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THE USE OF JUROR TESTIMONY TO IMPEACH A JURY VERDICT: THE MARYLAND PROBLEM AND THE FEDERAL SOLUTION

by Sean Patrick Casey

I. INTRODUCTION

In *Haley v. Blue Ridge Transfer Co.*,[1] independent truckers sued a trucking company ("Blue Ridge") claiming that Blue Ridge breached a contract by unfairly assigning favorable trucking routes to Blue Ridge employees. On the morning of trial, courthouse security guards mistakenly directed a non-juror to the jury room. The non-juror sat with the jury during the first day of trial, listening to the opening statements and the plaintiffs' first witness. The regular jurors believed the non-juror was a member of the panel. The error was not spotted initially, because thirteen jurors had been selected, and the court had excused one of the thirteen before trial.[2] After the first day, the judge discovered the error and discharged the non-juror from further service.[3] After a twelve day trial, the jury returned a verdict for the plaintiffs.[4]

The defendant filed a motion for a new trial, alleging the non-juror prejudiced the verdict. In support of the motion, the defendant offered an affidavit of a regular juror.[5] In the affidavit, the juror stated that during a recess the non-juror told the entire jury that he was familiar with the trucking business and knew trucking companies were unfair to truckers.[6] The non-juror added that regardless of Blue Ridge's defense, he would vote against the company.[7] Included in the affidavits was the fact that a female juror said, "she was glad this gentleman was on the jury because he would be a great help."[8] The only evidence of the non-juror's statements was the affidavit.[9] The United States Court of Appeals for the Fourth Circuit ruled that the trial court correctly admitted the juror's affidavit under Rule 606(b) of the Federal Rules of Evidence.[10] Presuming the non-juror's comments influenced the jury, the court granted Blue Ridge's motion.[11]

If *Haley* were decided under Maryland law, the court's analysis and final ruling would have been quite different. A Maryland court would deem the affidavit inadmissible under Md. Rule 5-606(b)[12] and accompanying case law, because it came directly from a juror.[13] The court could only review evidence not emanating from the jury to determine whether the non-juror's comments affected the verdict.[14] Under Md. Rule 5-606, the admissible evidence in *Haley* was

[1] 802 F.2d 1532 (4th Cir. 1986).

[2] *See id.* at 1534.

[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] *See id.*

[9] *See* id. at 1535. In *Haley*, the transcript from the evidentiary hearing was lost. The court did not address the issue of whether the non-juror was available to testify at the hearing. *Id.*

[10] FED. R. EVID. 606(b). Rule 606 permits juror testimony "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *Id.*

[11] *See infra* notes 91-106.

[12] Md. R. 5-606(b) Inquiry into Validity of Verdict
(1)Inquiry into the validity of a verdict, a juror may not testify as to (A) any matter or statement occurring during the course of the jury's deliberations, (B) the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict, or (C) the juror's mental processes in connection with the verdict.
(2)A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes.

[13] *See infra* note 53.

[14] *See* Harford Sands, Inc. v. Groft, 320 Md. 136, 145, 577 A.2d 7, 11 (1990).

that an individual sat with the jury for one day of a twelve day trial.[15]

Viewing this evidence under Maryland's "probability of prejudice" test,[16] the court would likely deny Blue Ridge's motion for a new trial. The available evidence would not suggest that the non-juror held a strong bias against trucking companies, nor would the court have considered the female juror's favorable impression of the non-juror's presence.[17] The possibility existed for the non-juror's mere presence to have influenced the verdict, but it would be unreasonable to conclude that the non-juror probably prejudiced the verdict.[18]

In many situations, Maryland's strict rule that a juror will not be heard to impeach his or her own verdict, denies litigants a verdict based "solely on evidence presented" at trial.[19] Improper third party contact,[20] dictionaries,[21] media coverage,[22] and a myriad of other extrinsic forces have tainted jury verdicts. If a competent source of evidence exposing these improprieties cannot be found, a reviewing court will affirm a corrupted verdict.

The primary issue in verdict impeachment cases is what evidence a court may consider in determining the degree of prejudice that was placed on the deliberations of the jury. The purpose of this article is to explain the Maryland and federal approaches to this issue and offer an equitable alternative to Maryland's strict rule. The article commences with an examination of the historical background and policy considerations for denying admissibility of jury testimony for verdict impeachment purposes. Next, it discusses the Maryland and federal approaches to this issue. The article closes by proposing that the Court of Appeals of Maryland abandon its hard line doctrine in favor of a balanced rule. The proposed rule combines elements of Federal Rule 606(b) with a variation of the local rule of the United States District Court for the District of Maryland that generally prohibits attorneys from contacting discharged jurors.[23]

II. POLICY CONSIDERATIONS

The tenet that a juror will not be heard to impeach his or her own verdict has its roots in eighteenth century England. In *Vaise v. Delaval,*[24] a party offered juror affidavits to prove that after reaching an impasse, the jury flipped a coin to determine the verdict of the suit.[25] Articulating what has become known as Lord Mansfield's Rule, the court refused to consider the affidavits. Writing for the court, Lord Mansfield stated:

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[15] The non-juror would be permitted to testify under Md. Rule 5-606, but the *Haley* court did not address the issue of the non-juror's testimony.

