Evidence:

Jury Impeachment

Colin Miller

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About the Author

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Preface

The anti-jury impeachment rule, contained in Federal Rule of Evidence 606(b) and state counterparts, is a rule preventing the admission of jury testimony or statements in connection with an inquiry into the validity of the verdict, subject to certain exceptions. Through a series of cases and hypotheticals drawn from actual cases, this chapter gives readers a roadmap for how to address any jury impeachment issue in practice.

Jury Impeachment Chapter

I. The Rule

> **Federal Rules of Evidence. Rule 606. Juror's Competency as a Witness….**
>
> **(b) During an Inquiry into the Validity of a Verdict or Indictment**.
>
> **(1)** ***Prohibited Testimony or Other Evidence.*** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> **(2)** ***Exceptions.*** A juror may testify about whether:
>
> **(A)** extraneous prejudicial information was improperly brought to the jury's attention;
>
> **(B)** an outside influence was improperly brought to bear on any juror; or
>
> **(C)** a mistake was made in entering the verdict on the verdict form.
>
> FED. R. EVID. 606(b).

In 2009, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States Courts decided to "restyle" the Federal Rules of Evidence. The goal in this project was to make the Rules more user friendly rather than to enact substantive changes. Below is a side by side comparison of the current Rule 606(b) and the "restyled" Rule 606(b). Because the changes were intended to be stylistic only, everything discussed in this chapter should continue to be good law after the "restyled" Rules take effect on December 1, 2011.

Previous Rules Language

(b) Inquiry into validity of verdict or indictment. 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 juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Restyled Rules Language

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) ***Prohibited Testimony or Other Evidence.*** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) ***Exceptions.*** A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

II. Historical Origins

Excerpt from Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 BAYLOR L. REV. 872 (2009)

> Prior to 1785, English courts "sometimes received" post-trial juror testimony and affidavits concerning juror misconduct, "though always with great caution." In that year, English Chief Justice Lord Mansfield decided *Vaise v. Delaval*, I.T.R. 11, where he was confronted with post-trial affidavits by jurors indicating that "the jury being divided in their opinion, had tossed up," i.e., resolved the case by "flipping a coin or some other method of chance determination." Mansfield deemed the affidavits inadmissible by applying the then-popular Latin maxim, *nemo turpitudinem suam allegans audietur* (a "witness shall not be heard to allege his own turpitude"). According to Mansfield, jurors were not competent to impeach their own verdicts, and thus themselves, because "a person testifying to his own wrongdoing was, by definition, an unreliable witness." *Vaise* thus became the basis for "Mansfield's Rule," "a blanket ban on jurors testifying against their own verdict," although, according to Mansfield, post-trial testimony concerning jury misconduct could be admissible if it came from another source, "such as from some person having seen the [deliberations] through a window, or by some such other means."
>
> * * *
>
> Based upon "the prestige of the great Chief Justice, [Mansfield's Rule] soon prevailed in England, and its authority came to receive in this country an adherence almost unquestioned" until the latter half of the nineteenth century.

The first major U.S. opinion challenging Mansfield's Rule was *Wright v. Illinois & Mississippi Telegraph Co.*, 20 Iowa 195 (Iowa 1866), an 1866 opinion in which the Supreme Court of Iowa found that a trial court erred by refusing to consider four juror affidavits alleging an illegal quotient verdict, *i.e.,* that their "verdict was determined by each juror marking down such sum as he thought fit, and dividing the aggregate by twelve and taking the quotient as their verdict." In the years after *Wright* created the "Iowa Rule," as it became known, state courts created new formulations of and variations on Mansfield's Rule. In 1915, however, in *McDonald v. Pless*, 238 U.S. 264 (1915), the United States Supreme Court's last significant opinion on jury impeachment before the drafting of the Federal Rules of Evidence, the Court deemed juror testimony regarding an alleged quotient verdict

inadmissible. The Court noted that it had to "choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room" and deemed the failure to redress the former injury "the lesser of two evils."

