECALL A DISCHARGED JURY

A. *The Facts of the Case*

The state court case that made its way to the highest court in the country involves a typical driving accident.⁵¹ Rocky Dietz brought this case against Hillary Bouldin to recover for injuries sustained in a car collision.⁵² The district court stipulated to damages of \$10,136 for Dietz's medical expenses.⁵³ The only issue for the jury was deciding if Dietz should recover *more* than the stipulated amount of \$10,136.⁵⁴ While the jury was deliberating, the jury asked the judge about Dietz's medical bills via a note.⁵⁵ The jurors wanted to know if the bills had been paid and, if so, who had paid them.⁵⁶ Because of the previous stipulation, the judge responded that the jury question was irrelevant, misleading the jury to award \$0 in damages.⁵⁷ Before the judge could realize the legally incorrect verdict, the jury was dismissed and all of the members had left the courtroom.⁵⁸

All of the jurors had remained in the building lingering in the hallways, with the exception of one who had left the building but had not gone too far.⁵⁹ Once the clerk had gathered all of the jurors and the petitioner had objected, the judge recalled the jury and brought them back into the courtroom. The judge questioned the jurors as a group, asking them collectively whether or not they had spoken to anyone in the interim.⁶⁰ The judge was certain after the questioning that there was no prejudice because the jurors unanimously stated they had not spoken to anyone about the case.⁶¹ The jury was instructed to come back the next day, where it awarded Dietz \$15,000 in damages, amending the previous

the presence, control and supervision of the court."); *Melton v. Commonwealth*, 111 S.E. 291, 294 (Va. 1922) ("When the court announces [jurors] discharge, and they leave the presence of the court, their functions as jurors have ended, and neither with nor without the consent of the court can they amend or alter their verdict. The sanctity of jury trials cannot be thus subjected to the hazard of suspicion.").

51. *Dietz v. Bouldin*, 136 S. Ct. 1885 (2016).

52. *Id.* at 1888.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

final verdict of \$0.⁶² After the Ninth Circuit affirmed the lower court decision, the United States Supreme Court reviewed the case and applied standards of inherent authority bestowed to judges.⁶³ The Court reviewed the requirements of inherent authority and affirmed that recalling a dismissed jury was part of federal judges' authority; it held that the lower court had not abused its discretion.⁶⁴ First, the Court found that recalling a dismissed jury to correct an error in the verdict is a reasonable response to a problem.⁶⁵ Secondly, the Court determined that there was not any other rule or statute preventing the court from creating this new power.⁶⁶ Lastly, the Court noted that the inherent power must be "carefully circumscribed" so that a jury is not wrongfully prejudiced.⁶⁷

B. The New Precedent Set by Dietz v. Bouldin

The Court expressed four factors that district court judges need to use to determine whether or not a dismissed jury can be fairly recalled to change the verdict.⁶⁸ The first factor the Court created as part of its prejudice test is the length of delay between the discharge and the recall.⁶⁹ According to the Court, the jury is more likely to be prejudiced the longer they have been away from the court's instruction.⁷⁰ The Court, however, leaves the federal court judges with the decision of deciding exactly how long is too long.⁷¹ The second factor the Court discussed was whether or not the jurors had talked to anyone about the case since being away from the court and from their juror duties.⁷² The Court suggests that even seemingly insignificant comments from people who watched the trial could be enough to prejudice a juror.⁷³ The third factor the Court analyzed

62. *Id.*

63. *Id.*

64. *Id.* at 1889.

65. *Id.* at 1888. The Court uses standards from two of its prior decisions, noting that district courts have the power to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962). It also applied the standard from *Degen v. United States* that an inherent power must be "a reasonable response to the problems and needs" of the court's requirement to uphold justice and that it cannot contradict an express limitation required by statute. 517 U.S. 820, 823-25 (1996).

66. *Dietz*, 136 S. Ct. at 1889. The Court did not find a limitation in FED. R. CIV. P. 51(b)(3) or in any other rules regarding post-verdict remedies. *Id.*

67. *Id.*

68. *Id.* at 1894-95.

69. *Id.* at 1894.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

was whether or not the jury was exposed to any reactions upon rendering the verdict, either while they were still in the courtroom or while they were walking throughout the courthouse.⁷⁴ Lastly, the Court requires that federal judges ask the jurors about their smartphone or Internet access after dismissal.⁷⁵ The Court realizes, though without giving it enough weight, that people check their phones quite often and that prejudice can come quickly if jurors accessed their phones at all post-discharge.⁷⁶ Upon applying all of these factors, the Court upheld the Ninth Circuit's and the district court's decision to recall the jury in this case because it was not wrongly influenced and could still fairly serve its duty.⁷⁷

C. *The Petitioner's Arguments*

The petitioner's argument is strict—recalling is prohibited. The two broad arguments supporting this stance are as follows: (1) a federal court lacks the inherent authority to recall discharged jurors; and (2) a bright-line rule against recalling discharged jurors appropriately addresses issues of fairness and finality.⁷⁸

1. Lack of Authority Argument

The petitioner argued that there are no rules in civil procedure regarding such inherent authority and that there is a fundamental principle that jurors go back to their normal daily lives once discharged. The most applicable rule, Federal Rule of Civil Procedure 51(b)(3), states that a jury can be instructed by the court *before* it is discharged.⁷⁹ Of note, there is not an option for a district court to reopen a case to change the verdict after the jury is discharged.⁸⁰

Furthermore, once jurors are discharged, they “return to being an ordinary citizen,” and the court is powerless to give more instruction to them.⁸¹ While serving as jurors, they lose some of their individual

74. *Id.*

75. *Id.* at 1895.

76. *Id.* (“Prejudice can come through a whisper or a byte.”).

77. *Id.* at 1897 (“Federal district courts have a limited inherent power to . . . recall a jury in a civil case. District courts should exercise this power cautiously and courts of appeals should review its invocation carefully.”).

78. Brief for Petitioner, *supra* note 5, at *7-21.

79. *Id.* at *10-12.