[16] *See* Wernsing v. General Motors, Co., 298 Md. 406, 419-20, 470 A.2d 802, 809 (1984).

> Where . . . the precise extraneous matter is known but direct evidence as to its effect on the deliberations is not permitted, a sound balance is struck by a rule which looks to the *probability of prejudice from the face of the extraneous matter* in relation to the circumstances of the particular case. It is the function of the trial judge when ruling on a motion for a new trial to evaluate the degree of probable prejudice and whether it justifies a new trial. *Id.* (emphasis added).

[17] *See* Williams v. State, 204 Md. 55, 70, 102 A.2d 714, 721 (1954).

> In Maryland there has been no deviation from the rule that what takes place in the jury-room ought to be ... known only to the jurors themselves and their testimony cannot be heard to impeach their verdict, whether the conduct objected to be misbehavior or mistake. *Id.*

[18] *See* Wernsing, 298 Md. at 419, 470 A.2d at 808.

[19] *See* James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond,* 65 ST. JOHN'S L. REV. 389, 393 (1991).

[20] *See* Kelly v. Huber Baking Co., 145 Md. 321, 125 A. 782 (1924).

[21] *See* Wernsing, 298 Md. at 419, 470 A.2d at 809.

[22] *See* United States v. Rocks, 339 F. Supp. 249 (E.D. Va. 1972).

[23] *See* U.S. DIST. CT. MD. R. 107.16.

[24] 99 Eng. Rep. 944 (K.B. 1785).

[25] *See id.*

> The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor, but in every such case the Court must derive their knowledge from some other source: such as from some person having seen the transaction through a window, or by some other means. [26]

American courts have since used Lord Mansfield's Rule as the foundation for limiting post-verdict juror testimony.[27]

Justifications for restricting juror testimony can generally be divided into three groups: protection of the jury, maintaining finality in litigation, and preserving the jury as the democratic element of the legal system.

A. Protection of the Jury

The first group of arguments advanced for not accepting juror testimony is centered on the policy goal of preventing post-verdict harassment of the jury. Courts have consistently held that allowing jurors to speak on their verdicts would create another way for a losing party to pursue its cause.[28] Compared to the appellate process, the potential for uncovering a flaw in the jury's deliberation is an expedient and cost effective alternative. In *McDonald v. Pless*,[29] the United States Supreme Court warned that if one verdict was successfully challenged using the testimony of a juror, the door would open to endless harassment of jurors and change the private process into a public investigation.[30]

The danger is not limited to interrogations by defeated litigants. Once a court receives testimony from the defeated party, the prevailing party will be compelled to gather testimony in support of the verdict.[31] Conflicting testimony will be offered, and a race to credible jurors will ensue.[32] In order to discourage post-verdict investigations, courts have deemed the fruit of these inquires inadmissible.[33]

Under a similar analysis, courts have argued that barring the introduction of jury testimony decreases the potential for jury tampering.[34] There will always be an opportunity to bribe or threaten a member of the jury during trial, but allowing jurors to testify after the verdict will afford the corrupt litigant another occasion to sway the verdict.

It can be safely stated that virtually all litigants enter trial with some hope of victory. Presumably, litigants without hope will settle their cases or accept pleas of guilty. In many cases defeat does not become a reality until a court has rendered a verdict.[35] By negating the effect of juror testimony, the motive to tamper with a jury is eliminated at the time many desperate litigants would first consider that extreme measure.

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[26] *Id.*

[27] *See* Peter N. Thompson, *Challenge to the Decision Making Process—Federal Rule of Evidence 606(b) and the Constitutional Right to a Fair Trial,* 38 SW. L.J. 1187, 1197 (1985).

[28] *See, e.g.,* McDonald v. Pless, 238 U.S. 264 (1915); Aron v. Brock, 118 Md. App. 475, 703 A.2d 208 (1997).

[29] 238 U.S. 264 (1915).

[30] *See id.* at 267.

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference. *Id.*

[31] *See generally* Diehm, *supra* note 19, at 397.

[32] *See id.* at 397.

[33] *See id.* at 395.

[34] *See supra* note 30.

[35] *See* Diehm, *supra* note 19, at 396.

