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# Judging the Court's Own Conduct: Tracing the Use of the Schwartz Hearing through Time—State v. Greer

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**JUDGING THE COURT'S OWN CONDUCT:  
TRACING THE USE OF THE *SCHWARTZ* HEARING  
THROUGH TIME—*STATE V. GREER***

Kelly Lyn Mitchell<sup>†</sup>

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I. INTRODUCTION

In the fall of 2001, the Minnesota Supreme Court issued a seemingly unimportant decision in the case of *State v. Greer*.<sup>1</sup> The case involved Ronald Lewis Greer's appeal from convictions for first- and second-degree murder in the shooting death of Kareem Brown.<sup>2</sup> At first glance, the case seems insignificant because the court disposed of three of Greer's bases for appeal in a very straightforward manner,<sup>3</sup> and merely remanded the fourth issue to the district court for the creation of a more complete record by conducting a *Schwartz* hearing.<sup>4</sup> However, a historical analysis of the use of the *Schwartz* hearing reveals that *Greer* was a much more significant case.

The facts of the case are as follows. Kareem Brown was shot to death in south Minneapolis shortly after midnight on July 26,

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1. *State v. Greer*, 635 N.W.2d 82 (Minn. 2001).

2. *Id.* at 84.

3. *Id.* at 85.

4. *Id.* A *Schwartz* hearing is a procedure for determining whether an outside influence has had a prejudicial effect on the jury. See *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 104 N.W.2d 301 (1960). See also discussion *infra* Part II.A.1.

1998.<sup>5</sup> One witness at the scene said two men were arguing in the middle of the street, and then one of the men shot the other with a semi-automatic handgun and ran away through a vacant lot.<sup>6</sup> Another witness said he heard gunshots, and then saw a man dispose of a gun in a trash can in the alley below his window.<sup>7</sup> Still another witness stated he saw a man he knew as Ronald Lewis Greer walking toward the scene of the shooting with a gun, and that he later heard gunshots and the sound of someone opening a trash can lid and throwing an object into it.<sup>8</sup> Based upon this information, the police attempted to locate Greer, and were subsequently notified that he was in custody in Detroit, Michigan.<sup>9</sup> The police interrogated Greer, both in Detroit and Minneapolis, and received several conflicting statements from him.<sup>10</sup> Greer was subsequently tried for the death of Kareem Brown and convicted of first- and second-degree murder.<sup>11</sup>

On appeal,<sup>12</sup> Greer raised four issues: (1) whether the trial court deprived him of the right to an impartial jury by limiting voir dire examination of six prospective jurors regarding their attitudes toward police officers; (2) whether he was denied due process and the right to confront witnesses against him when the trial court refused to permit him to impeach a witness for the prosecution with evidence of a prior conviction; (3) whether his right to present a meaningful defense was violated when the trial court refused to permit him to testify as to the circumstances surrounding his statements to the police; and (4) whether he was entitled to a *Schwartz* hearing to determine the nature and effect of the trial court's *ex parte* contacts with the jury during trial.<sup>13</sup> The Minnesota Supreme Court found that Greer's arguments as to the first three

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5. *Greer*, 635 N.W.2d at 85.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 86.

10. *Id.* at 86-87. Greer first told the officers he was present at the scene of the shooting, but that another individual, referred to as "E," shot Brown. *Id.* at 86. At trial, Greer testified that he told the police that he was at a friend's home at the time of the killing and had placed himself at the scene only so Minneapolis officers would get him out of the Detroit jail, which he described as a "filthy rat-and roach-infested cell." *Id.* at 86-87.

11. *Id.* at 84.

12. In Minnesota, a person who has been convicted of first-degree murder may appeal as of right directly to the supreme court. MINN. STAT. § 632.14 (2000); MINN. R. CRIM. P. 29.02, subd. 1.

13. *Greer*, 635 N.W.2d at 84-85.

issues were without merit, but that it lacked a sufficient record to determine the fourth issue.<sup>14</sup> Therefore, the case was remanded to the Chief Judge of the Fourth Judicial District of Minnesota for further proceedings.<sup>15</sup>

The fourth issue—whether Greer was entitled to a *Schwartz* hearing to determine the nature and effect of the trial judge's alleged *ex parte* contacts with the jury—is the focus of this article. This issue presented the supreme court with an unusual set of circumstances in which the trial judge's rulings regarding his *own* conduct were central to the controversy. Yet through subtle language, the court managed to utilize these unique circumstances to express positive shifts in policy that will ensure the defendant's right to both an impartial jury and an impartial judge. First, the court clarified that Minnesota Rule of Criminal Procedure 26.03, subdivision 9 applies to allegations of misconduct discovered *prior* to jury deliberations, while Minnesota Rule of Criminal Procedure 26.03, subdivision 19(6) applies to allegations of misconduct discovered *after* the jury has entered deliberations or after the verdict has been rendered, though both procedures may result in what has come to be known as a *Schwartz* hearing.<sup>16</sup> Second, the case marked the first time that the supreme court clearly established that when there is a question as to the effect of the trial judge's *own* conduct on the verdict, and a *Schwartz* hearing is held, it should be conducted by a *different* judge so there can be no question as to the impartiality of the court's decision.<sup>17</sup>

## II. THE TRIAL COURT'S *EX PARTE* CONTACTS WITH THE JURY

The procedural history of Greer's fourth basis for appeal is convoluted, overlapping, and downright confusing. Following his conviction, Greer filed a motion for a new trial alleging that the trial judge had improper *ex parte* contacts with the jury.<sup>18</sup> During voir dire, the judge admitted that he was usually the one to tell jurors when it was time to break for lunch.<sup>19</sup> And, according to affidavits filed by Greer's attorneys with the motion for a new trial,

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14. *Id.* at 85.

15. *Id.*

16. *Greer*, 635 N.W.2d at 93. *See also infra* Part II.A.

17. *Greer*, 635 N.W.2d at 93-94. *See also infra* Part II.B.

18. Brief for Appellant at 33, *State v. Greer*, 635 N.W.2d 82 (Minn. 2001) (Nos. C9-99-1550, C7-00-2154).

19. *Id.* n.60.

the attorneys saw the trial judge enter the jury room numerous times during the trial.<sup>20</sup> Moreover, during sentencing, Greer's counsel and the trial court judge had the following exchange:

MS. DIEPERINK: Your Honor, I just want to say for the record that you did go into the jury room and close the door. The door was closed and we don't know what those conversations were, and we're not waiving any of our rights to any of our appeal issues because you're cutting us off here.

THE COURT: I did not go in the jury room and close the door. The door was always left open.<sup>21</sup>

Contemporaneously with the motion for a new trial filed with the trial judge, Greer filed a motion for a new trial with the Chief Judge of the Fourth Judicial District requesting that the trial judge recuse himself on the issue of contact with the jurors. Greer also requested that the Chief Judge preside over a *Schwartz* hearing on that issue.<sup>22</sup> The Chief Judge denied the motion, stating, "the Motion for New Trial shall be heard and determined by the [trial court] unless and until he recuses himself or is otherwise removed for cause from presiding in the case."<sup>23</sup> Three days after the order was issued, Greer brought a motion to disqualify or remove the trial court judge.<sup>24</sup> Greer argued that the trial court judge should recuse himself from the issue of contacts with the jurors because he had "personal knowledge of the disputed evidentiary facts" and "his impartiality might reasonably be questioned."<sup>25</sup> Therefore, Greer requested that the Chief Judge remove the trial court judge for cause from the pending proceedings. Greer also requested that the Chief Judge personally preside over the *Schwartz* hearing and the accompanying motion for a new trial.<sup>26</sup> The motion was

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20. *Id.* at app. 5-6.