III. The Drafting of Federal Rule of Evidence 606(b)

In 1969, the Advisory Committee's first draft of what would become Federal Rule of Evidence 606(b) merely precluded jurors from impeaching verdicts through testimony "concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith." Citing to the Iowa Rule, the Committee indicated that its proposed Rule permitted "impeachment concerning the existence of conditions or occurrences, 'without regard to whether the happening [wa]s within or without the jury room.'" In 1971, however, the proposed Rule was hastily rewritten so that it also precluded jury impeachment regarding "any matter or statement occurring during the course of the jury's deliberations...."

The House rejected this new draft while the Senate endorsed it. Eventually, the Senate and House Committees resolved the dispute in the Senate's favor. The Senate version did allow jurors to impeach their verdicts through testimony concerning "whether extraneous prejudicial information was improperly brought to the jury's attention and on the question whether any outside influence was improperly brought to bear on any jurors." Most states have counterparts to Federal Rule of Evidence 606(b) that generally preclude jury impeachment, subject to the above two exceptions.

IV. Public Policy Underlying Federal Rule of Evidence 606(b)

The Advisory Committee's Note to Federal Rule of Evidence 606(b) recognized three main values that are promoted by a rule that generally precluded jury impeachment:

- safeguarding the stability and finality of verdicts;
- preventing the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly motivated ex-jurors; and
- protecting the freedom of discussion and deliberation.

V. Supreme Court Precedent

Excerpt from *Tanner v. United States*, 483 U.S. 107 (1987)

JUSTICE O'CONNOR delivered the opinion of the Court.

Petitioners William Conover and Anthony Tanner were convicted of conspiring to defraud the United States…and of committing mail fraud….The United States Court of Appeals for the Eleventh Circuit affirmed the convictions….Petitioners argue that the District Court erred in refusing to admit juror testimony at a post-verdict hearing on juror intoxication during the trial; and that the conspiracy count of the indictment failed to charge a crime against the United States. We affirm in part and remand.

….

I.

….The day before petitioners were scheduled to be sentenced, Tanner filed a motion, in which Conover subsequently joined, seeking continuance of the sentencing date, permission to interview jurors, an evidentiary hearing, and a new trial. According to an affidavit accompanying the motion, Tanner's attorney had received an unsolicited telephone call from one of the trial jurors, Vera Asbul…. Juror Asbul informed Tanner's attorney that several of the jurors consumed alcohol during the lunch breaks at various times throughout the trial, causing them to sleep through the afternoons….The District Court continued the sentencing date, ordered the parties to file memoranda, and heard argument on the motion to interview jurors. The District Court concluded that juror testimony on intoxication was inadmissible under Federal Rule of Evidence 606(b) to impeach the jury's verdict. The District Court invited petitioners to call any nonjuror witnesses, such as courtroom personnel, in support of the motion for new trial. Tanner's counsel took the stand and testified that he had observed one of the jurors "in a sort of giggly mood" at one point during the trial but did not bring this to anyone's attention at the time….

Earlier in the hearing the judge referred to a conversation between defense counsel and the judge during the trial on the possibility that jurors were sometimes falling asleep. During that extended exchange the judge twice advised counsel to immediately inform the court if they observed jurors being inattentive, and suggested measures the judge would take if he were so informed….

….

As the judge observed during the hearing, despite the above admonitions counsel did not bring the matter to the court again….

Following the hearing, the District Court filed an order stating that, "[o]n the basis of the admissible evidence offered I specifically find that the motions for leave to interview jurors or for an evidentiary hearing at which jurors would be witnesses is not required or appropriate."

The District Court also denied the motion for new trial….