B. Maintaining Confidentiality in the Jury Room

Another policy consideration offered is the potential constraint that would be placed on debate and expression in the jury room if the deliberations were made public. Our jury system operates effectively only when jurors are free to express their thoughts and opinions without the thought of societal retaliation.[36] The single goal of deliberation is to arrive at a fair, well-reasoned verdict. If statements made in the privacy of deliberation could be made public, additional agenda would develop. Instead of open communications based on the merits of a claim, jurors might decide cases based on the popularity of a verdict.[37]

C. Finality of Jury Verdicts

An additional argument is based on the need for finality of jury verdicts. The finality argument is founded on the premise that the jury system is imperfect,[38] but litigation must end at some point. By prohibiting jurors from impeaching their verdicts, legislatures and courts have deemed the announcement of the verdict as the final cutoff. The choice to bring closure to litigation is important both for the parties and society as a whole.[39] If courts were to receive testimony every time a juror made a mistake, many cases would be retried.[40] Confidence and trust in the legal system would be shaken if constant imperfections in the jury system were broadcast to the public.[41]

A related policy consideration is the reality that our legal system moves at a slow pace. The pace is further delayed when jurors wait long periods of time before revealing a flaw in the process.[42] The combined result is that many years may pass before a case is retried. As time passes, witnesses disappear, memories fade, and evidence is lost.[43] It is unlikely that the parties will be able to assemble the necessary resources to retry the case effectively. The final result will be another trial in which the jury renders a verdict based on a fragment of the evidence, instead of the full merits of the case.[44] A refusal to accept juror testimony is partially based on the practical reality that a fair judgment is less attainable on retrial.

D. The Democratic Element of the Legal System

The jury system is based on the concept that twelve representatives of the community will decide the merits of the case. In the criminal context, jurors are considered the peers of the accused. The jury, as a representative of the community, has "the power to decide what values will control the verdict."[45] This power is constant, even when the jury's values are different from those of the court or the legislature.[46]

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[36] *See id.* at 399.

[37] *See id.* at 400.

[38] *See* Jorgensen v. Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir. 1947). In *Jorgensen*, the court rationalized that attainment of perfection is an impossible task, stating:

> [I]t would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. It is doubtful whether more than *one in a hundred* would stand such at test . . . . *Id.* (emphasis added).

[39] *See* Diehm, *supra* note 19, at 403.

[40] *See id.*

[41] *See* Tanner v. United States, 483 U.S. 107, 121 (1987). Justice O'Connor writing for the Court stated, "[T]he community's trust in a system that relies on the decisions of lay people would be undermined by a barrage of post-verdict scrutiny of juror conduct." *Id.*

[42] *See* Government of the Virgin Islands v. Nicholas, 759 F.2d 1073, 1075-76 (3d Cir. 1985) (explaining that juror waited twenty months after announcement of the verdict before coming forward to reveal that a hearing impairment prevented him from understanding the evidence offered in the case).

[43] *See* Diehm, *supra* note 19, at 402.

[44] *See id.* at 403.

[45] *See* Victor Gold, *Juror Competency to Testify That a Verdict Was the Product of Racial Bias,* 9 ST. JOHN'S J. LEGAL COMMENT. 125, 135 (1993).

[46] *See* United States v. Powell, 936 F.2d 1056, 1062 (9th Cir. 1991) ("The concept of jury nullification allows the jury to acquit the defendant even when the government has proven its case beyond a reasonable doubt").

The practice of permitting the jury to testify about the deliberation process would provide the government an opportunity to witness and control the jury's decision-making. Independence of thought, whether grounded in accepted legal theory or the will of the community, is essential to maintaining the autonomous role of the jury in our legal system.[47]

The focus of the paper will now turn to an analysis of how the above policy considerations have been incorporated into the strict Maryland rule forbidding juror testimony to challenge a verdict.

III. MARYLAND LAW

Maryland Rule 5-606(b) is the rule of evidence that addresses the competency of a juror as a witness.[48] The rule is the result of a balancing test in which the rights of a litigant to a fair and accurate verdict are weighed against the policy considerations advanced for excluding juror testimony.[49] By adopting Rule 5-606(b), a hard-line stance against receiving juror testimony to impeach a verdict, the Court of Appeals of Maryland has essentially determined that the right of a litigant to a fair trial is subordinate to protecting the jury and the deliberation process.

A. Broad Application of Lord Mansfield's Rule

The first clear application of Lord Mansfield's Rule in Maryland occurred in 1864. In *Browne v. Browne,*[50] the Court of Appeals of Maryland refused to consider juror testimony alleging that a compromise was reached so a sick juror could return home. Since *Browne*, Maryland courts have broadly applied a general bar excluding juror testimony, regardless of whether the offered testimony alleged a mistake made during the deliberations or unlawful conduct affecting the jury.[51] Additionally, courts do not distinguish between civil and criminal cases.[52]

The policy reasons underlying the general rule are cited as consistently as the rule is applied.[53] Courts have held that permitting juror testimony would encourage jury tampering and harassment, make private deliberations the subject of public concern, and remove finality and stability from jury verdicts.[54] In Maryland, there has been close compliance with the rule against receiving juror testimony supported by unwavering policy justifications, but a distinction must be made between two types of verdict impeachment cases.