80. *Id.* at *16. This is similar to FED. R. CIV. P. 50(b) as well as FED. R. CRIM. P. 33, which both do not explicitly allow a dismissed jury to be recalled by a district court. *Id.* It is also similar to FED. R. CIV. P. 48(c) and FED. R. CRIM. P. 31(d) which state that counsel's request to poll the jury terminates once the jury is discharged. *Id.*

81. Brief for Petitioner, *supra* note 5, at *18.

freedoms and are asked to follow specific instructions, such as to not access press coverage and to avoid discussions with people about the case.⁸² However, as soon as the jury is discharged by the court, the “protective shield” is removed and the jurors are free to use their smartphones, hold conversations, watch the news, and reconsider their decisions made in the deliberating room.⁸³

The petitioner also argues that none of the three steps that decide if a district court has this inherent authority have been met in this case.⁸⁴ The first step questions whether a relevant statute or rule overrides judges’ alleged inherent power,⁸⁵ and as previously stated, Civil Rule 51 (b)(3) directly conflicts with judges’ power to recall juries post-discharge.⁸⁶ The court then must consider whether there is any evidence of a special history of recalling discharged jurors.⁸⁷ I discussed earlier in this Article that there is a history of judges *not* reconvening a discharged jury, per the bright-line rule.⁸⁸ Lastly, the court must determine that if there is a history of this alleged power to recall, by assessing whether it is “necessary to the exercise” of the federal court’s powers and whether it is sufficiently “limited by the necessity giving rise to its exercise.”⁸⁹ Without this ability to recall, however, judges can still exercise all of their powers, such as managing their own dockets and ordering new trials.⁹⁰

2. Bright-Line Rule Argument

The petitioner argued that a bright-line rule prohibiting the recall of discharged jurors promotes better assurance of fairness and protects the “sanctity of jury verdicts.”⁹¹ Not only may jurors be prejudiced by others

82. *Id.* at *19.

83. *Id.* at *8. *See also* Capital Cities Media, Inc v. Toole, 463 U.S. 1303, 1306 (1983) (“Any interest in shielding jurors from pressure [that occurs] during the course of the trial becomes attenuated after the jury brings in its verdict and is discharged.”).

84. Brief for Petitioner, *supra* note 5, at *13.

85. *Degen v. United States*, 517 U.S. 820, 823 (1996) (“In many instances the inherent powers of the courts may be controlled or overridden by statute or rule.”).

86. Brief for Petitioner, *supra* note 5, at *23 (“Recalling discharged jurors for further service in a case would ‘circumvent or conflict with’ a variety of civil and criminal rules constricting a federal court’s authority upon discharge.”).

87. *Id.* (“There is no ‘long unquestioned’ history of courts recalling discharged jurors for further service in a case.”).

88. *See supra* notes 5-27 and accompanying text.

89. Brief for Petitioner, *supra* note 5, at *23.

90. *Id.* at *31-32. (“Even absent the power to recall discharged jurors, existing rules already provide ample procedures for remedying an invalid or ambiguous verdict after the jury has been discharged: most notably, a new trial.”).

91. *Id.* at *36.

while discharged, but jurors may change their minds once outside of the deliberation room and after the verdict is rendered.⁹² Jurors may re-think their decisions by “merely having additional time to reflect.”⁹³ Finality is also promoted by a bright-line rule prohibiting this authority for federal judges because there will be less re-opening of cases.⁹⁴ The justification for allowing the recall of discharged jurors—that it is more cost-effective than starting a new trial—is not enough to outweigh the more important issues. Both issues of fairness and finality are essential to keeping a jury trial a sacrosanct right.

IV. REPLACING THE TEST FROM *DIETZ*

A. *Dietz’s Prejudice Test Allows Too Much Judicial Discretion*

The Supreme Court’s new prejudice test does not afford enough protection to ensure that dismissed juries are not changing verdicts in unfair ways post-recall. The judges have far too much lee-way in deciding whether or not a case should be given a new trial or whether or not the jury should be recalled to correct the error in the verdict. Imagine if the hypothetical facts below had occurred in the Walter Smith case discussed at the beginning of this Article where the jury’s verdict was legally inconsistent. Using this new Supreme Court test, how would a judge decide what to do?

Upon the jury’s dismissal, the jurors had all left the courtroom. While juror number one was mingling in the hallway just outside the courtroom, she noticed a spectator who had sat through the entire trial walk out of the courtroom with tears streaming down her face. Juror number two had coincidentally made eye contact with Mrs. Smith, Walter’s mother, as she walked by her at the conclusion of the trial. Mrs. Smith mouthed the words “shame on you” to the juror. After leaving the courthouse, before driving home, juror number three texted his wife and said “heading home, we awarded him the right amount of money.” As the juror was driving his wife responds, “I’m sure you did the right thing.” Juror number four went straight home after the trial and searched the Internet for the victim’s obituary, which he found. Juror number five was on the sidewalk near the courthouse waiting for the bus when he did a search on his phone for the

92. *Id.* at *34.

93. *Id.* at *35. *See* Wagner v. Jones, 758 F.3d 1030, 1036 (8th Cir. 2014) (“We hesitate to give a vacillating juror an opportunity to reconsider, after he or she has already been polled and discharged, especially where there is the possibility that the jury, or some of its members, may have been confused in the understanding of the instructions.”).

94. Brief for Petitioner, *supra* note 5, at *38.

defendant Greenwich's website. Jurors numbers six and seven had a brief discussion about the case and made comments that they were both glad it was over. Juror number eight took to Facebook upon arriving home and posted that she was done with her civic duty and felt good about the jury's decision.⁹⁵ In only an hour's time, she had several comments left on her post from her friends. Because of a busy docket, the judge could not recall this exact jury until three days later where the jurors were back to amend the flawed verdict. Assume no other conversations, Internet searches, or social media posts occurred by these or any other jurors.

1. First Factor—Length of Delay Between Discharge and Recall

The Supreme Court noted that the longer the jury has been dismissed, the more likely there will be prejudice because jurors will likely forget key facts from the case and may overlook the importance of the jury's role.⁹⁶ The only specific reference to the length of delay that the Court mentions is stating that the dismissal could possibly last just a few minutes, as it did in that case.⁹⁷ In the hypothetical scenario presented above, the dismissed jury went about their lives for three whole days before they were asked to report back to the courthouse to decide issues on the same case. In that amount of time, the jurors could be exposed to varying amounts of prejudice, from a comment made by a friend to an article on the Internet reporting about how the case turned out. In the Court's test, the other factors may give reasons for a new trial if such exposure occurred. Yet, this time factor alone would not be reason enough to say that the jury should not be recalled.

If in Walter Smith's case the jurors came back after three days and all stated that they did not talk to anyone about the case, did not search the Internet, and did not witness any emotional outcries in the courtroom, then they would be able to sit back in the juror box and change the verdict. Even without experiencing any outside influences, the jurors could still simply change their minds within those three days.⁹⁸ During that time away from the case and away from the instruction of the court, the jurors'

95. See *United States v. Liu*, 69 F. Supp. 3d 374, 386 (S.D.N.Y. 2014) (denying a new trial, although a juror had posted general comments on Twitter about the case but had not included anything regarding the substance of the case).

96. *Dietz v. Bouldin*, 136 S. Ct. 1885, 1894 (2016) ("In taking off their juror 'hats' and returning to their lives, they may lose sight of the vital collective role they played in the impartial administration of justice.").

97. *Id.*; see also *People v. Grider*, 246 Cal. App. 2d 149, 149 (1966) (deciding that nine minutes was too long for the jury to have been dismissed and then recalled).

98. Brief for Petitioner, *supra* note 5, at *34.

own reflections can affect them; they could very likely ruminate about their decision in the case and suddenly change their mind or rethink why they casted their vote the way they had.⁹⁹ Therefore, the Supreme Court should have given a specific time frame for how long would be too long for a jury to be discharged and still come back to amend a verdict. Not knowing where the line will be crossed affords judges too much discretion in assuming prejudice has not occurred while the jury has been discharged for any amount of time.