While the appeal of this case was pending before the Eleventh Circuit, petitioners filed another new trial motion based on additional evidence of jury misconduct. In another affidavit, Tanner's attorney stated that he received an unsolicited visit at his residence from a second juror, Daniel Hardy….Despite the fact that the District Court had denied petitioners' motion for leave to interview jurors, two days after Hardy's visit Tanner's attorney arranged for Hardy to be interviewed by two private investigators….The interview was transcribed, sworn to by the juror, and attached to the new trial motion. In the interview Hardy stated that he "felt like...the jury was on one big party."…Hardy indicated that seven of the jurors drank alcohol during the noon recess. Four jurors, including Hardy, consumed between them "a pitcher to three pitchers" of beer during various recesses….Of the three other jurors who were alleged to have consumed alcohol, Hardy stated that on several occasions he observed two jurors having one or two mixed drinks during the lunch recess, and one other juror, who was also the foreperson, having a liter of wine on each of three occasions….Juror Hardy also stated that he and three other jurors smoked marijuana quite regularly during the trial….Moreover, Hardy stated that during the trial he observed one juror ingest cocaine five times and another juror ingest cocaine two or three times….One juror sold a quarter pound of marijuana to another juror during the trial, and took marijuana, cocaine, and drug paraphernalia into the courthouse….Hardy noted that some of the jurors were falling asleep during the trial, and that one of the jurors described himself to Hardy as "flying."…Hardy stated that before he visited Tanner's attorney at his residence, no one had contacted him concerning the jury's conduct, and Hardy had not been offered anything in return for his statement….Hardy said that he came forward "to clear my conscience" and "[b]ecause I felt ... that the people on the jury didn't have no business being on the jury. I felt...that Mr. Tanner should

have a better opportunity to get somebody that would review the facts right."….

The District Court…denied petitioners' motion for a new trial.

The Court of Appeals for the Eleventh Circuit affirmed….We granted certiorari…to consider whether the District Court was required to hold an evidentiary hearing, including juror testimony, on juror alcohol and drug use during the trial….

II.

…Petitioners assert that, contrary to the holdings of the District Court and the Court of Appeals, juror testimony on ingestion of drugs or alcohol during the trial is not barred by Federal Rule of Evidence 606(b). Moreover, petitioners argue that whether or not authorized by Rule 606(b), an evidentiary hearing including juror testimony on drug and alcohol use is compelled by their Sixth Amendment right to trial by a competent jury.

By the beginning of this century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict….

Exceptions to the common-law rule were recognized only in situations in which an "extraneous influence," *Mattox v. United States*, 146 U.S 140, 146 U.S. 149 (1892), was alleged to have affected the jury. In *Mattox*, this Court held admissible the testimony of jurors describing how they heard and read prejudicial information not admitted into evidence. The Court allowed juror testimony on influence by outsiders in *Parker v. Gladden*, 385 U.S. 363, 386 U.S. 365, (1966) (bailiff's comments on defendant), and *Remmer v. United States*, 347 U.S. 227, 347 U.S. 228-230, (bribe offered to juror). *See also Smith v. Phillips*, 455 U.S. 209, (1982) (juror in criminal trial had submitted an application for employment at the District Attorney's office). In situations that did not fall into this exception for external influence, however, the Court adhered to the common-law rule against admitting juror testimony to impeach a verdict. *McDonald v. Pless*, 238 U.S. 264, (1915)….

Lower courts used this external/internal distinction to identify those instances in which juror testimony impeaching a verdict would be admissible. The distinction was not based on whether the juror was literally inside or outside the jury room when the alleged irregularity took place; rather, the distinction was based on the nature of the allegation. Clearly a rigid distinction based only on whether the event

took place inside or outside the jury room would have been quite unhelpful. For example, under a distinction based on location, a juror could not testify concerning a newspaper read inside the jury room. Instead, of course, this has been considered an external influence about which juror testimony is admissible….Similarly, under a rigid locational distinction jurors could be regularly required to testify after the verdict as to whether they heard and comprehended the judge's instructions, since the charge to the jury takes place outside the jury room. Courts wisely have treated allegations of a juror's inability to hear or comprehend at trial as an internal matter….

Most significant for the present case, however, is the fact that lower federal courts treated allegations of the physical or mental incompetence of a juror as "internal" rather than "external" matters….

There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process....Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct….