B. Verdict Impeachment Cases

1. Evidence From the Jury

Cases in which evidence of improper conduct has been presented to courts can be divided into two broad classes.[55] The first group concerns situations when a juror is the only source of evidence. No distinction is made between cases where the juror comes forward to offer testimony of impropriety or when a third party claims to have received evidence from a juror and attempts to present it to the court.[56] The question is whether the original source of the testimony is a

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[47] *See* United States v. D'Angelo, 598 F.2d 1002, 1005 (5th Cir. 1979). Without a restriction on juror testimony, "the result would be that every jury verdict would either become the court's verdict or would be permitted to stand only by the court's leave." *Id.*

[48] *See supra* note 12.

[49] *See id.*

[50] 22 Md. 103 (1864).

[51] *See* Williams, 204 Md. at 67-68, 102 A.2d at 719 (citing Browne, 22 Md. 103, 113 (1864)). Explaining the broad application of the rule, the court stated, "[t]he law in Maryland is well settled that a juror cannot be heard to impeach his verdict, whether the jury conduct objected to be misbehavior or mistake." *Id.*

[52] *See id.* at 72, 102 A.2d at 722. "[T]here is no sound basis for a distinction between civil and criminal cases in this regard."

[53] *See e.g.,* Harford Sands, 320 Md. at 145, 577 A.2d at 11; Wernsing, 298 Md. at 411-12, 470 A.2d at 805; Oxtoby v. McGowan, 294 Md. 83, 101, 447 A.2d 860, 870 (1982); Williams, 204 Md. at 67-72, 102 A.2d at 720-21; Brinsfield v. Howeth, 110 Md. 520, 530, 73 A. 289, 290 (1909); Dixon v. State, 27 Md. App. 443, 448, 340 A.2d 396, 400 (1975).

[54] *See supra* note 53.

[55] *See* Aron , 118 Md. App. at 493, 703 A.2d at 226.

[56] *See* Zeller v. Mayson, 168 Md. 663, 673, 179 A. 179, 184 (1935) (non-juror's affidavit excluded as pure hearsay).

juror.[57] When the only evidence offered can be traced directly to a juror, the law is clear. Under Md. Rule 5-606(b) and cases decided before its enactment, juror testimony will not be heard to impeach a verdict.[58]

An example of the application of this law can be found in the court of appeals holding in *Kelly v. Huber Baking Co.*[59] In *Kelly*, a juror's affidavit was offered to prove that the brother-in-law of the defense counsel approached a juror and told him the plaintiff's principle witness was a "crook" and should not be believed.[60] After acknowledging the seriousness of the charge, the court refused to consider the affidavit.[61] The court determined that "under no circumstances could the affidavit be considered for the purpose for which it was offered."[62]

More recently, Maryland appellate courts have ruled that trial judges properly denied motions for new trials when the only available evidence had been juror affidavits alleging the verdict was tainted by racial prejudice,[63] a friendship with a member of the law firm representing a party,[64] or the improper consideration of the accused's prior criminal record.[65] When the only evidence directly or indirectly emanates from members of the jury, the court must uphold the verdict even if it is apparent that a transgression has taken place.

[57] In *Harford Sands*, the court excluded testimony of the plaintiff's counsel and a spectator at the trial. The substance of the testimony was that a juror had told them he was "the strongest member of the jury" and "he was very proud he had played [an] important role [in swaying the verdict]." Harford Sands, 320 Md. at 143, 577 A.2d at 10.

[58] *See supra* note 12.

[59] 145 Md. 321, 125 A. 782 (1924).

[60] *See id.*

[61] *See id.*

[62] *Id.*

[63] *See* Williams, 204 Md. at 72, 102 A.2d at 722.

[64] *See* Braun v. Ford Motor Co., 32 Md. App. 545, 363 A. 2d 562 (1976).

[65] *See* Dixon, 27 Md. App. 443, 340 A.2d 396 (1975).

2. Evidence From Other Sources

The analysis becomes compounded when evidence from competent sources is presented to the court. In cases where alternative means of proof are available, Maryland courts run the evidence through a two prong test.[66] In the first prong, the court determines the admissibility of the proffered evidence. Md. Rule 5-606(b) operates as a gatekeeper, excluding testimony that flows from the jury. Evidence that is deemed admissible under this analysis advances to the second prong. Here, under a "probable prejudice"[67] standard, the court reviews the admissible evidence to determine if the jury was affected by the alleged misbehavior.[68] In the second prong there is not a bright line rule for making the determination. Instead, the court must make its decision based on the circumstances of each case.[69]

An illustration of this two prong analysis can be found in *Harford Sands v. Groft*.[70] In that case, a juror questioned construction workers about the capabilities of a concrete pumping machine to repair the damage. Later at trial, the plaintiff's expert witness testified that the same machine could not repair the damage on the plaintiff's property. The expert testimony was inconsistent with the information given by the construction workers. The jury awarded the limited sum of $4,000.00 to the plaintiff.[71] Harford Sands filed a motion for a new trial, alleging that the juror's conversation with the construction workers affected the verdict. In support of the motion, it attempted to introduce affidavits from the juror, the construction workers, and individuals that had spoken with the juror after the trial.[72]

[66] *See* Harford Sands, 320 Md. 136, 577 A.2d 7 (1990).