2. Second Factor—Conversing About the Case

The Supreme Court gave more yet still inadequate guidance in stating its second factor of the prejudice test, which asks whether the jurors had spoken to anyone about the case post-discharge.¹⁰⁰ The Court lists a number of people whom could potentially speak to the jury and taint them, including press, spouses, and witnesses.¹⁰¹ This list, however, is not exhaustive, leaving the possibilities seemingly endless for what kind of person and in what context someone could have an effect on a discharged juror.¹⁰² The Court further provides that even “innocuous comments” about the case, such as saying “job well done,” could constitute prejudice in this scenario.¹⁰³

The Court does not make it explicitly clear, however, how the federal court judge making this decision should characterize the question when asking the jury. It is extremely easy to see how a judge deciding whether to utilize this power to recall a jury could ask this question to the jury hastily and without much description. For example, the transcription could look something like this:

Judge: Now, in this time that you’ve been let go from your duties as a juror, did you speak to anyone about the case?

Foreperson: No, your Honor. No one in the jury spoke to anyone after discharge.

99. *Id.* at *23; see *Gugliotta v. Morano*, 829 N.E.2d 757, 764 (Ohio Ct. App. 2005) (deciding whether or not to recall a dismissed jury, the judge polled each juror asking if there was a potential for prejudice, and one juror stated that her “emotional state had changed when the judge told the jury it was dismissed”).

100. *Dietz*, 136 S. Ct. at 1894.

101. *Id.* Other people the Court mentions are court staff, attorneys, litigants, sketch artists, and friends.

102. *Id.* The Court lists people who could prejudice the jury and then says “and so on,” indicating that it foresees the impossibility of limiting the type of prejudice that could occur. *Id.*

103. *Id.*

Through this quick dialogue, it would be easy for a juror to not realize that a comment such as in the example above, “job well done,” is considered a prejudicial conversation, according to the rule set out by the Supreme Court. Only a very astute juror would, before answering, ask the very necessary question: “What type of comments or conversation constitutes having spoken to someone about the case?” In most cases, if the judge does not make it clear that even brief comments in passing could have prejudicial effects, the jury itself will not presume that they do.

Outside conversation also means that prior to the case ending the jurors are not to discuss the case amongst themselves.¹⁰⁴ Typical jury instructions include a segment on how the jurors may not talk to each other about the case until the end and unless every juror is present and no one else is.¹⁰⁵ In this new scenario of recalling a discharged jury, clearly the jurors have already spoken to each other about the case because the verdict was rendered. However, post-discharge, the jurors are free to speak to each other outside of the entire jury’s presence, so the Supreme Court’s factor asking whether jurors had spoken to anyone should also include the other juror members themselves. Upon being dismissed and away from the court’s instruction, jurors will likely talk amongst themselves about the case. Yet again, assuming that the judge will ask this specific question is assuming too much. At the time of polling, the judge may simply forget to ask if they spoke to each other or could refuse to ask this question specifically to keep the trial moving.¹⁰⁶

In the hypothetical case of Walter Smith, there are four jurors who had technically spoken to another individual about the case. The Supreme Court’s factor test, however, will not expose all of these conversations so

104. HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS, *supra* note 18 (“Jurors should not discuss the case even among themselves until it is concluded.”).

105. See MICHIGAN SUPREME COURT, MODEL CIVIL JURY INSTRUCTIONS, courts.mi.gov/Courts/MichiganSupremeCourt/mcji/Documents/Model%20Civil%20Jury%20Instructions.pdf [https://perma.cc/W7KJ-J3XL] (last visited Jan. 18, 2017). The court has the choice to read Alternative A, which allows the jurors to speak to each other during the trial’s recess so long as they follow the rest of the rules, or Alternative B, which states:

Before you are sent to the jury room to decide the case, you are not to discuss the case even with the other members of the jury. This is to ensure that all of you are able to participate in all of the discussions about the case, and so that you do not begin to express opinions about the case until it has been submitted to you for deliberation.

Id. at 2-11; see also ILLINOIS COURTS, GENERAL CAUTIONARY INSTRUCTIONS 2, http://www.illinoiscourts.gov/Circuitcourt/civilJuryInstructions/IL_IPI_Civil.pdf [https://perma.cc/8G4R-LTXZ] (last visited Jan. 18, 2017); see also NEW JERSEY COURTS, NEW JERSEY MODEL CIVIL JURY CHARGES, https://www.judiciary.state.nj.us/civil/civindx.html [https://perma.cc/5CGK-NERZ] (last visited Jan. 18, 2017).

106. See *infra* notes 159-161 and accompanying text regarding judges feeling pressured to clear their dockets.

that they are addressed and contemplated as part of the judge's decision to recall. Juror number two may not be thinking that a conversation took place when Mrs. Smith looked at her and mouthed "shame on you." For the juror to mention this, the judge would likely need to clarify that even such innocuous comments are considered conversation. Juror number three who texted his wife about the outcome may not have thought of that as a conversation since he was simply telling his wife what happened but did not discuss the details of the case. Lastly, jurors number six and seven may not tell the judge about their conversation because, without the judge specifically asking, they may assume that conversations amongst jurors did not amount to prejudice and were acceptable, especially considering they have already all deliberated together. These problematic issues would be avoided if the Supreme Court had required judges to be very specific when asking questions about conversations jurors had during the time they were discharged. The importance of this question must not be lost on the jurors; thus, it must not be lost on the judges, either.

3. Third Factor—Exposure to Emotional Reactions

The third factor that federal judges must consider in their decisions to recall a discharged jury is whether or not the jury was exposed to any reactions post-verdict in the courtroom or corridors of the courthouse.¹⁰⁷ This rule recognizes that if jurors witness emotional outcries, cheers, gasps, or the like, they can begin to reconsider their decisions.¹⁰⁸ This type of individual, discrete reconsideration is exactly what the Court is trying to avoid through the new prejudice test. This particular factor is extremely relevant, for "[a]ny judge who has sat with juries knows that in spite of forms [juries] are extremely likely to be impregnated by the environing atmosphere."¹⁰⁹ This particular factor is extremely important because of the fact that spectators can easily affect juries, whether it is unintentional or intentional.¹¹⁰

107. *Dietz*, 136 S. Ct. at 1894.

108. *Id.*

109. *Frank v. Mangum*, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting) (disagreeing with the holding that the rejection of the application for a writ of habeas corpus be affirmed because the jury's decision was affected by the spectators packing the court, by a mob surrounding the court outside, and by the judge conferring with the police chief in the presence of the jury, amongst other issues of prejudice to the jury).