21. *Id.* at 35 n.61 (citing sentencing transcript).

22. *Id.* at app. 7.

23. *Id.* at app. 11 (Order, Chief Judge Daniel Mabley, June 4, 1999).

24. *Id.* at app. 12-13 (Notice of Motion and Motion to Disqualify or Remove, June 7, 1999).

25. *Id.* at app. 15 (Memorandum of Law, citing MINN. CODE JUDICIAL CONDUCT Canon 3(D)).

26. *Id.* at app. 17 (Memorandum of Law).

denied.<sup>27</sup> That same day, the trial court judge summarily denied Greer's motions to recuse and to grant a new trial.<sup>28</sup>

In deciding whether Greer was erroneously deprived of a Schwartz hearing, the Minnesota Supreme Court addressed two critical issues: (1) the procedure to be followed in alerting the trial court to the possibility of outside impact on the jury's verdict;<sup>29</sup> and (2) the propriety of a trial court judge presiding over a hearing to determine the nature and effect of his own conduct.<sup>30</sup> This section will examine each issue in turn.

#### A. *A Question of Procedure*

In analyzing Greer's entitlement to a *Schwartz* hearing, the supreme court first addressed the procedure that Greer should have followed in bringing the alleged misconduct to light. Initially, the court stated: "If a defendant learns, either during deliberations or after the verdict is reached, that a court official has had *ex parte* contacts with the jury, the defendant should move for a *Schwartz* hearing pursuant to Minn. R. Crim. P. 26.03, subd. 19(6)."<sup>31</sup> However, the court then differentiated the procedure that should be used *during* trial by stating: "If, on the other hand, a defendant becomes aware of such exposure *during the trial proceeding itself*, then the proper course of action is to bring the matter to the attention of the trial court at once in the form of a motion for a hearing under Minn. R. Crim. P. 26.03, subd. 9."<sup>32</sup> This differentiation misconstrues the origin and interpretation of the cited Criminal Rules of Procedure and, if subsequently followed, represents a shift in application.

#### 1. *Minnesota Rule of Criminal Procedure 26.03, subdivision 19(6) (Schwartz Hearing)*

The *Schwartz* hearing is a procedure that was established by the Minnesota Supreme Court in 1960 in *Schwartz v. Minneapolis Suburban Bus Co.*<sup>33</sup> In *Schwartz*, which involved an accident between

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27. State v. Greer, 635 N.W.2d 82, 93 (Minn. 2001).

28. Brief for Appellant at app. 18 (Order Denying Defense Motion for a New Trial, Judge Harry Crump, June 16, 1999).

29. Greer, 635 N.W.2d at 93.

30. *Id.*

31. *Id.*

32. *Id.* (emphasis added).

33. 258 Minn. 325, 104 N.W.2d 301 (1960).

an automobile and a bus, one juror allegedly answered in voir dire that he could be fair and impartial and that neither he nor any member of his family had ever been in an accident.<sup>34</sup> However, after the trial an investigator for the defendant interviewed the juror and learned that his daughter had been injured in an accident a short distance from where the accident at issue in the trial had occurred.<sup>35</sup> As a result of the interview, the defendant produced a sworn statement from the juror stating that he had thought about his daughter's accident frequently during the trial and that it may have influenced his decision.<sup>36</sup> Based on this statement, the defendant bus company made a motion for a new trial, which was subsequently denied by the trial court.<sup>37</sup>

In considering the case on appeal, the Minnesota Supreme Court expressed concern about what had apparently become a common practice of parties questioning jurors about their deliberations. The court stated, "we are of the opinion that it is undesirable to permit attorneys or investigators for a defeated litigant to harass jurors by submitting them to interrogation of this kind without more protection for the ascertainment of the facts than appears in this case."<sup>38</sup> In response to that concern, the court set forth a procedure that would come to be known as the *Schwartz* hearing, stating:

Cases may and do arise where a juror's untruthful answering of questions propounded upon a voir dire examination will prevent a litigant from having a fair trial. Where such cases arise, and the facts come to light after the rendition of a verdict, some method of obtaining relief obviously should be available. However, rather than permit or encourage the promiscuous interrogation of jurors by the defeated litigant, we think that the better practice would be to bring the matter to the attention of the trial court, and, if it appears that the facts justify so doing, the trial court may then summon the juror before him and permit an examination in the presence of counsel for all interested parties and the trial judge under

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34. *Id.* at 327, 104 N.W.2d at 302-03. However, it should be noted that one attorney in the case filed a counter affidavit stating that the question regarding involvement in an accident by the juror or a member of his family was never asked. *Id.* at 327, 104 N.W.2d at 303.

35. *Id.*

36. *Id.*

37. *Id.* at 326, 104 N.W.2d at 302.

38. *Id.* at 328, 104 N.W.2d at 303.

proper safeguards . . . . A record then could be made which could be presented to this court if any doubt existed about the correctness of the trial court's ruling after such hearing.<sup>39</sup>

Thus, the initial procedure described in *Schwartz* seemed to be limited to post-trial situations in which a juror provided untruthful or misleading answers on voir dire. Additionally, because the procedure was developed in the context of a civil case, there was some question as to its applicability to criminal cases.

Initially, cases interpreting or applying this procedure were limited to the narrow circumstances present in *Schwartz*.<sup>40</sup> But it was not long before the supreme court indicated in its opinions that the *Schwartz* hearing could be used for a broader category of conduct including improper conduct by a juror outside the jury room during deliberations,<sup>41</sup> juror bias resulting in an excessive verdict,<sup>42</sup> alleged misconduct by a bailiff,<sup>43</sup> or alleged prejudicial misconduct by a spectator.<sup>44</sup> On several occasions, however, the court reiterated that the true purpose of the hearing was to discontinue the once accepted practice of parties questioning jurors to discover possible bases for impeachment of the verdict.<sup>45</sup>

In *Olberg v. Minneapolis Gas Co.*,<sup>46</sup> the court reiterated its explanation of the post-verdict procedure set forth in *Schwartz* and then further explained: (1) the *Schwartz* hearing should be requested by the verdict loser when the first suspicion of misconduct arises; (2) the court should be liberal in granting a *Schwartz* hearing, even in the case of oral assertions of misconduct

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39. *Id.*

40. *See, e.g., State v. Hayden Miller Co.*, 263 Minn. 29, 116 N.W.2d 535 (1962); *Atkinson v. Mock*, 271 Minn. 393, 135 N.W.2d 892 (1965).

41. *See Weber v. Stokely-Van Camp, Inc.*, 274 Minn. 482, 144 N.W.2d 540 (1966).

42. *See Patterson v. Donahue*, 291 Minn. 285, 190 N.W.2d 864 (1971).

43. *See Fick v. Wolfinger*, 293 Minn. 483, 198 N.W.2d 146 (1972).