[67] *See supra* note 16.

[68] *See supra* note 16.

[69] *See* Smith v. Pearre, 96 Md. App. 376, 391, 625 A.2d 349, 349 (1993) (judgment of the trial judge will not be disturbed but for abuse of discretion).

[70] 320 Md. 136, 577 A.2d 7 (1990).

[71] *See id.* (In *Harford Sands*, the plaintiff, was seeking $1.1 million in damages).

[72] *See id.* at 136, 577 A.2d at 9.

Under the first prong of the test, the trial court excluded the affidavits of the juror and the individuals he had spoken to after trial,[73] but accepted the affidavits of the construction workers. The construction workers' affidavits were admissible because they were based on their personal knowledge and could not be traced back to the jury room.[74] The appellate court found that the excluded affidavits suffered "the taint of possible post-verdict importuning," and were properly excluded.[75]

Moving to the second prong, the court considered the possible effect the construction workers' statements had on the jury's deliberations.[76] The court took into account that credible evidence was admitted to show the plaintiff's damages may have been only $4,000.00. Failing to find "probable prejudice" in relation to the circumstances of the case, the court denied Harford Sands' motion for a new trial.[77]

In a similar case of juror misconduct, *Smith v. Pearre,*[78] a trial judge instructed jurors not to watch television programs on medical subjects. In defiance of these instructions, the jury foreman watched a *60 Minutes* episode on doctors who left the medical industry due to their frustration with medical insurance companies. After a verdict in favor of the plaintiff, the defendants discovered the misbehavior and filed a motion for a new trial. After applying the two prong analysis, the court affirmed the denial of the motion for a new trial.[79] First, the court admitted juror testimony of the fact that the juror watched the program because it was extraneous material of an occurrence outside of the jury room.[80] After analyzing the second prong, the court concluded, "while it was possible that the *60 Minutes* segment influenced the jury foreman, we are not convinced that it probably resulted in prejudice."[81]

C. Criminal Cases

Criminal cases dealing with the issue of the admissibility of juror testimony follow the same analysis. In *Williams v. State,*[82] the Court of Appeals of Maryland refused to consider an affidavit of a juror that explained the verdict was based on racial prejudice.[83] The court pointed out that "under Maryland law the affidavit of a juror is inadmissible, . . . and there is no sound basis for a distinction between civil and criminal cases in this regard."[84]

In *Dixon v. State,*[85] a criminal defendant filed a motion for a new trial, claiming his Sixth Amendment right to be confronted with the witnesses against him had been violated. He alleged that the prosecutor privately informed a juror of the defendant's prior rape conviction. The defendant offered another juror's affidavit to prove that the defendant's prior criminal history was relayed to the entire jury.[86] Relying on *Williams v. State* and a series of civil cases, the court found the affidavit inadmissible and affirmed the denial of the motion for a new trial.[87] The court did not specifically address the defendant's Sixth Amendment challenge.[88]

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[73] *See id.*

[74] *See* Christ v. Wempe, 219 Md. 627, 642, 150 A.2d 918, 926 (1959).

[75] Harford Sands, 320 Md. at 138, 577 A.2d at 9 (quoting Wernsing, 298 Md. at 413, 470 A.2d at 805).

[76] *See id.*

[77] *See id.* at 150, 577 A.2d at 13.

[78] 96 Md. App. 376, 625 A.2d 349 (1993).

[79] *See id.* at 391, 625 A.2d at 356.

[80] *See id.* at 390, 625 A.2d at 355.

[81] *Id.* at 391, 625 A.2d at 356.

[82] 204 Md. 55, 102 A.2d 714 (1954).

[83] *See id.* at 70, 102 A.2d at 722.

[84] *Id.*

[85] 27 Md. App. 443, 340 A.2d 396 (1975).

[86] *See id.* at 446, 340 A.2d at 398.

[87] *See id.*

[88] *See generally* Allen v. State, 89 Md. App. 25, 46-47, 597 A.2d 489, 499-500 (1990). In dicta, the court explained that in criminal cases when jury misconduct or improper communication is shown, prejudice is presumed and the burden shifts to the state to rebut the presumption of harm. *See also* Eades v. State, 75 Md. App. 411, 541 A.2d 1001 (1988).

IV. FEDERAL LAW

The federal answer to the question of admissibility of juror testimony to challenge a verdict is significantly different from Maryland's approach.