110. *See id.*

When we find the judgment of the expert on the spot, of the judge whose business it was to preserve not only form, but substance to have been that if one juryman yielded to the reasonable doubt that he himself later expressed in court as the result of most anxious deliberation, neither prisoner nor counsel would be safe from the rage of the crowd, we

This factor issued by the Supreme Court does not address exactly *how* the judge asks the jury if it has witnessed any emotional reactions. This creates a double-edge sword: If the judge asks a blanket question whether the jurors have witnessed such emotional responses, they may not know what that entails and thus not disclose everything necessary. Yet, if the judge happened to witness a response of some kind and asks the jury about that specific reaction, then the jurors may all become prejudiced even without witnessing the scene or hearing the emotional response because the judge informed them of it. For example, a judge in Georgia may have accidentally prejudiced the jury by asking if while deliberating any of them witnessed a gathering outside the window in the jury's sight.¹¹¹ A man had tied a noose in a rope and waved it in the jury's view.¹¹² The majority of the jurors responded that they had not witnessed it, but now it creates a dilemma since they are aware that such conduct occurred.¹¹³

Such emotional reactions are more likely to occur in criminal cases where defendants are facing prison sentences and more severe charges.¹¹⁴ In cases where spectators' "demonstrations" made during the trial have led the court to decide whether a new trial, mistrial, or reversal of a criminal conviction should be granted, courts have looked at several factors including the length and nature of demonstrations, as well as the number of demonstrators.¹¹⁵ For example, a Louisiana court granted a new trial when, during the defense attorney's closing argument for a murder trial, a woman ran her finger under her throat.¹¹⁶ Four of the jurors had witnessed the gesture and told the court that they were not affected by it, but the court reasoned that a juror is not competent to show "how that

think the presumption overwhelming that the jury responded to the passions of the mob.

Id.

111. *Douglass v. State*, 110 S.E. 168, 172-73 (Ga. 1921).

112. *Id.*

113. *Id.* at 173. ("The slightest demonstration within the view and comprehension of the jury may have been sufficient to turn the delicate scale of justice, so evenly balanced as it seems to have been during the deliberations of the jury.")

114. *Disruptive Conduct of Spectators in Presence of Jury During Criminal Trial as Basis for Reversal, New Trial, or Mistrial—Gestures, Passive Demonstrations, and the Like*, 3 A.L.R.7th Art. 3 (2015). Trial spectators' conduct affects jurors in criminal cases because "the defendant may feel that the jury has been unfairly influenced when attendees shake fists or glare at him or her or at witnesses, hug or otherwise comfort the victim, or wear clothing or emblems or hold up signs memorializing the victim." *Id.*

115. *Id.* Other factors include: "whether the defendant was acquitted of more serious charges, the strength of the evidence of guilt, whether counsel objected to, or the trial court noted, the first instance of misconduct, the identity of the demonstrating spectator. . . ." *Id.*

116. *State v. Henry*, 198 So. 910, 921 (La. 1940).

influence operated on his mind.”¹¹⁷ Another court offered cautionary instruction to a jury that similarly witnessed spectators’ facial expressions and gestures indicating disapproval of the defense counsel’s closing argument.¹¹⁸ That jury also witnessed the victim’s mother stand, put her hands over her head, and direct applause toward defense counsel.¹¹⁹ These examples are clear instances where the jury was prejudiced during a criminal trial.

However, similar reactions could likely occur in a civil case, such as in the hypothetical case of Walter Smith. Juror number one was exposed to an emotional reaction while he was standing in the corridor of the courthouse and witnessed a spectator leave the courtroom crying. The judge should be “reluctant”¹²⁰ to bring back a discharged jury if it has witnessed reactions to the verdict, but a particular judge may not find a few tears to be considered prejudicial emotion at the cost of ordering a whole new trial. Again, there is too much discretion given to judges regarding this factor. Perhaps this judge has witnessed much more prejudicial types of reactions in the past—such as a spectator coming at the defendant with a chair in the courtroom—so that discrete crying witnessed by only one juror seems insubstantial in comparison.¹²¹ Such comparison should not be a factor in this judge’s analysis of whether jurors were affected by spectators’ emotions, but the *Dietz* test affords federal judges so much latitude that it is possible.

Furthermore, juror number one in Walter’s case may declare to the judge that her decision will not be affected by witnessing the woman crying, but that raises the question of whether anyone can really know how observing such emotions will weigh on one’s ability to make decisions based on the law.¹²² If judges rely on the *Dietz* test, they could possibly taint the jurors accidentally, or they could wrongly ensure that jurors have not witnessed any emotional reactions, despite that every

117. *Id.* at 922.

118. *State v. Weinberg*, 575 A.2d 1003 (Conn. 1990).

119. *Id.*; *see also* *State v. Stewart*, 295 S.E.2d 627, 630 (S.C. 1982) (reversing a judgment for conviction of murder because there were several fits of laughter from spectators and because one juror reported that a spectator had been glaring at her with “obvious disgust” and had made opinionated remarks overheard by other jury members); *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990) (reversing the denial of habeas corpus relief when the court noticed spectators with buttons that read “Women Against Rape” inside the courtroom for a trial on kidnapping and sexual intercourse without consent).

120. *Dietz v. Bouldin*, 136 S. Ct. 1885, 1894-95 (2016) (explaining that witnessing emotional reactions can cause jurors to ask themselves “‘Did I make the right call?’”).

121. *Collier v. State*, 42 S.E. 226 (Ga. 1902) (explaining that the husband of a prosecuting witness in a rape case went after the defendant with a chair and approximately 200 people got up on seats to view the defendant).

122. *See supra* notes 116 and 117 and accompanying text.

claimant's basic rights afford him a fair day in court. The *Dietz* test does not ensure that jurors will understand if they have witnessed a prejudicial reaction, nor does it ensure that they will come forward with the information as they should.

4. Fourth Factor—Access to Smartphones and Internet

Last in the Court's four-factor prejudice test is the factor regarding jurors' use of their smartphones and the Internet.¹²³ Texting one's spouse about the case and using Google to research about the evidence in the case are examples of how a juror could be prejudiced in this way.¹²⁴ The key to this factor seems to be relevance. If jurors texted something to their spouses or used the Internet to search something that had nothing to do with the case, then such use is likely acceptable. The problem arises when a juror uses a phone or the Internet to interact with others, post on social media, or research something relevant to the case. Like all parts of the *Dietz* test, the question is how much prejudice is too much prejudice.

Researching aspects of the case and posting on social media are grounds for jury misconduct, and courts have remedied such cases of misconduct by granting new trials. For example, new trials were granted because of the following juror misconduct: posting on Facebook during the trial and deliberations about having to look at horrible photos;¹²⁵ becoming friends with the victim's mother on Facebook and writing her comments about what she wished would have happened with the verdict;¹²⁶ and researching deferred compensation rules which were material to ten separate counts the defendant was facing.¹²⁷ A conviction was reversed in another case where a juror expressed on Twitter the difficulty in making decisions.¹²⁸ These types of juror misconduct easily cause problems with the present issue. If a judge is to recall a discharged jury, the judge should verify that while discharged no jurors posted content regarding the case, researched information related to the case, or texted/talked about the case. However, the precedent now set in *Dietz* does

123. *Dietz*, 136 S. Ct. at 1895 (“It is a now-ingrained instinct to check our phones whenever possible.”).