44. *See Goblirsch v. W. Land Roller Co.*, 310 Minn. 471, 475, 246 N.W.2d 687, 690 (1976) ("We have approved the use of such hearings under the supervision of the trial judge, and had a clear and timely request been made, it would not have been inappropriate to conduct such a hearing in this case.").

45. *See, e.g., Patterson*, 291 Minn. at 289, 190 N.W.2d at 867 (1966) ("The remote possibility that misconduct requiring reversal may be undetected is more than offset by the importance of shielding jurors from harassment."); *Olberg v. Minneapolis Gas Co.*, 291 Minn. 334, 344, 191 N.W.2d 418, 425 (1971) ("Attorneys should not be allowed to contact and harass jurors who render verdicts of a nonsuspicious nature.").

46. 291 Minn. 334, 191 N.W.2d 418 (1971).



or hearsay affidavits; and (3) neither the defeated party's counsel nor investigator should ever contact a juror to gather evidence for a *Schwartz* hearing.<sup>47</sup> The court felt so strongly about its desire to end juror harassment, that it closed the *Olberg* opinion by stating, "[i]t is hoped that this explanation of the *Schwartz* hearing will end the practice of attorneys contacting jurors in hopes of impeaching the verdict."<sup>48</sup>

Six years later, however, juror harassment had *not* ended. In *Baker v. Gile*,<sup>49</sup> the Minnesota Supreme Court refused to consider the issue of juror misconduct altogether because the attorney in that case obtained information about the alleged misconduct by contacting three jurors directly.<sup>50</sup> Additionally, the court encouraged trial courts to deny petitions for *Schwartz* hearings when based upon information that was improperly obtained.<sup>51</sup> In taking this stand, the court firmly established the *Schwartz* hearing in civil practice.

Two years prior, the procedure was integrated into criminal practice when the Minnesota Supreme Court promulgated the Rules of Criminal Procedure,<sup>52</sup> which incorporated the *Schwartz* hearing as Minnesota Rule of Criminal Procedure 26.03, subdivision 19(6).<sup>53</sup> At the time of its inception in July of 1975, the rule read substantially as it does today:

(6) *Impeachment of the Verdict.* Affidavits of jurors shall not be received in evidence to impeach their verdict. If the defendant has reason to believe that the verdict is subject to impeachment, he shall move the court for a summary hearing. If the motion is granted the jurors shall be interrogated under oath and their testimony recorded.<sup>54</sup>

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47. *Id.* at 343-44, 191 N.W.2d at 424-25.

48. *Id.* at 344, 191 N.W.2d at 425.

49. 257 N.W.2d 376 (Minn. 1977).

50. *Id.* at 378.

51. *Id.*

52. The authority of the Minnesota Supreme Court to promulgate rules in criminal proceedings was recognized by the state legislature in 1971. 1971 Minn. Laws ch. 250, §§ 1-8 (now codified at MINN. STAT. § 480.059 (2000)).

53. See MINN. R. CRIM. P. 26.03, subd. 19(6) cmt. (adopting the procedure set out in *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 327, 104 N.W.2d 301, 303 (1960)).

54. MINN. R. CRIM. P. 26.03, subd. 19(6) (effective July 1, 1975). Since its original promulgation, the Rule has been amended only twice: once to add a reference to MINN. R. EVID. 606(b) regarding what a juror may testify to in the *Schwartz* hearing, MINN. R. CRIM. P. 26.03, subd. 19(6) (effective August 1, 1983), and once to update the language so that it would be gender neutral. MINN. R.

As in the civil context, initial applications in the criminal arena centered on *post-trial* discovery of misconduct.<sup>55</sup> But contrary to the suggestion in *Greer*,<sup>56</sup> in both civil and criminal proceedings, use of the *Schwartz* procedure has not remained limited to post-trial discovery of misconduct. In *Quinn v. Winkel's, Inc.*,<sup>57</sup> the court indicated that a *Schwartz* hearing might be appropriate to uncover the possibility of jury tampering.<sup>58</sup>

In the criminal context, pre-verdict issues have arisen more frequently. In *State v. McRae*,<sup>59</sup> a juror notified the judge that a man in the hall outside the courtroom had said, in effect, "You better vote guilty or we'll kill you."<sup>60</sup> The trial court immediately held a *Schwartz* hearing to determine whether the communication affected the jury's ability to render a fair and impartial verdict.<sup>61</sup> The trial court found no evidence of prejudice, and the court of appeals upheld this finding.<sup>62</sup> In *State v. Durfee*,<sup>63</sup> the defendant learned that a juror talked about the case outside of the trial but the defendant concealed his knowledge of the conversation until after the verdict was rendered.<sup>64</sup> Citing *Schwartz*, the court stated that the information should have been brought to the trial court's attention immediately, which would have necessitated a *Schwartz* hearing

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CRIM. P. 26.03, subd. 19(6) (effective January 1, 1990).

55. See, e.g., *State v. Larson*, 281 N.W.2d 481, 484-85 (Minn. 1979) (holding that the trial court acted well within its discretion in denying defendant's motion for a *Schwartz* hearing because a juror's statements to the press following the verdict that "the mental illness defense is just an easy way out" did not reveal jury misconduct in light of the verdict acquitting the defendant by reason of mental illness); *State v. Domabyl*, 272 N.W.2d 745, 746-47 (Minn. 1978) (upholding trial court's denial of a *Schwartz* hearing because defense sought to question jurors about possible misunderstanding of the instructions, which is outside the scope of issues to which a juror may testify); *State v. Kyles*, 257 N.W.2d 378, 381 (Minn. 1977) (finding defense counsel should have requested a *Schwartz* hearing when they learned of juror's affiliation with the insurance company that paid the claim for items taken during the burglary defendant was alleged to have committed).

56. *State v. Greer*, 635 N.W.2d 82, 93 (Minn. 2001).

57. 279 N.W.2d 65 (Minn. 1979).

58. *Id.* at 69 (upholding the trial court's decision not to conduct a full *Schwartz* hearing in response to allegations of jury tampering after the trial court questioned the jurors as a group, and on the record, as to whether anyone had attempted to contact them about the trial).

59. 371 N.W.2d 66 (Minn. Ct. App. 1985).

60. *Id.* at 67.

61. *Id.* at 67-68.

62. *Id.* at 68.

63. 322 N.W.2d 778 (Minn. 1982).

64. *Id.* at 786.

prior to the jury entering into deliberations.<sup>65</sup> And in *Boitnott v. State*,<sup>66</sup> the supreme court upheld the use of a *Schwartz* hearing to determine whether a juror could remain on the panel after she informed the trial court that her sister was attending the trial and apparently knew some of the witnesses.<sup>67</sup>

Applying the *Schwartz* procedure to pre-verdict discovery of misconduct makes sense in light of the supreme court's original directive in *Olberg* that a *Schwartz* hearing should be requested "when the first suspicion of misconduct arises."<sup>68</sup> However, the more recent supreme court decisions have referred to the *Schwartz* procedure only in the context of post-trial issues. In *State v. Shoen*,<sup>69</sup> the court noted, "its applicability has expanded to address other *post-trial* issues involving juries."<sup>70</sup> And in *Greer*, the court held that the hearing codified in Minnesota Rule of Criminal Procedure 26.03, subdivision 19(6) should be used if the defendant learns of misconduct during deliberations or after the verdict is reached, but that Minnesota Rule of Criminal Procedure 26.03, subdivision 9 should be used if the defendant becomes aware of the misconduct during the trial itself.<sup>71</sup> Thus, in order to determine whether this distinction is correct, one must also examine the origin of Minnesota Rule of Criminal Procedure 26.03, subdivision 9.