….[P]etitioners argue that substance abuse constitutes an improper "outside influence" about which jurors may testify under Rule 606(b). In our view, the language of the Rule cannot easily be stretched to cover this circumstance. However severe their effect and improper their use, drugs or alcohol voluntarily ingested by a juror seems no more an "outside influence" than a virus, poorly prepared food, or a lack of sleep.

In any case, whatever ambiguity might linger in the language of Rule 606(b) as applied to juror intoxication is resolved by the legislative history of the Rule….

The House Judiciary Committee described the effect of the version of Rule 606(b) transmitted by the Court as follows:

> "As proposed by the Court, Rule 606(b) limited testimony by a juror in the course of an inquiry into the validity of a verdict or indictment. He could

> testify as to the influence of extraneous prejudicial information brought to the jury's attention (e.g. a radio newscast or a newspaper account) or an outside influence which improperly had been brought to bear upon a juror (*e.g.* a threat to the safety of a member of his family), but he could not testify as to other irregularities which occurred in the jury room. Under this formulation a quotient verdict could not be attacked through the testimony of juror, *nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations."* (emphasis supplied).

….The House Judiciary Committee, persuaded that the better practice was to allow juror testimony on any "objective juror misconduct," amended the Rule so as to comport with the more expansive versions proposed by the Advisory Committee in earlier drafts, and the House passed this amended version.

….[T]he Senate decided to reject the broader House version and adopt the narrower version approved by the Court. The Senate Report explained:

> "[The House version's] extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised.
>
> "The rule passed by the House…would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations.
>
> ….
>
> "As it stands then, the rule would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors.
>
> "Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury

> system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors."

The Conference Committee Report reaffirms Congress' understanding of the differences between the House and Senate versions of Rule 606(b):

> "[T]he House bill allows a juror to testify about objective matters occurring during the jury's deliberation, such as the misconduct of another juror or the reaching of a quotient verdict. The Senate bill does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations."
>
> …The Conference Committee adopted, and Congress enacted, the Senate version of Rule 606(b)."

Thus, the legislative history demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations, including juror intoxication. This legislative history provides strong support for the most reasonable reading of the language of Rule 606(b) -- that juror intoxication is not an "outside influence" about which jurors may testify to impeach their verdict.

….

Petitioners also argue that the refusal to hold an additional evidentiary hearing at which jurors would testify as to their conduct "violates the sixth amendment's guarantee to a fair trial before an impartial and *competent* jury." (emphasis in original).

This Court has recognized that a defendant has a right to "a tribunal both impartial and mentally competent to afford a hearing."….

….Petitioners' Sixth Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process. The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*. Moreover, during the trial the jury is observable by the court, by counsel, and by court personnel. *See* *United States v. Provenzano*, 620 F.2d 985, 996-997 (CA3 1980) (marshal discovered sequestered juror smoking marijuana during early morning hours). Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court before they render a verdict. *See* *Lee v. United States*, 454 A.2d 770 (DC App.1982), cert. denied sub

nom. *McIlwain v. United States*, 464 U.S. 972, (1983) (on second day of deliberations, jurors sent judge a note suggesting that foreperson was incapacitated). Finally, after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct. *See United States v. Taliaferro*, 558 F.2d 724, 725-726 (CA4 1977) (court considered records of club where jurors dined, and testimony of marshal who accompanied jurors, to determine whether jurors were intoxicated during deliberations). Indeed, in this case the District Court held an evidentiary hearing giving petitioners ample opportunity to produce nonjuror evidence supporting their allegations.

In light of these other sources of protection of petitioners' right to a competent jury, we conclude that the District Court did not err in deciding, based on the inadmissibility of juror testimony and the clear insufficiency of the nonjuror evidence offered by petitioners, that an additional post-verdict evidentiary hearing was unnecessary.