124. *Id.* (“Immediately after discharge, a juror could text something about the case to a spouse, research an aspect of the evidence on Google, or read reactions to a verdict on Twitter.”).

125. *United States v. Ganas*, 755 F.3d 125 (2d Cir. 2014).

126. *State v. Webster*, No. 131095, 2014 WL 5861967, at *9 (Iowa Ct. App. 2014).

127. *United States v. LaRoque*, No. 4:12CR881H, 2014 WL 683729, at *4 (E.D.N.C. Feb. 20, 2014).

128. *Dimas-Martinez v. State*, 385 S.W. 3d 238, 246-48 (Ark. 2011). The juror had tweeted on Twitter: “Choices to be made. Hearts to be broken. We each define the great line.” *Id.*

not require that jurors be individually polled.¹²⁹ The *Dietz* test also does not include references to other types of research conducted without using the Internet, such as research from a dictionary or a library reference book.

In the hypothetical case of Walter Smith, three jurors' Internet and social media uses under the *Dietz* test would likely bring about inconsistent analyses of prejudice. Both jurors four and five used the Internet for related material: the victim's obituary and the defendant company's website. Under the *Dietz* test, two judges may look at those facts and come to differing opinions because there is no barometer for what the Court was attempting to make precedent. Is an obituary prejudicial? Does researching the company website matter if what the juror found had already been discussed at trial? Additionally, juror number eight's comment on Facebook may be deemed prejudicial to some judges, while others may view it as simply a general comment not amounting to any level of prejudice.¹³⁰ Judges making this decision would be left to use their own personal opinions about what constitutes a comment or research that is related to the case. The inconsistencies would be great. Without an individual jury poll, judges would never obtain the information necessary to make an accurate decision about whether the social media or outside resources jurors used was so influential as to amount to prejudice.

B. *Solution—Implement A Balancing Test*

Dietz is a step in the right direction because this power afforded to judges prevents cases from being retried for mistakes that could be easily fixed with the same jury. It is no secret that not having a new trial saves both parties time, money, and the distress of not gaining closure sooner, not to mention that it prevents court congestion. In fact, the situation in *Dietz* is in many ways the perfect scenario for when judges *should* recall a discharged jury.¹³¹ However, the guidelines now left to federal judges from this case are hardly guidelines at all; it is difficult for judges to know exactly when to recall juries and when to grant new trials. The Court should instead adopt a more streamlined test that asks judges to consider the risk of prejudice against the burden of a new trial. To enhance fairness to each claimant, if there is a clear mistake with the verdict, the

129. *Dietz*, 136 S. Ct. at 1896-97 (“While individual questioning could be the better practice in many circumstances, *Dietz*'s attorney raised no objection to this part of the court's process. We decline to review this forfeited objection.”). Individual questioning is suggested but not required.

130. See *United States v. Fumo*, 655 F.3d 288, 298 (3d Cir. 2011) (finding that a juror's Facebook post commenting about the case was harmless and did not rise to the level of prejudice).

131. See *supra* notes 51-62 and accompanying text regarding the facts of *Dietz*.

presumption should be that a new trial will be granted unless the risk of prejudice is less than the burden of starting a new trial with an entirely new jury. As opposed to the large discrepancies that could happen using the Supreme Court's test, this test will still enable judges to use their own discretion, but it tightens the amount of latitude and allows for more consistency.

The Federal Rules of Evidence has a similar balancing test for deciding whether or not to exclude relevant evidence.¹³² Rule 403 balances the evidence's probative value with the possible dangers of bringing in the evidence, such as unfair prejudice, jury confusion, and wasting time.¹³³ If one of the dangers substantially outweighs the probative value, the court may exclude the evidence that is otherwise relevant. This kind of balancing act is exactly what is needed for the present issue because it still allows for judicial discretion, but it offers an actual test to consult, not just mere guidelines.

1. Proposed Test—A Deeper Look at the Risk of Prejudice

a. Jury Questionnaire

Practically speaking, a federal judge looking to recall a jury post-verdict should ask about instances of prejudice to each juror before allowing the same jury to sit again on the case.¹³⁴ Rather than asking these questions to the jury collectively, the judge should issue a type of written jury questionnaire to each juror to complete individually without discussion with other jurors. The questionnaire can therefore ask more specific questions and give examples of the kind of prejudice that may have occurred while they were discharged. This way, judges will not have to make examples on the spot of how prejudice can occur, and the form can be consistently used by each judge in the jurisdiction. There will be more consistency in these types of judicial decisions regarding recall, and these forms will better document what informed the judge's decision for record-keeping purposes if the case is appealed.

132. FED. R. EVID. 403. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.*

133. *Id.*

134. See *Dietz v Bouldin*, 794 F.3d 1093-1102 (9th Cir. 2015), *aff'd*, 136 S. Ct. 1885 (2016) (requiring that the court poll the jurors upon being recalled); see also *supra* notes 39-40 and accompanying text.

This questionnaire would work as a type of jury polling or inquiry so that the judges receive the most accurate information from each individual juror. The Federal Rules of Criminal Procedure has a similar jury polling that must take place upon a party's request or which the court may issue on its own.¹³⁵ In criminal cases, this polling takes place post-verdict but prior to the discharge of the jury, and the purpose of it is to assure that the jury made a unanimous decision without any coercion of jurors to agree to the verdict.¹³⁶ Regarding the present issue, judges would issue this individual polling via a standard written questionnaire so that jurors are not influenced by other jurors' verbal responses made to the judge.¹³⁷

b. Length of Delay—Must Recall within the Same Day of the Verdict

As previously mentioned, juries have been viewed as a single unit made up of individuals who only revert back to their individual mindsets, so to speak, once they are dispersed back into society.¹³⁸ Upon dismissal, jurors leave the environment where they rationalized their decision, and they leave the people whom they deliberated with about the verdict. It is not surprising that the Court fears the longer the jury has been dismissed, the more likely it is susceptible to some kind of prejudice.¹³⁹ For these reasons, federal judges should not be able to recall a jury that has been discharged for over a day. Only if a mistake was found and the jury could be recalled within the same day, noting the hours of the court, can the same jury be asked to amend a verdict. If there is no possibility of bringing in the same jury on the day that the mistake was made and the verdict read, then the judge must automatically award a new trial.

135. FED. R. CRIM. P. 31(d). *See also* FED. R. CRIM. P. 31(d) advisory committee's notes. There is no actual language in the rule that requires polling be done individually, but the Committee recommends it is. *Id.*

136. FED. R. CRIM. P. 31(d) advisory committee's notes.

137. *See id.* Collective polling of jurors does not save much time and is not adequate in determining that a juror has not been coerced by others because there is no certainty that a juror who was coerced would speak up as the dissenting voice.