A. Amending Lord Mansfield's Rule

The first United States Supreme Court case to consider whether a juror could be heard to impeach a verdict was *Mattox v. United States*. [89] In *Mattox,* the defendant, after being convicted of murder, presented juror affidavits reporting that extraneous matters were presented to the jury by a bailiff and through a newspaper article.[90] By accepting the affidavits, the Court carved out an exception to Lord Mansfield's Rule. The Court maintained that jury testimony regarding motives and influences that affected the deliberations were inadmissible, "[b]ut a juryman may testify to any facts bearing upon the . . . existence of any extraneous influence, although not as to how far that influence operated on his mind."[91] The Court relied on precedent from state and federal cases which advised that situations may arise where Lord Mansfield's Rule should be amended in the interests of justice.[92]

After *Mattox*, federal courts varied their approach to the issue of juror testimony for impeachment purposes. In *McDonald v. Pless*,[93] the Court retreated from its previous holding and excluded juror affidavits claiming the jury created a mathematical formula to reach a damage award. Relying heavily on Lord Mansfield's Rule, the Court refused to consider the affidavits.[94] The Court clarified that *Mattox* was an exception to the general rule against receiving juror testimony.[95] The exception was limited to circumstances where the basic principles of justice would be violated without the juror testimony. The Court determined the facts were insufficient to warrant admission of jury testimony.

By the early 1970's, the federal approach had stabilized in two respects. First, federal courts excluded all juror testimony in regard to the reasoning process employed during deliberations. Second, evidence concerning misconduct by third parties or other extraneous sources influencing the verdict was generally received.[96] With these policies in mind, the Federal Rules Advisory Committee drafted Rule 606(b) of the Federal Rules of Evidence.[97]

B. Rule 606(b) of the Federal Rules of Evidence

In 1974 Congress enacted Federal Rule 606(b).[98]

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[89] 146 U.S. 140 (1892).

[90] *See id.* at 142-43. The affidavits alleged that the bailiff told a group of jurors that Mattox had killed two other men. Additionally, another juror admitted reading an account of the trial in the newspaper. The newspaper article detailed an earlier murder trial in which Mattox had been found not guilty. *Id.*

[91] *Id.* at 149.

[92] *See* United States v. Reid, 33 U.S. (12 How.) 361, 366 (1851)("Cases might arise in which it would be impossible to refuse [juror testimony] without violating the plainest principles of justice."); Wright v. Illinois & Mississippi Telegraph Co., 20 Iowa 195 (1866)("Affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring ... which does not essentially adhere in the verdict.").

[93] 238 U.S. 264 (1915).

[94] *See id.* at 268-69.

[95] *See id.*

[96] *See* Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusion Principle of Rule 606(b) Justified?,* 66 N.C.L. REV. 509, 520 (1988).

[97] *See id.*

[98] FED. R. EVID. 606(b). Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the jurors to assent or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may an affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be

Incorporating language from *Mattox*, the rule permits testimony as to whether extraneous prejudicial information was brought to the jury's attention or whether any outside influence was placed on a juror.[99] Rule 606(b) maintained the general bar against receiving testimony on jurors' thought processes in connection with the verdict. Congress attached an Advisory Committee Note to help lower courts interpret the new statute.[100]

Federal courts apply Rule 606(b) in the same manner that Maryland courts employ Rule 5-606(b).[101] The rule operates as a gatekeeper for evidence originating inside the jury room. Examples of juror testimony received under Rule 606(b) include bribery attempts,[102] knowledge acquired from media sources,[103] and unauthorized viewing of accident sites.[104]

An example of the federal approach to the admissibility of juror testimony is found in *United States v. Tanner*.[105] After receiving convictions for conspiracy to defraud the United States and mail fraud, the defendants filed a motion for a new trial. In support of their motion, they sought to introduce juror affidavits alleging that the jury engaged in substantial drug and alcohol abuse during the trial. The United States Supreme Court ruled that the affidavits were inadmissible under Rule 606(b) and affirmed the convictions. Drawing a distinction between internal and external influences, the Court held that juror testimony on juror incompetence issues was internal in nature and therefore barred by Rule 606(b).[106] The Court indicated that juror testimony may be admissible in cases of substantial incompetence, but held that the defendants' claim fell short of the standard.[107]

When evidence is offered alleging juror impropriety, like their Maryland counterparts, federal courts apply a similar two prong analysis.[108] A major difference between the jurisdictional approaches is the standard of prejudice required for a new trial. In the federal context, if the court finds admissible evidence of extraneous juror contact, it invokes a presumption of prejudice.[109] The burden shifts to the party seeking to sustain the verdict to prove there was not a "reasonable possibility that the jury's verdict was influenced by an improper communication."[110]

Stephens v. South Atlantic Canners, Inc.,[111] illustrates the federal approach. In *Stephens*, documents previously entered into evidence were supplemented with extraneous information damaging to the defendant. On appeal, the United States Court of Appeals for the Fourth Circuit first determined that juror affidavits revealing the existence of extraneous information were properly received under Rule 606(b). The court then held that the juror testimony mandated a presumption of prejudice because the extraneous material was more than "innocuous."[112] Finally, the court ruled that the plaintiff did not offer rebuttal evidence or an explanation to show a lack of a reasonable possibility of prejudice on the jury.[113]

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received for these purposes.