## 2. Minnesota Rule of Criminal Procedure 26.03, subdivision 9

Minnesota Rule of Criminal Procedure 26.03, subdivision 9 was promulgated as one of the original Rules of Criminal Procedure that went into effect on July 1, 1975. Here again, the Rule read substantially the same as it does today:

**Subd. 9. Questioning Jurors About Exposure to Potentially Prejudicial Material in the Course of a Trial.** If it is determined that material disseminated outside the

65. *Id.* at 786 n.8.

66. 631 N.W.2d 362 (Minn. 2001).

67. *Id.* at 368, 371-72.

68. *Olberg v. Minneapolis Gas Co.*, 291 Minn. 334, 343, 191 N.W.2d 418, 424 (1971). Granted, this directive was given in the context of the "verdict loser;" however, it is likely that the court simply did not anticipate discovery of misconduct prior to deliberations in making this statement. *See also State v. Durfee*, 322 N.W.2d 778, 786 (Minn. 1982) ("A party who learns of a misconduct of a juror during trial may not keep silent and then attempt to take advantage of it in the event of an adverse verdict.")

69. 578 N.W.2d 708 (Minn. 2002).

70. *Id.* at 716 (emphasis added).

71. *State v. Greer*, 635 N.W.2d 82, 93 (Minn. 2001).

trial proceedings raises serious questions of possible prejudice, the court may on its initiative and shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. The examination shall take place in the presence of counsel, and a verbatim record of the examination shall be kept.<sup>72</sup>

But unlike Rule 26.03, subdivision 19(6), which originated from case law, Rule 26.03, subdivision 9 originated from the American Bar Association Standards regarding Fair Trial and Free Press.<sup>73</sup> Rule 26.03, subdivision 9 is actually just the last paragraph of American Bar Association Standards For Criminal Justice 8-3.6, which is a six-paragraph standard relating primarily to jury exposure to pretrial publicity.<sup>74</sup> As noted in the comments to the ABA standard, its original purpose was to address the tension inherent in the Sixth Amendment's dichotomy between the people's right to a public trial and the defendant's right to a fair trial.<sup>75</sup> This relationship, however, is obscured in Minnesota's Rules of Criminal Procedure. In promulgating the Rules, the court chose only to adopt paragraph (e), which relates to admonishing the jury not to pay attention to the media in any case in which there appears to be significant public interest, and paragraph (f), which governs investigating possible exposure to media content.<sup>76</sup> Though the full ABA standard was not adopted, the two paragraphs that were adopted were placed side-by-side as subdivisions 8 and 9 of Rule 26.03. Additionally, the sources of subdivisions 8 and 9 were referenced in the comments to the Rules.<sup>77</sup> Thus, the

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72. MINN. R. CRIM. P. 26.03, subd. 9 (1976). The Rule has been amended only once, to update the language so that it is gender neutral. MINN. R. CRIM. P. 26.03, subd. 9 (effective January 1, 1990).

73. See MINN. R. CRIM. P. 26.03, subd. 9 cmt. (adopting AMERICAN BAR ASSOCIATION STANDARDS, FAIR TRIAL AND FREE PRESS, 3.5(f) (Approved Draft, 1968)). A subsequent edition of the standards renumbered standard 3.5 as 8-3.6. See AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE § 8-3.6 cmt. at 8-51 (1978). However, paragraph (f) remained unchanged. *Id.* at 8-57.

74. See AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE § 8-3.6 cmt. at 8-52 (1978) ("The purpose of the standard is to preserve the integrity of the criminal trial process in the setting of a highly publicized case.").

75. AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE § 8.6 cmt. at 8-31S (Supp. 1986).

76. See AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE § 8-3.6(e) and (f) and cmt. at 8-56 and 57 (1978) (stating the purpose of paragraph (e) has not changed since the first edition, and stating that paragraph (f) is unchanged from the first edition).

77. See MINN. R. CRIM. P. 26.03, subd. 8 cmt. (adopting the substance of

placement and source references indicate that subdivisions 8 and 9 were originally intended to apply to pretrial publicity. However, two circumstances have led to a broader application.

First, though subdivision 8 clearly refers to publicity about the case,<sup>78</sup> subdivision 9 simply refers to “material disseminated outside the trial proceedings.”<sup>79</sup> Thus, the plain meaning of the language in subdivision 9 could conceivably be interpreted as referring to items other than or in addition to publicity. Second, though the comments were written contemporaneously with the Rules, the comments were not printed in the official state publication of the Rules until 1988, about thirteen years *after* the Rules were first promulgated.<sup>80</sup> Thus, many members of the bench and bar may have had no guidance regarding the origin or intended interpretation of the Rules, and would not have known that Rule 26.03, subdivision 9 originated as a pretrial publicity rule.

Since its promulgation, Minnesota Rule of Criminal Procedure 26.03, subdivision 9 has been examined at the appellate level in only eleven cases, excluding *State v. Greer*.<sup>81</sup> However, only *State v. Denny*,<sup>82</sup> an unpublished opinion by the court of appeals, discussed the Rule in the context of trial publicity.<sup>83</sup> Each of the other cases involved some other source alleged to have prejudiced the jury, which typically occurred during the course of the trial.<sup>84</sup> Although

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AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE 8-3.6(a) (1985)); MINN. R. CRIM. P. 26.03, subd. 9 cmt. (adopting AMERICAN BAR ASSOCIATION STANDARDS, FAIR TRIAL AND FREE PRESS, 3.5(f) (Approved Draft, 1968)).

78. MINN. R. CRIM. P. 26.03, subd. 8 (directing that jurors not read, listen to, or watch media reports about the case).

79. MINN. R. CRIM. P. 26.03, subd. 9.

80. *See* MINN. R. CRIM. P., as printed in the Court Rules volume of the Minnesota Statutes (1988). Though the Rules of Criminal Procedure were printed in the Court Rules or final volume of the Minnesota Statutes in each publication between 1976 and 1988, the comments were not printed with the Rules until 1988. The comments were, however, printed with the Rules in Minnesota Reports when they were first promulgated. *See* MINN. R. CRIM. P., as printed in Minnesota Reports, vol. 299 (1975) (special section following page 253).

81. *See infra* notes 84-85.

82. No. C4-94-478, 1994 WL 615115 (Minn. Ct. App. Nov. 8, 1994).

83. *See id.* (discussing the procedure followed when two front-page articles were printed the morning after the parties rested their cases).