138. *See* *Porret v. City of New York*, 169 N.E. 208, 208 (N.Y. 1929). Chief Judge Cardozo stated that after discharge the jury "has ceased to be a jury, and, if its members happen to come together again, they are there as individuals, and no longer as an organized group, an arm or agency of the law." *Id.*

139. *See supra* notes 69-71 and accompanying text.

c. Conversation

A question that must be asked as part of the jury questionnaire, and which is in line with the *Dietz* prejudice test, is whether or not the jury members spoke to anyone about the case post-verdict.¹⁴⁰ It must be specific and include examples such as spouses, bailiffs, friends, spectators of the trial, and even other jurors if spoken to outside of the jury as a whole. The question must also define “conversation” to mean simply any communication whatsoever with another person about any aspect of the case. The questionnaire would cover this inquiry best if it included the Supreme Court’s description that even innocuous comments said to a juror would count as prejudice.¹⁴¹ The question should be broad enough to include conversations made in person, via cell phone, or via social media. The questionnaire should include a space for jurors to write exactly what was discussed about the case, as well as whom the conversation was with. *Dietz* does not allude to any real significance regarding who actually speaks to the juror, just that conversation took place at all. However, it is an important aspect when weighing the prejudicial factors against the burden of a new trial. Certain comments may be more prejudicial to the juror depending on who said it. If only one of the jurors had an insignificant conversation with someone about the case, and no other issues of prejudice were present at all, then a judge in applying this proposed test may decide that the risk of prejudice is less than the burden of having a new trial.

d. Emotional Reactions

The next question posed to each juror via this form should be whether or not any juror witnessed emotional outcries or reactions during and after the final verdict being read. The term emotional outcries or expressions should be defined broadly on the form so that the jurors have a basis for what they saw or heard that could have prejudiced them. An example of the definition could be: “any reaction, response, or gesture, whether verbal or non-verbal, that you witnessed that was in reaction, whether simultaneously or not, to the outcome or the procedures of the trial.” The question regarding emotional outcries should also be open-ended so that jurors could write in any instances that they feel amounted to the court’s definition and whether or not it would impact their ability to amend the verdict. Though jurors may respond that they would not be affected by

140. See *supra* notes 72-73 and accompanying text.

141. See *supra* note 103 and accompanying text.

witnessing varying types of emotions, it should still be the judges' ultimate decision. The judges, when viewing the questionnaires as a whole, must decide whether or not the jurors' witnessing of emotional cries amounted to prejudice that would outweigh the burden of a new trial. Jurors are not capable of making such decisions on their own as to whether they have been prejudiced in this way. Judges should consider certain emotional reactions, such as chairs being thrown or clapping and hollering, to weigh heavily on the side of prejudice that is enough to render a new trial.

e. Smartphone Access and Use of Extrinsic Evidence

The last component of the jury questionnaire should include questions asking whether or not the jurors used their smartphone or accessed any extrinsic evidence that is in any way connected to the trial. This is an expansion of *Dietz*, which only references smartphone and Internet use. A juror may come across a newspaper headline of the trial or use an actual dictionary or other library sources to verify something post-verdict.¹⁴²

The first question should ask whether jurors used their phone to call or text, and if so, whether or not the case was discussed in any way. The next question should ask whether or not the jurors used social media at all, such as Facebook or Twitter, and if so, whether or not they posted any information at all relating to the trial or to serving as a juror in the particular case. The questionnaire should leave in space for the jurors to transcribe verbatim the comments that they posted on social media, as well as any follow-up comments that friends left, so that the judge may know more quickly rather than having to investigate. If any juror responds affirmatively to either of these questions and the information they spoke of or posted related to the trial, then judges should be more likely to indicate a high-risk of prejudice that is grounds for a new trial.¹⁴³ Posting on social media is more severe because it involves access to more people in a shorter amount of time, and the ways the juror could be prejudiced

142. See *United States v. Martinez*, 14 F.3d 543 (11th Cir. 1994) (explaining that the court granted a new trial where a juror used a dictionary to look up terminology while deliberating and had also informed other jurors about a newspaper headline she had seen discussing the possible sentencing the defendant could receive).

143. Similarly, in criminal cases, if a juror's third-party communication is related to the case, it is critical to determine if it is harmless prejudice or whether it is substantial. See *Remmer v. United States*, 347 U.S. 227, 229 (1954) (explaining that conversation is "presumptively prejudicial," but the government has a heavy burden to prove that the harm to the defendant was harmless).

from it are seemingly endless.¹⁴⁴ Leaving comments about the trial on social media “engenders responses that include extraneous information about the case, or attempts to exercise persuasion and influence.”¹⁴⁵ One “like” on a juror’s post about the trial could be enough to prejudice that juror because it approved that juror’s conduct or thought-process.

However, if the comments posted are “harmless ramblings” about the case, then it may not rise to a level of prejudice that would warrant a new trial when compared to the burdens of starting a new trial.¹⁴⁶ For example, a juror posted on social media before the verdict was rendered, “This is it . . . no looking back now!”; the post was considered meaningless and not actual prejudice.¹⁴⁷ Because of this, it is critical that judges take time to investigate what was exactly posted by jurors on social media, as well as any responses posted by friends, to determine if the prejudice is severe enough to tip the balancing scales towards ordering a new trial.

The next question on the form should ask if the jurors post-discharge used the Internet, whether on their smartphones or otherwise, or any other outside documents or books to research information relating to the trial. Researching information about the parties, elements of the case, and the like should also be given the same bright-line standard, and there should be an automatic new trial scheduled rather than letting the same jury amend the verdict.¹⁴⁸ In these situations, jurors now have outside information that could be used to sway their opinions once back inside the deliberation room to amend the verdict.¹⁴⁹ Just as this is unacceptable juror behavior and in violation of the jury instructions at any time *during* a trial, it also should be deemed highly prejudicial if the jurors lawfully

144. See *United States v. Fumo*, 655 F.3d 288, 305 (3d Cir. 2011) (“If anything, the risk of such prejudicial communication may be greater when a juror comments on a blog or social media website than when she has a discussion about the case in person, given that the universe of individuals who are able to see and respond to a comment on Facebook or a blog is significantly larger.”).

145. *Id.*

146. *Id.* at 298.