[99] *See id.*

[100] *See* Crump, *supra* note 96 (citing Rules of Evidence for United States Courts and Magistrates, 56 F.D.R. 183, 266 advisory committee's note, subdivision (b) (1973)). Rather than defining the exceptions to the general rule, the note explained conduct which would not fit into the exceptions. The note suggested that compromise verdicts, quotient verdicts, and misunderstanding of jury instructions were not extraneous prejudicial information. Verdicts decided by lot or chance were not improper outside influences. *Id.*

[101] *See supra* note 97.

[102] *See* Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977).

[103] *See* United States v. Homer, 411 F. Supp. 972 (W.D. Pa. 1976).

[104] *See* United States v. Bruscino, 687 F.2d 938 (7th Cir. 1982).

[105] 483 U.S. 107 (1987).

[106] *See id.* at 118.

[107] *See id.* at 125.

[108] *See supra* note 98.

[109] *See, e.g.*, Haley v. Blue Ridge Transfer Co., 802 F.2d 1532, 1537 (4th Cir. 1986); Stephens v. South Atlantic Canners, Inc., 848 F.2d 484, 486 (4th Cir. 1988).

[110] *See* Haley, 802 F.2d at 1537 (citing United State v. Barnes, 747 F.2d 24 (4th Cir. 1984)).

[111] 848 F.2d 484 (4th Cir. 1988).

[112] *Id.* at 487.

[113] *See id.* at 489. The court stated that a new trial "is justified when the verdict is so obviously rendered suspect because the

The presumption applied in federal cases similar to *Stephens* is justified because Rule 606(b) prevents an inquiry into the actual effect the extraneous material had on the jurors' minds. Without the presumption, the moving party would face the daunting task of proving prejudice, lacking any reasonable means to produce competent evidence.

C. Sixth Amendment Challenges

The Sixth Amendment of the Constitution guarantees the criminal defendant the right to be confronted with witnesses against him or her.[114] When the jury receives evidence from an outside source and not through trial, this fundamental constitutional right is denied to the accused.[115] The "extraneous prejudicial information" exception in Rule 606(b) addresses this constitutional concern.[116] By admitting juror testimony on the question of whether extraneous prejudicial information improperly reached the jury, a federal court may fairly evaluate if the defendant was denied a fair trial.[117]

D. Local Rule Safeguard

Federal Rule of Evidence 606(b) is silent on the means an attorney may employ to investigate charges of impropriety within the jury. Without a safeguard, the important policy of preventing post-trial harassment of jurors would go unprotected.[118] Many jurisdictions have local federal rules to address this omission.[119]

In Maryland, an attorney or party in a federal case may not question a juror without court permission.[120] The local rule serves two purposes. First, it prevents random harassment of jurors. By requiring attorneys to obtain the court's permission prior to questioning a juror, attorneys are prevented from seeking evidence of misconduct without reasonable suspicion. Second, the rule brings the court into the process at the start of the investigation. The court may set limits on the inquires. These guidelines prevent reasonable investigations from developing into harsh inquisitions.

V. PROPOSAL TO COURT OF APPEALS OF MARYLAND[121]

This section of the paper is a proposal to the Maryland Court of Appeals to redraft Rule 5-606(b), incorporating necessary changes for a clear and equitable approach to the admissibility of juror testimony for verdict impeachment purposes.

A. New Rule 5-606(b) - Policy Considerations Addressed

The proposed rule balances the justifications underlying existing Rule 5-606(b) with additional considerations that are required to secure justice in jury trials.

1. Fairness and Accuracy in Verdicts

A compromise must be reached between the goal of protecting the jury system and insuring that parties receive a fair and accurate verdict. Existing Maryland Rule 5-606(b) ignores the need for balance. The rule excludes "any matter or statement occurring during

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jury considered extraneous material which was not properly admitted into evidence." *Id.*

[114] *See, e.g.*, Turner v. Louisiana, 379 U.S. 466, 472-73 (1965).

[115] *See* Pointer v. Texas, 380 U.S. 400 (1965).

[116] *See* Peter A. Kuperstein, *Extraneous Information Prejudicial If It Influences Average Reasonable Juror's Decision - State v. Hartley*, 656 A.2d 954 (R.I. 1995) 30 SUFFOLK U.L. REV. 557, 558-59 (1995).

[117] *See also* Parker v. Gladden, 385 U.S. 363 (1966) (allowing juror testimony concerning bailiff's comments to the jury).

[118] *See supra* notes 28-35 and accompanying text.

[119] *See* Crump, *supra* note 96, at 525-28.