84. *State v. Wilford*, 408 N.W.2d 577, 581 (Minn. 1987) (referring to MINN. R. CRIM. P. 26.03, subd. 9 as the proper procedure to address the effect of a conversation jurors overhead while on the elevator); *State v. Cox*, 322 N.W.2d 555, 560 (Minn. 1982) (upholding the trial court’s denial of a mistrial where the court promptly held a hearing pursuant to MINN. R. CRIM. P. 26.03, subd. 9 to gauge the possibility that a remark made by the sheriff would affect the verdict); *State v. Varner*, No. C4-00-801, 2001 WL 506973 (Minn. Ct. App. May 15, 2001) (utilizing

the cases can generally be characterized by the occurrence of misconduct prior to the jury's deliberations, a few mention the *Schwartz* procedure and attempt to combine the two rules.<sup>85</sup> In contrast, where the ABA standard underlying Minnesota Rule of Criminal Procedure 26.03, subdivision 9 has been adopted or applied in other jurisdictions, it has almost always been exclusively applied to cases involving pre- or mid-trial publicity.<sup>86</sup> Thus, it

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*Schwartz* hearing case law (citing *State v. Landro*, 504 N.W.2d 741 (Minn. 1993)) to analyze defendant's appeal based on improper denial of a hearing pursuant to MINN. R. CRIM. P. 26.03, subd. 9), *rev'd*, 643 N.W.2d 298, 305 (Minn. 2002) (stating that MINN. R. CRIM. P. 26.03, subd. 9 *required* the trial court to question jurors to determine the prejudicial effect of a racial comment made by a member of the panel) (emphasis added); *State v. LeRoy*, 594 N.W.2d 193, 194-95 (Minn. Ct. App. 1999) (stating that there should have been an inquiry pursuant to MINN. R. CRIM. P. 26.03, subd. 9 to determine the prejudicial effect of a complaint accidentally sent in with the jury); *State v. Willette*, C1-98-477, 1999 WL 10243 (Minn. Ct. App. Jan. 12, 1999) (distinguishing between independent voir dire (MINN. R. CRIM. P. 26.03, subd. 9) and a *Schwartz* hearing (MINN. R. CRIM. P. 26.03, subd. 19(6)) in analyzing alleged improper contact between a bailiff and the jury); *State v. McMahan*, No. C6-96-986, 1997 WL 76319 (Minn. Ct. App. Feb. 25, 1997) (finding no abuse of discretion in denying a mistrial motion where the defendant did not move the trial court to question the jurors following allegations that they may have seen a police officer holding an assault weapon in the hall outside the courtroom before the trial began); *State v. Pischke*, No. C1-94-941, 1994 WL 637762 (Minn. Ct. App. Nov. 15, 1994) (analyzing whether a *Schwartz* hearing should have been held pursuant to MINN. R. CRIM. P. 26.03, subd. 9 after counsel erroneously contacted a juror by phone during deliberations); *State v. Parker*, 412 N.W.2d 419, 422 (Minn. Ct. App. 1987) (stating that counsel should have requested a *Schwartz* hearing pursuant to MINN. R. CRIM. P. 26.03, subd. 9 after discovering that an injured pedestrian had mingled with the jury during a break), *rev'd on other grounds*, 417 N.W.2d 643 (Minn. 1988); *State v. McBroom*, 394 N.W.2d 806 (Minn. Ct. App. 1986) (upholding denial of *Schwartz* hearing where juror simply saw, but did not come in contact with, a witness outside of the trial).

85. See *State v. Pischke*, No. C1-94-941, 1994 WL 637762, at \*2 (Minn. Ct. App. Nov. 15, 1994); *State v. Parker*, 412 N.W.2d 419, 421 (Minn. Ct. App. 1987); *State v. McBroom*, 394 N.W.2d 806, 812 (Minn. Ct. App. 1986).

86. See, e.g., *U.S. v. Williams*, 809 F.2d 1072 (5th Cir. 1987); *U.S. v. Manzella*, 782 F.2d 533 (5th Cir. 1986); *U.S. v. Herring*, 568 F.2d 1099 (5th Cir. 1978); *U.S. v. Lord*, 565 F.2d 831 (2d Cir. 1977); *U.S. v. Akin*, 562 F.2d 459 (7th Cir. 1977); *Booton v. Hanauer*, 541 F.2d 296 (1st Cir. 1976); *U.S. v. Alessio*, 528 F.2d 1079 (9th Cir. 1976); *U.S. v. Concepcion Cueto*, 515 F.2d 160 (1st Cir. 1975); *U.S. v. Hyde*, 448 F.2d 815 (5th Cir. 1971); *U.S. v. Solomon*, 422 F.2d 1110 (7th Cir. 1970); *Hanscomb v. Meachum*, 435 F. Supp. 1162 (D. Mass. 1977); *U.S. v. Titsworth*, 422 F.Supp. 587 (D. Neb. 1976); *Brown v. State*, 601 P.2d 221 (Alaska 1979); *Harper v. Colorado*, 817 P.2d 77 (Colo. 1991); *Calaway v. U.S.*, 408 A.2d 1220 (D.C. 1979); *Salas v. State*, 544 So.2d 1040 (Fla. Dist. Ct. App. 1989); *State v. Keliioholokai*, 569 P.2d 891 (Haw. 1977); *State v. Jones*, 383 N.E.2d 239 (Ill. App. Ct. 1978); *State v. Lykins*, 382 N.E.2d 1242 (Ill. App. Ct. 1978); *State v. Frank*, 298 N.W.2d 324 (Iowa 1980); *State v. Burt*, 249 N.W.2d 651 (Iowa 1977); *Commonwealth v. Hanscomb*, 328 N.E.2d 880 (Mass. 1975); *State v. Rumney*, 258

would appear that through an accident of publishing, Minnesota Rule of Criminal Procedure 26.03, subdivision 9 has never been construed to apply merely to pretrial publicity, as was most likely originally intended.

### 3. *Reconciling Greer with History*

The *Schwartz* procedure has been utilized on innumerable occasions since it was first established in case law and then promulgated as Minnesota Rule of Criminal Procedure 26.03, subdivision 19(6). As discussed above, use of the *Schwartz* hearing has expanded over time to include both mid- and post-trial issues.<sup>87</sup> In contrast, Rule 26.03, subdivision 9 has been seldom utilized since its promulgation. When subdivision 9 has been utilized, it has usually been construed in terms of pre- or mid-trial issues.<sup>88</sup> Thus, an examination of the two Rules raises the question of whether the distinction made in *Greer* as to when each Rule should be used is historically accurate.<sup>89</sup> The answer is that the “*Schwartz* hearing” is a term of art describing the procedure by which *both* rules are carried out. Rather than standing simply for a procedure to ferret out allegations of misconduct discovered *after* the jury has entered into deliberations or has rendered a verdict, the term now stands for a pre- or post-verdict procedure in which:

- (1) counsel is required to bring allegations of misconduct or source of prejudicial effect to the trial court’s attention as soon as such suspicion arises;
- (2) the trial court considers whether the allegations

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A.2d 349 (N.H. 1969); *State v. Harris*, 716 A.2d 485 (N.J. 1998); *State v. Bey*, 548 A.2d 846 (N.J. 1988); *State v. Reedy*, 324 A.2d 607 (N.J. Super. Ct. Law Div. 1974); *State v. Voeller*, 356 N.W.2d 115 (N.D. 1984); *Commonwealth v. Beasley*, 479 A.2d 460 (Pa. 1984); *Commonwealth v. Bruno*, 352 A.2d 40 (Pa. 1976); *Commonwealth v. Reeves*, 387 A.2d 877 (Pa. Super. Ct. 1978); *Thompson v. Commonwealth*, 247 S.E.2d 707 (Va. 1978); *State v. Howe*, 87 Wash. App. 1067 (Wash. Ct. App. 1997); *State v. Mims*, 511 P.2d 1383 (Wash. Ct. App. 1973); *State v. Clay*, 501 P.2d 603 (Wash. Ct. App. 1972); *Drollinger v. State*, 284 N.W.2d 122 (Wis. Ct. App. 1979). *But see* *U.S. v. Spinella*, 506 F.2d 426 (5th Cir. 1975) (regarding the effect of telephone calls made to jurors during trial); *State v. Finley*, 355 S.E.2d 47 (Va. 1987) (regarding possible prejudice from a juror who served on a jury that tried the defendant on a different indictment).