147. *Id.* See also *United States v. Villalobos*, No. 14-40147, 2015 WL 544898, at *2 (5th Cir. 2015) (denying a new trial because the comments were vague and not prejudicial—the juror had commented about wanting the trial to be over). Compare this to *People v. Lozano*, where a juror posted specific details of the case, such as that the trial she was serving on was a child abuse case that happened when the baby was four months old, and that everything weighed on the credibility of the witnesses. No. D058370, 2011 WL 6217076 (Cal. Ct. App. Dec. 14, 2011). Still, the court in that case did not order a new trial. *Id.*

148. See *United States v. LaRoque*, No. 4:12CR881H, 2014 WL 683729, at *4 (E.D.N.C. Feb. 20, 2014).

149. See *id.* (explaining that the judge had no idea which definition the juror used when making his decision on the verdict—the one researched online or the definition and information provided from the trial).

behaved this way post-discharge, but were later recalled for the same case.¹⁵⁰

2. Proposed Test—A Deeper Look at the Burden of a New Trial

a. Types of Burdens

If a judge finds any amount of potential prejudice to the jury, under the proposed test the judge will weigh that potential for risk of prejudice against the burdens of starting a new trial. The main burdens of starting a new trial are, not surprisingly, additional costs to each party, having to deal with congested courts, and the inevitable prolonged litigation.¹⁵¹ Parties want their cases to be over, but by starting a new trial, they have to wait even longer for a resolution, which means waiting a long time to receive the compensation they likely need immediately.¹⁵² Not to mention that if the party is a business, the business might be put on hold.¹⁵³ The court also has to spend its own money in helping to manage the case, deciding motions for the parties, and other ways in which it is involved in the process of starting a new trial.¹⁵⁴ Other issues include the effect that new trials have on the public's distrust of and loss of confidence in the judicial system.¹⁵⁵ The public starts to wonder if the courts operate as equitable and timely as they should.¹⁵⁶ Furthermore, there is a real possibility that in the time that the first case has ceased and the new trial

150. In criminal cases, there have been reversals and remandings due to jury misconduct for using outside information. *See Gibson v. Clanon*, 633 F.2d 851 (9th Cir. 1980), *cert. denied*, 450 U.S. 1035 (1981) (noting that jury members used a medical dictionary to determine aspects that were material to the counts); *see also United States v. Renteria*, 625 F.2d 1279 (5th Cir. 1980) (noting that defendant alleged an entire tape recording was given to jury when only portions of the tape were actually admitted); *United States v. Vasquez*, 597 F.2d 192 (9th Cir. 1979) (noting that the court's official file containing inadmissible evidence had been left in the jury room).

151. *See Michael Heise, Justice Delayed? An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 814 (2000). *See generally* George L. Priest, *Private Litigation and the Court Congestion Problem*, 69 B.U.L. REV. 527 (1989).

152. *See Andrew J. Wistrich & Jeffrey J. Rachlinski, How Lawyers' Institutions Prolong Litigation*, 86 S. CAL. L. REV. 571, 573 (2013) (citing Nathalie Chappe, *Demand for Civil Trials and Court Congestion*, 33 EUR. J. L. & ECON. 343, 344 (2012)) ("Delays in the resolution of legal disputes create a wide variety of social costs: injured parties do not receive compensation when they most need it, individuals are deterred from bringing cases, future offences are insufficiently deterred. . . .").

153. *See id.*

154. *Id.* at 574.

155. Heise, *supra* note 151, at 814-15 ("Delays in the resolution of civil disputes erode public confidence in the civil justice system, disappoint and frustrate those seeking compensation through the legal system, and generate benefits for those with the financial ability to withstand delays or otherwise benefit from them.").

156. *Id.*

begins, evidence has spoiled, witnesses' memories have faded, and witnesses or litigants have died.¹⁵⁷

According to an empirical study performed in 2000, the average civil jury case tried in the United States took two and a half years to resolve (30.2 months) from the time it was filed to the time the jury trial verdict was announced.¹⁵⁸ A large factor contributing to this problem is the backlog of cases that judges have on their dockets that have accumulated over time.¹⁵⁹ Thus, in the present situation, federal judges must keep these considerations in mind when faced with whether or not to order a new trial because they are the ones in charge of their own dockets. The interplay between this burden and the risk of prejudice is this: the concerns about the burdens of starting a new trial will generally be the same in most situations. However, the risk of prejudice is unique to each case and, therefore, will need to be evaluated on a case-by-case basis.

b. Judges' Incentives as Case Managers

Because of all of these aforementioned burdens on the courts, it is easy to see the incentive that judges have to use the same jury to amend the verdict rather than opt for a new trial altogether. Judges are now acting as case managers and have more power than ever to decide each piece of the case and the scheduling and timing of it all.¹⁶⁰ With this fact that judges have the power and the incentives to clear their dockets and keep the cases moving, it makes it hard to believe that most judges pressed with a decision to recall a discharged jury or start a new trial would consider doing the latter.¹⁶¹ Of course, if there is obvious prejudice that occurred

157. *Id.*

158. *Id.* at 833-36. In the sample conducted in Heise's study, the most expeditious civil jury trials were in Fairfax County, Virginia and took only 17.5 months to complete, while the longest trials took over five years in Cook County, Illinois.

159. George L. Priest, *Private Litigation and the Court Congestion Problem*, 69 B.U.L. Rev. 527, 527 (1989). Referencing the congestion problem articulated from a crucial study by using a metaphor of a logjam from the lumber industry:

Cases flow into a court calendar in the way logs float into a lake. The determinants of the size of the logjam at any point are the rate that logs flow into the lake, the rate that logs flow out of the lake, and the number of logs stuck in the lake from earlier imbalances in the flow.

Id.

160. Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 669-74 (2010). Of note, empirical data shows that most attorneys have been satisfied with the case management and believe it has benefitted their work. *Id.* at 687. However, judges involved in case management have time taken away from their main job of trying cases. *Id.* at 694. Case management is another "dangerous form of judicial activism." *Id.* at 691-92.

161. *See id.* at 691-93. Judges who are effective case managers are involved in the Rule 16 stage and are better able to tailor their cases in the beginning so that they are not overly expensive and

to jurors once discharged, judges would likely face accusations of abuse of discretion on appeal if they did not opt for a new trial.¹⁶² But in those cases that are close calls, it would be easy to see how a judge would want to save a congested docket and simply bring back the discharged jury. For these reasons, the proposed test balancing the two factors is much more reliable than the *Dietz* test. The Supreme Court ignores the reality that judges have their own hand and own concerns in cases, so a tightening of this discretion is necessary.

C. *Application of the Proposed Balancing Test*

If the proposed test was applied in the hypothetical Walter Smith case, then it would automatically be given a new trial. The jury did not reconvene to amend the verdict until three days later, and the test proposes it must be brought back within one day. For the purpose of this Article, however, each juror's behavior after the discharge will be analyzed under the proposed test.