[120] *See* U.S. DIST. CT. MD. R. 107.16. Rule 107.16 provides: Unless otherwise ordered by the Court, no attorney or party shall directly or through an agent interview or question any juror, alternate juror or prospective juror with respect to that juror's jury service. *Id.*

[121] *See* The Proposed Rules.

the course of deliberations."[122] This inflexible barrier to juror testimony ignores the need for occasional investigations into the jury room.[123] The frequency of essential inquiries into the jury deliberation may be limited, but the courts require a means to investigate when a valid case for inquiry is presented. A Sixth Amendment challenge by a criminal defendant is an instance when a court must have the ability to hear from jurors.[124]

The two exceptions in Proposed Rule 5-606(b) offer Maryland courts vital windows into the jury room. By permitting limited juror testimony on external influences, a sound balance is struck. Jurors are prevented from testifying on the reasoning process employed during deliberations or the effect of anything on their minds. They are permitted to testify on the existence of external matters inconsistent with the search for justice. The compromise offers courts the ability to receive testimony and make determinations based on the merits of each case.

2. Protecting the Jury from Post-Verdict Harassment

Maryland cases dealing with the admissibility of juror testimony consistently cite the extreme harassment jurors would receive if they were permitted to testify about their verdicts.[125] Existing Md. Rule 5-606(b) fails to completely address this important policy objective. The present rule operates as a disincentive for attorneys to question jurors because the fruits of the inquiries will be inadmissible. This argument overestimates the legal reasoning power of the average litigant. Upon receipt of an unfavorable verdict, a losing party may search for an explanation of the verdict without considering the uselessness of any information uncovered. Absent a clear rule preventing this activity, disappointed litigants will continue to interrogate jurors.

A disincentive approach can only work if it is focused on preventing specific behavior. Existing Md. Rule 5-606 only collaterally addresses the solicitation of jurors. Subtlety has no place in effective legislation. The goal of preventing juror harassment is extremely important and warrants more than an exclusionary rule. Proposed Rule X directly addresses the need to protect the jury by forbidding contact with jurors without leave of court. By placing the control in the hands of the trial judge, unfounded searches into the jury deliberations will be prevented.[126]

3. Public Opinion of the Legal System

The argument has been advanced that permitting inquiry into the deliberation process will make private deliberations the focus of public inquiry.[127] The reality in our society is that the deliberation process has already been made public. Jurors write books detailing the events of the deliberation process and appear on television programs explaining their impression of the evidence at trial. Excluding juror testimony to keep the deliberation process private is overlooking the fact that we live in an exposed society with a powerful, relentless media. When a trial attracts attention, the media will not be stopped from making the private search for truth available for public viewing.

The Proposed Rules
Maryland Rules
Title 5 - Evidence
Chapter 600 Witnesses

Rule 5-606(b)[128]

Inquiry into Validity of Verdict
(1) Upon an inquiry into the validity of a verdict, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other

[122] *Supra* note 12.

[123] *See generally* Kelly v. Huber Baking Co., 145 Md. 321, 125 A. 782 (1924).

[124] *See supra* notes 107-10.

[125] *See supra* note 53 and accompanying text.

[126] *See supra* note 16 and accompanying text.

[127] *See* Williams, 204 Md. at 67-68, 102 A.2d at 728.

[128] FED. R. EVID. 606(b).

juror's mind or emotions as influencing the jurors to assent or dissent from the verdict or concerning the juror's mental processes in connection therewith, except that a juror may testify on the following questions:

> (A) whether extraneous prejudicial information was improperly brought to the jury's attention;
> (B) whether any outside influence was improperly brought to bear upon any juror;

(2) A juror's affidavit or evidence of any statement the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes.

Maryland Rules
of Civil and Criminal Procedure
Rule X

Contact With Jurors[129]

(1) After the jury has been discharged, neither attorney in the action or the parties shall contact a member of the jury regarding the verdict.
(2) If any attorney believes in good faith that the verdict may be subject to legal challenge, the attorney may apply to the court for permission to interview members of the jury regarding any fact claimed to support the legal challenge.
(3) If satisfied that good cause exists, the court may grant permission to the attorney to make the requested contact and shall prescribe the terms and conditions under which the contact shall be conducted.
(4) If upon inquiry the court finds that a valid legal challenge to the verdict exists, the court may grant a hearing to review legal challenge and supporting evidence.
(5) If an attorney in the action is contacted by a juror regarding the verdict, the attorney shall direct the juror to contact the court. An attorney shall not counsel or contact the juror regarding the information to be delivered to the court.

[129] *See* Crump, *supra* note 96, U.S. DIST. CT. N.D. MISS. R. 1(b)(4); U.S. DIST. CT. S.D. MISS. R. 1(b)(4).

VI. CONCLUSION

The policy justifications for excluding juror testimony to challenge a verdict are sound. The jury trial plays a vital role in our legal system and must be protected. Unchecked inquisitions, bribery or threats of violence, and an additional loss of public confidence in the legal system will result if courts begin to openly receive juror testimony. Maryland Rule 5-606(b) succeeds in preventing these dangerous results. However, the rule fails to acknowledge the importance of an accurate verdict based only on evidence offered at trial. An updated responsible rule is necessary to reach an equitable balance between fairness in litigation and the preservation of the jury system. Maryland Rule 5-606(b) should be amended to achieve this important objective.

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