87. See discussion *supra* Part II.A.1.

88. See discussion *supra* Part II.A.2.

89. See *State v. Greer*, 635 N.W.2d 82, 93 (Minn. 2001) (stating MINN. R. CRIM. P. 26.03, subd. 19(6) should be used if the defendant learns of misconduct during deliberations or after the verdict, and MINN. R. CRIM. P. 26.03, subd. 9 should be used if the defendant learns of the misconduct during the trial proceeding itself).

indicate prejudice which could influence or may have influenced the verdict; and

- (3) if a hearing is granted, jurors are questioned by the trial court on the record.<sup>90</sup>

Thus, the *Schwartz* hearing is just that: the *hearing* conducted pursuant to either Rule 26.03, subdivision 9 or subdivision 19(6). In *State v. Greer*, the court differentiated between the timing of the two rules, stating that subdivision 9 applied to exposure learned of during the trial and subdivision 19(6) applied to exposure learned of during deliberations or after the verdict is reached.<sup>91</sup> As detailed above, this distinction is not supported by the relevant case law. However, if the *Schwartz* hearing can be understood to refer to the hearing that is held in conjunction with *both* rules rather than simply subdivision 19(6), then the distinction in *Greer* is a good one. The distinction would make clear that parties may assert misconduct or prejudicial exposure at any stage of trial. Yet reference to the *Schwartz* hearing in conjunction with both rules would not limit the case law available to support arguments about such issues as how liberally the hearing should be granted,<sup>92</sup> what type of showing must be made,<sup>93</sup> or whether the jurors must be questioned separately or as a panel.<sup>94</sup> Fortunately, the *Greer*

90. It should be noted that the type of questions that are permissible at pre- and post-verdict hearings *do* differ. Prior to deliberations, the trial court may ask whether the outside influence will affect the juror's ability to render a fair and impartial verdict. *State v. Cox*, 322 N.W.2d 555, 559 n.1 (Minn. 1982) (stating Rule 606(b) does not prohibit the trial court from asking about the "likely effect of a prejudicial statement on the subsequent deliberations"). But after the verdict, the trial court may not inquire as to the jurors' thought processes. *See State v. Martin*, 614 N.W.2d 214, 226 (Minn. 2000) (upholding the trial court's denial of a *Schwartz* hearing where the defendant alleged that sympathy controlled the jury's decision because the rules of evidence forbid testimony about thought processes in determining guilt). *See also* MINN. R. EVID. 606(b). *But see State v. Callender*, 297 N.W.2d 744, 746 (Minn. 1980) (excepting inquiry into racial bias stating, "the rule should not be interpreted as completely foreclosing inquiry into jury deliberations even in cases in which there is strong evidence that racial prejudice infected the jury's verdict").

91. *Greer*, 635 N.W.2d at 93.

92. *See, e.g., Olberg v. Minneapolis Gas Co.*, 291 Minn. 334, 343, 191 N.W.2d 418, 424 (1971) ("The trial courts . . . should be liberal in granting a hearing.").

93. *See, e.g., State v. Larson*, 281 N.W.2d 481, 484 (Minn. 1979) ("To establish a *prima facie* case, a defendant must submit sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct.").

94. *See, e.g., Quinn v. Winkel's, Inc.*, 279 N.W.2d 65, 69 (Minn. 1979) (finding that the trial court did not abuse its discretion in failing to hold a full *Schwartz* hearing when answers to questions directed at the jury as a whole indicated that none had been contacted about the trial).



opinion can be read in this manner because the court's reference to the *Schwartz* hearing appears prior to the discussion as to when each Rule must be applied. If that was the court's intent, it marks a substantial step forward in clarifying the applicability and scope of the now forty-year-old procedure codified in Minnesota Rule of Criminal Procedure 26.03, subdivision 19(6) and the seldom-utilized procedure in Minnesota Rule of Criminal Procedure 26.03, subdivision 9.

*B. A Question of Propriety*

After discussing the procedure Greer should have followed in raising the issue of outside influence upon the jury, the court next turned to the propriety of the trial judge deciding the motion for a new trial and a *Schwartz* hearing when his own conduct was at issue. The court expressed grave concern:

Our more serious concern is that when counsel did, in the context of a motion for a *Schwartz* hearing, raise the jury contact issue, the motion was decided by the same trial court judge alleged to have engaged in improper conduct. When a judge presides over a motion hearing to decide whether further inquiry is required into the propriety of *the judge's own conduct*, it raises questions about the impartiality of the court's decision. Because public trust and confidence in the judiciary depend on the integrity of the judicial decision-making process, we can ill afford to ignore this problem. We stress that nothing in the albeit sparse record indicates that the trial court's consideration of Greer's motion was not impartial. However, the mere appearance of partiality warrants concern.<sup>95</sup>

The court then remanded the case to the Chief Judge of the Fourth Judicial District for a *Schwartz* hearing regarding the trial court's *ex parte* contacts with the jury.<sup>96</sup> This action represented a positive policy shift, recognizing that a trial judge should never be placed in the position of evaluating his own credibility or the effect of his own conduct on the jury.

Though the law in Minnesota is well established as to the

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95. *Greer*, 635 N.W.2d at 93-94 (emphasis added).

96. *Id.* at 94. On remand, the Chief Judge of the Fourth Judicial District conducted a *Schwartz* hearing of six randomly selected jurors and found that the jury's verdict was not the product of misconduct by the trial court. *State v. Greer*, Findings of Fact, Conclusions of Law, and Order, Dist. Ct. File No. 98103242 (May 24, 2002).

impropriety of a trial judge communicating or coming into contact with a jury *after* it has entered into deliberations,<sup>97</sup> there is virtually no case law regarding the propriety of the trial judge communicating with or coming into contact with the jury *before* deliberations.<sup>98</sup>

The first case to discuss the utilization of a *Schwartz* hearing to address the possible effect on a jury of the trial judge's conduct was *Zimmerman v. Witte Transportation Co.*<sup>99</sup> In that case, two jurors contacted the judge to express their belief that they had rendered a verdict in favor of Zimmerman, but had learned from a newspaper article that Witte Transportation had prevailed.<sup>100</sup> The trial judge questioned the jurors, off-the-record and without notifying counsel, and determined that the jurors did not feel the truck driver from the Witte Transportation Co. was negligent.<sup>101</sup> Since this comported with the verdict rendered, the trial judge did not feel the need to disturb the verdict or to discuss the issue with counsel.<sup>102</sup> When Zimmerman's counsel learned of the trial judge's contact with members of the jury from other sources, he made a motion for a *Schwartz* hearing, which was denied by the trial court as follows:

It appears that at least two of the jurors thought that the verdict they agreed to would entitle plaintiffs to recover. Each of these jurors came to the Court the next day and so stated. Upon questioning, however, both were adamant that in their opinion the defendant's driver was not negligent. By virtue of the foregoing plaintiffs now seek a hearing pursuant to [*Schwartz*]. It does not appear to the Court that that is a case where such a hearing would be appropriate. *Schwartz* (*ibid*) involved a case where there was alleged misconduct on the part of a juror. In that case the Supreme Court said there should be a hearing on that kind of question before the trial judge. In the case at bar, plaintiffs' claim that a *Schwartz* hearing should be

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97. See MINN. STAT. § 631.09 (2000) (providing that "[n]o person may be permitted to speak or communicate with any juror, unless by order of the court"). See also *State v. Mims*, 306 Minn. 159, 165, 235 N.W.2d 381, 386 (1975) (finding reversible error where the judge entered the jury room during deliberations).