Juror one's witness of a spectator crying post-verdict would likely be considered prejudicial, but on its own it likely would not be enough to outweigh the burden of starting a new trial. Juror two, based on the questionnaire, would know that even Mrs. Smith's comment "shame on you" is considered conversation for purposes of the prejudice analyses, whereas under the *Dietz* guidance the juror may not have. The judge would likely determine that this is highly prejudicial, especially because it was a comment said by the decedent's mother. That particular comment would be perhaps most prejudicial coming from her, rather than any other spectator in the courtroom that day. Similarly, juror three will have noted on the questionnaire his texts with his wife. The judge will likely find that the conversation is highly prejudicial because the wife's comment is validating, which is one of the exact reasons conversations about the trial can be dangerous. Jurors four and five would have answered on the questionnaire that they had accessed and researched what would now be extrinsic evidence if they were to be asked to decide again on the same case. These actions alone would be enough for the judge to decide to issue a new trial because, under the proposed test, any extrinsic evidence looked

prolonged. *Id.* Thus, judges are more involved from the beginning and would not be likely to grant a new trial in this new form of discretion offered in recalling discharged juries. If judges are not in charge of their own case management and instead give that job to a magistrate, then that judge may be criticized for doing so because it violates the "single judge" rule of the Civil Caseflow Management Guidelines. *Id.* at 694-95.

162. See Cravens, *supra* note 4, at 948.

into about the case is considered so prejudicial that it is automatic grounds for a new trial.

The conversation between jurors six and seven would be noted on the questionnaire since talking to other jurors outside of the deliberation room about the case can also amount to prejudice. Here, however, the judge would likely determine that general comments about being glad the case is over have no actual taint on the jurors. Lastly, juror eight's Facebook comment itself may not rise to the level of prejudice, but since there were several comments left by others responding to it, the judge would need to inquire about what those comments were and whether the juror had read them while discharged.

The judge deciding whether to recall the jury from Walter Smith's case would have all of this information gathered from the jurors' questionnaires and would then weigh it all against the burdens of starting a new trial in that same court. The amount of prejudice in this case would have been substantial enough to outweigh the burdens of having a new trial, and therefore a new trial should be rendered. Multiple jurors experienced prejudice so that the fate of Walter Smith's case should no longer rest in the hands of that very same jury. The costs and lack of finality that come with starting a new trial are not ideal for any claimant to have to endure, but in this case it would be worth it so that the verdict and amount of damages is not unfairly amended.

D. Post-Verdict Motions and Party Objections

Another significant aspect that the Supreme Court test fails to address is the implication of post-verdict motions and party objections.¹⁶³ Because there is no timeline from the decision indicating "how long is too long" for the jury to be discharged and still be considered for a recall, there is nothing stopping a party from requesting, perhaps days later, that the judge re-empanel the jury to fix the flawed verdict. A party negatively impacted by the flawed verdict may first try this route rather than file a motion for a new trial. Parties have 28 days to file a motion for a new trial or for an amendment to the verdict,¹⁶⁴ so what is stopping a party from, prior to seeking a new trial, taking nearly 28 days to request to recall the original jury? Without a strict time-frame issued under *Dietz*, district courts may grant the request and recall the original jurors who would have had more than enough time and opportunity to be prejudiced in a number

163. See Brief for Petitioner, *supra* note 5, at *38-39.

164. FED. R. CIV. P. 59(b) & (e). The court can order a new trial by granting a party's motion, or it can grant a new trial for reasons other than what is stated in the party's own motion. *Id.*

of ways. The balancing test proposed above prohibits this from happening because the time-frame to recall the jury is one day only. Other federal rules indicate that parties can identify and correct errors, but it must happen while the jury is still empaneled.¹⁶⁵

Typically, a party that fails to object to an inconsistent verdict before the jury is excused waives its right to make any future objections on the verdict.¹⁶⁶ The rationale for the rule is that the party did not object when it had a chance to have the original jury head back into the deliberation room and amend the verdict, or even have the judge further instruct the jury. However, under the *Dietz* test this notion becomes futile. If the judge can always re-empanel the same jury whose verdict is inconsistent, then objecting is not necessary.¹⁶⁷ On the other hand, the party that wins with the original verdict may want to object to the recall because it will be unfavorable to them; in other words, the party who wins initially may be better off with a new trial than with the same jury amending its verdict after it has been recalled and received more instruction from the judge.¹⁶⁸ Because the Court's opinion did not address the impact it will have on other Federal Rules of Civil Procedure, such as Rules 48, 49, 51, and 59,

165. See FED. R. CIV. P. (48)(c) ("After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually."); FED. R. CIV. P. 51 (b)(3) ("The court may instruct the jury at any time before the jury is discharged."); FED. R. CRIM. P. 30(c) ("The court may instruct the jury before or after the arguments are completed, or at both times."); and FED. R. CRIM. P. 31(d) ("After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually.").

166. See FED. R. CIV. P. 46. Unless the party had no chance to object, the right to object is waived: "Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made." *Id.* See *Babcock v. General Motors Corp.*, 299 F.3d 60, 63-67 (1st Cir. 2002) ("General Motors has waived any claim that the special verdict form was unacceptable by failing to object at a time when I could have taken corrective action; and General Motors has waived any claim that the verdicts are inconsistent because I gave it an opportunity to assert such a claim before I discharged the jury and it declined to make its argument at a time when I could have taken corrective action."); see also *Colonial Refrigerated Transp., Inc. v. Mitchell*, 403 F.2d 541, 552 (5th Cir. 1968) ("The burden was on the defendants' counsel to make a timely request that the court properly limit the admissibility to the evidence and properly charge the jury with respect to the manner in which it was to be considered.").

167. See FED. R. CIV. P. 46 (Notes & Decisions). There is a further issue here, however, about what could happen on appeal in this case if the party did not object to the inconsistent verdict, and the judge recalled the jury, and the verdict was not in that party's favor. Yet, there is still a chance, albeit a slim one, that the appellate court may bring an objection *sua sponte* if none was made by a party.

168. See *R. B. Co. v. Aetna Ins. Co.*, 299 F.2d 753, 760 (5th Cir. 1962) ("When so much of the verdict is made up of answers which are not sustained by the evidence and the really critical issue on increase of hazard was not submitted to the jury at all . . . the case must be retried."); see also FED. R. CIV. P. 49 (b)(4) ("When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial."); FED. R. CIV. P. 49 (Notes & Decisions).

the district courts will be left to figure out these dilemmas as they arise. The sense of finality for claimants that the Court was defending in its opinion is actually a false sense of finality because in reality there will likely be more appeals due to this new power afforded to federal judges.

V. CONCLUSION

As this Article illustrates, judges are afforded far too much authority in the precedent set forth in *Dietz*. The strategy that may have worked for the facts of that particular case should not be set as the standard for all federal judges to use when found in a situation of deciding whether to recall a discharged jury to amend a flawed verdict. It is far too simplistic of a test for it to fit all the various scenarios that could arise during the time that the jury is discharged. Once jurors have removed their “juror cap,” they are free from the court’s instruction and can act, think, and speak as they please. Without stricter guidelines on how judges should consider the concept of using the same jury, too many cases will be amended by juries that have been prejudiced beyond repair. Issuing jurors a questionnaire upon their recall will enhance the effectiveness of the judge’s determination of whether or not there was prejudice during the time the jury was discharged. By balancing that risk against the burdens of starting a new trial in an era plagued with congested courts, the sanctity of our judicial system will be preserved and will remain a reliable and equitable function of our society as a whole.