98. See, e.g., *State v. McGath*, 370 N.W.2d 882, 886 (Minn. 1985) (finding the trial judge's on-the-record interview of a juror for possible bias did not deny defendant's right to trial by an impartial jury even though neither the defendant nor his counsel was present during the questioning).

99. 259 N.W.2d 260 (Minn. 1977).

100. *Id.* at 262.

101. *Id.* at 263.

102. *Id.*

had because the jury was confused and misunderstood the effect of the verdict. That is not a ground for a Schwartz hearing.<sup>103</sup>

In reviewing the issue on appeal, the supreme court recognized that, ideally, the conversations between the trial judge and the troubled jurors would have been on the record.<sup>104</sup> However, because the trial court was “unequivocal in his recollection of the statements made to him by the jurors,” the court found it had not committed error in denying the *Schwartz* hearing.<sup>105</sup> Further, the court distinguished *Zimmerman* from the case of *Ramfjord v. Sullivan*,<sup>106</sup> in which the court had ordered a new trial because the trial judge’s recollection of off-the-record conversations that had taken place with the jurors when they returned the verdict was “a little hazy as to just what took place.”<sup>107</sup>

In the next case to address the issue, *Gersdorf v. G.M. Stewart Lumber Co.*,<sup>108</sup> the trial judge provided a written response to a question submitted by the jury during deliberations without informing the parties’ counsel and without a court reporter present.<sup>109</sup> In that case, however, the supreme court made a clear connection between the *Schwartz* hearing and inquiry into the trial court’s own conduct by stating, “[w]e have also held that where the trial judge is unequivocal in his recollection of the facts concerning prejudicial conduct, a *Schwartz* hearing is unnecessary.”<sup>110</sup> The supreme court then remanded the case to the trial court for a determination as to its recollection, stating, “[i]f the trial judge unequivocally recollects giving the alleged secret instruction, then a new trial must be granted. In the alternative, if the trial judge is unsure of the incident, then this is remanded with an order for the trial judge to conduct a *Schwartz* hearing.”<sup>111</sup> Thus, unlike *Greer*, in which the case was remanded to a judge *other* than the judge whose conduct was at issue, in *Gersdorf*, the court remanded the issue to

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103. *Id.*

104. *Id.*

105. *Id.* at 263-64.

106. 301 Minn. 238, 222 N.W.2d 541 (1974). It should be noted that whether to grant a *Schwartz* hearing was never at issue in *Ramfjord*. Rather, the case concerned conversations between the judge and jury when the jury returned a comparative negligence verdict that seemed to contain a mathematical error. *Id.*

107. *Zimmerman*, 259 N.W.2d at 264.

108. 316 N.W.2d 517 (Minn. 1982).

109. *Id.* at 518.

110. *Id.* (citing *Zimmerman*, 259 N.W.2d 260 (Minn. 1977)).

111. *Id.*

the *same judge* alleged to have engaged in the disputed conduct.

A few years later, *Gersdorf* was cited in the case of *State v. Ming Sen Shiue*<sup>112</sup> as an example of case law defining actionable contact between the judge and jury.<sup>113</sup> In that case, the jury requested that they be able to view three videotapes entered into evidence.<sup>114</sup> “The trial judge granted the request after conducting the jury to the courtroom and notifying counsel.”<sup>115</sup> However, after viewing just one of the tapes, the jury communicated to the judge that they were possibly a hung jury.<sup>116</sup> The judge suggested that the jury view the remaining two tapes as they had originally requested, but after doing so, the jury indicated that they were still hung.<sup>117</sup> Defense counsel objected to the judge’s *ex parte* contact with the jury in which he suggested the review of additional evidence and moved for a mistrial, which was denied.<sup>118</sup> Stating simply that “[t]he court’s recollection of the incident was uncontroverted,” the supreme court found that the contact was “not of the type that requires application of legal standards concerning communication between a judge and jury outside the presence of counsel and off the record.”<sup>119</sup>

Three years later, in *State v. Jurek*,<sup>120</sup> the Minnesota Supreme Court addressed the utilization of a *Schwartz* hearing to address the trial court’s recollection of a third party’s conduct as well as his own. In that case, when the jury asked the bailiff if certain testimony could be reread, the bailiff instructed the jury to “abide by their own recollection of the evidence and the judge’s instructions.”<sup>121</sup> When the appellant informed the court of the bailiff’s remark, the trial court “acknowledged the existence of a communication but believed it to be centered on a juror’s lost ring.”<sup>122</sup> Then, in attempting to determine whether the jury had been affected by the bailiff’s comment, the judge stated, “[w]hat the bailiff told you, to rely on your own recollection. Frankly that’s what I would have told you so I don’t see anything harmful about it,

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112. 326 N.W.2d 648 (Minn. 1982).

113. *Id.* at 653.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 653-54 (citing *Gersdorf*, 316 N.W.2d 517 (Minn. 1982)).

120. 376 N.W.2d 233 (Minn. 1985).

121. *Id.* at 235.

122. *Id.* at 237.

but I just thought I would ask.”<sup>123</sup> In deciding the issue on appeal, the supreme court distinguished *Jurek* from those cases in which a *Schwartz* hearing was found to be unnecessary because in *Jurek* the trial judge was not unequivocal in his recollection of the facts concerning the prejudicial conduct.<sup>124</sup>

Finally, the connection between a *Schwartz* hearing and the judge’s conduct was most recently discussed in *State v. Kelley*.<sup>125</sup> In that case, the jury contacted the trial judge in writing several times to say that it was doubtful they would be able to reach a unanimous decision.<sup>126</sup> In each case, the note was read to the judge over the phone, and in each case the judge, without consulting or notifying counsel, or making a record of the communication, instructed the clerk to inform the jury to keep working.<sup>127</sup> Eventually, the jury returned a unanimous verdict; however, shortly afterward, a juror informed the trial judge that another juror had threatened him with physical violence.<sup>128</sup> The trial court held a *Schwartz* hearing to investigate the allegation, but ultimately found that no misconduct had occurred.<sup>129</sup> However, the trial court’s ruling did not address its *own* conduct, and it was on that basis that the appellant made his appeal.<sup>130</sup> In deciding the case, the supreme court continued its distinction between the types of contacts between the judge and jury that might necessitate a new trial, this time citing American Bar Association Standards for Criminal Justice 15-3.7(b), which states that “[t]he trial judge . . . should not communicate with a juror or the jury on any aspect of the case itself (as distinguished from matters relating to physical comforts and the like), except after notice to all parties and reasonable opportunity for them to be present.”<sup>131</sup> Ironically, this slight reference to the ABA standard became the basis for the court’s statement in *Greer* that it had previously distinguished between “communications relating to aspects of a pending case from nonsubstantive contacts and mere

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123. *Id.*

124. *Id.* (citing *Zimmerman v. Witte Transp. Co.*, 259 N.W.2d 260 (Minn. 1977)).

125. 517 N.W.2d 905 (Minn. 1994).

126. *Id.* at 907-08.

127. *Id.*

128. *Id.* at 908.

129. *Id.*

130. Appellant argued that he was entitled to a new trial because the court’s *ex parte* contacts with the jury coerced the jury to convict. *Id.*

131. *Id.*

pleasantries.”<sup>132</sup> However, the *Kelley* opinion had no effect on the propriety of holding a *Schwartz* hearing based upon the strength of the trial judge’s recollection because in *Kelley*, a second error coupled with the trial court’s contacts required reversal.<sup>133</sup> Thus, leading into *Greer*, the Minnesota Supreme Court had not yet commented as to the propriety of a judge presiding over a hearing at which his or her own conduct was at issue. Rather, the court still relied heavily on the trial court’s discretion in granting the *Schwartz* hearing,<sup>134</sup> even in that circumstance.

As in Minnesota, the question as to whether a judge should preside over a hearing in which his or her own conduct is at issue has arisen infrequently in other jurisdictions. In *Tyler v. Swenson*,<sup>135</sup> the Eighth Circuit considered the effect of the trial court judge presiding over a post-conviction hearing to address the voluntariness of the defendant’s guilty plea when the defendant asserted that the trial judge coerced him into making the plea.<sup>136</sup> In that case, the trial judge interjected his own recollection of events throughout the post-conviction hearing, and even entered into a dispute with the defendant’s counsel, which was so heated that counsel was eventually held in contempt.<sup>137</sup> The circuit court found that the defendant had been denied a full, fair, and adequate hearing because he had no opportunity to cross-examine the judge as to his recollections, or to have the hearing held before another judge.<sup>138</sup> The court explained that although a trial judge should not be disqualified from hearing *every* post-conviction hearing simply because he or she is familiar with the proceedings, where, as in *Tyler*, the judge’s recollection is the *only* testimony that can refute the defendant’s claim, the judge should not preside over the hearing.<sup>139</sup>

However, a Texas case interpreting *Tyler* came to a different conclusion. *George v. Texas*<sup>140</sup> also involved a situation where the trial judge presided over the post-conviction hearing following

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132. *State v. Greer*, 635 N.W.2d 82, 93 n.3 (Minn. 2001).

133. *State v. Kelley*, 517 N.W.2d 905, 910-11 (Minn. 1994).

134. *See, e.g., Zimmerman v. Witte Transp. Co.*, 259 N.W.2d 260, 262 (Minn. 1977) (“The granting of a *Schwartz* hearing is generally a matter of discretion for the trial court.”).

135. 427 F.2d 412 (8th Cir. 1970).

136. *Id.* at 414-15.

137. *Id.* at 414.

138. *Id.* at 415.

139. *Id.* at 417.

140. 20 S.W.3d 130 (Tex. Ct. App. 2000).

allegations that the trial judge coerced the defendant's plea.<sup>141</sup> Additionally, the trial judge made a lengthy statement on the record "in which she relied upon her recollection of the events preceding appellant's plea to refute much of the testimony of his trial counsel."<sup>142</sup> In deciding the issue, the court of appeals disagreed with *Tyler*, stating, "we believe *Tyler* is mistaken in suggesting that a judge's unarticulated recollection of events or proceedings from the trial can rightly be characterized as 'testimony' or that the memory of such events transforms the judge into a 'witness.'"<sup>143</sup> Therefore, the court found that "[u]nless the trial judge is disqualified or has been recused, it is not improper for a trial judge to preside over a hearing on the motion for new trial and review the propriety of his or her own rulings, pronouncements or conduct."<sup>144</sup> This statement is very similar to the pronouncement made by the Chief Judge of the Fourth Judicial District in *Greer* when denying Greer's motion for a *Schwartz* hearing.<sup>145</sup> But in *George*, the trial judge's conduct was on the record, whereas in *Greer*, the trial judge's conversations with the jury in the jury room were not on the record. Thus, *Tyler* seems to present the better rule.

It is clear that the Minnesota Supreme Court has expressed a desire in its opinions to establish permissible and impermissible contact between a judge and jury. However, the court also seems to have expressed an opinion that all contacts, regardless of their nature, should be conducted in the presence of counsel and on the record.<sup>146</sup> Thus, a fair interpretation of these policies seems to be that a trial judge should never be in a position to pass judgment on his or her own credibility.<sup>147</sup> Should the judge be placed in that position, the hearing should be heard by another judge so that there can be no question about the impartiality of the court's

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141. *Id.* at 133.

142. *Id.* at 139.

143. *Id.* at 137.

144. *Id.* at 139.

145. Brief for Appellant at app. 11 (Order, Chief Judge Daniel Mabley, June 4, 1999) (ordering that the hearing be heard by the trial court judge "unless and until he recuses himself or is otherwise removed for cause").

146. *See, e.g.*, *State v. Kelley*, 517 N.W.2d 905, 908 (Minn. 1994) (stating that contacts between the judge and jury should be in the presence of defendant and counsel).

147. *See Tyler v. Swenson*, 427 F.2d 412, 415 (8th Cir. 1970) (finding the record supported petitioner's contention that the judge in effect passed upon his own credibility in making the factual determination).

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decision.<sup>148</sup> *Greer* is the first case to make that explicit.<sup>149</sup>

### III. CONCLUSION

*State v. Greer* is a significant Minnesota Supreme Court opinion for two reasons. First, it clarifies that Minnesota Rule of Criminal Procedure 26.03, subdivision 9 applies to allegations of misconduct discovered *prior to* jury deliberations, while Minnesota Rule of Criminal Procedure 26.03, subdivision 19(6) applies to allegations of misconduct discovered *after* the jury has entered deliberations or after the verdict has been rendered. However, both rules may arguably result in a *Schwartz* hearing, which has become a term of art rather than a procedure linked only to subdivision 19(6). Second, if there is a question as to the effect of the trial judge's *own* conduct on the verdict, a *Schwartz* hearing should be conducted by a *different* judge so there can be no question as to the impartiality of the court's decision. Each clarification marks a subtle but positive shift in policy. And in turn, each policy change ensures the defendant's rights to an impartial jury and an impartial judge.

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148. See *State v. Greer*, 635 N.W.2d 82, 93 (Minn. 2001).

149. It is not clear, however, which procedure a litigant should use to gain a hearing before another judge. In this case, *Greer* attempted to gain a hearing before the Chief Judge of the Fourth Judicial District by filing both a motion for a new trial and a motion for recusal. Brief for Appellant at 2, *State v. Greer*, 635 N.W.2d 82 (Minn. 2001) (Nos. C9-99-1550, C7-00-2154). The supreme court did not indicate in its opinion whether either method should have succeeded.