Notes

1. In the wake of *Tanner*, Indiana amended Indiana Rule of Evidence 606(b) so that jurors can now testify "to drug or alcohol use by any juror…." *See* Colin Miller, *Amores Perros: Indiana Firefigther Convicted of Running Pitbull-Fighting Operation Seeks Jury Impeachment Based Upon Unadmitted Photo*, EVIDENCEPROF BLOG, July 8, 2008, http://lawprofessors.typepad.com/evidenceprof/2008/07/dog-fighting-60.html. Other jurisdictions do not have such an exception.

2. As noted, in its 1915 opinion in *McDonald v. Pless*, 238 U.S. 264, the United States Supreme Court concluded that it had to "choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room." Later in its opinion, the Court noted that the anti-jury impeachment rule that it was announcing did not apply in criminal cases. There is no such limitation in Federal Rule of Evidence 606(b), and, obviously, the Court applied the Rule to *Tanner*, a criminal case. Do you agree with the Court's conclusion in *Pless* or the current formulation of the Rule? Should the Rule apply even in death penalty appeals? *See* Colin Miller, *We The Jury: Supreme Court Of Pennsylvania Refuses To Hear Allegations Of Extreme Juror Racial Prejudice In Death Penalty Appeal*, EVIDENCEPROF BLOG, December 19, 2008, http://lawprofessors.typepad.com/evidenceprof/2008/12/606b-com-v-stee.html.

3. What sources of protection of a defendant's right to a competent jury does Justice O'Connor identify? Do you think that these protections are sufficient?

VI. 606(b): The External/Internal Distinction

As Justice O'Connor found in *Tanner*, there is an external/internal distinction in Rule 606(b). Jurors can impeach their verdicts based upon anything *external* to the jury deliberation process, but they cannot impeach their verdicts based upon anything *internal* to the jury deliberation process. Examples of matters internal to the jury deliberation process include claims that jurors (1) took the defendant's refusal to testify as evidence of his guilt, (2) misunderstood jury instructions, (3) reached a majority or quotient verdict, or (4) threatened each other.

> **Hypothetical 1:** Charles Orange is charged with aggravated sexual conduct and the lesser-included offense of indecency with a child. The jury finds Orange "not guilty" of aggravated sexual misconduct but "guilty" of indecency with a child. After trial, jurors inform defense counsel that there was no unanimity. Some jurors wanted to convict Orange of aggravated sexual conduct while others wanted to acquit him entirely. In the end, the jurors split the difference and compromised, convicting Orange of the lesser-included offense. Can the jurors impeach the verdict? *See* *Orange v. State*, No. 06-08-00193-CR, (Tex. App. 6th 2008) 2009 WL 3851068; Colin Miller, *Compromising Position: Court Of Appeals Of Texas Notes That Rule 606(b) Precludes Jury Impeachment Regarding Compromise Verdict*. EVIDENCEPROF BLOG, Nov. 19, 2009, http://lawprofessors.typepad.com/evidenceprof/2009/11/606b-compromise--charles-eugene-orange-appellant-v-the-state-of-texas-appellee----sw3d------2009-wl-3851068texapp-t.html.
>
> **Hypothetical 2:** A jury found David Jackson guilty of murder and sentenced to him death based upon the killing of another inmate during a prison fight. Jackson thereafter moved for a new trial, alleging that the jury erroneously believed that even if Jackson were sentenced to life without parole, it was still possible he could be released before the end of his life, despite the district court's explicit instruction to the contrary. In support of this contention, he proffered an affidavit of an investigator who contacted jurors after the trial. The affidavit stated that a number of jurors believed that Jackson could be released early, as had happened with a cooperating witness who testified at trial. Should the affidavit be deemed admissible? *See* *United States v. Jackson*,

No. **06-41680** (5th Cir. 2008) 2008 WL 4901375; Colin Miller, *How Different Is Death?: Fifth Circuit Precludes Jury Impeachment Based Upon Misunderstood Jury Instructions In Capital Case*. EVIDENCEPROF BLOG, Nov. 30, 2009, http://lawprofessors.typepad.com/evidenceprof/2008/11/essential-eleme.html.

A. 606(b)(2)(A): Extraneous Prejudicial Information

Rule 606(b)(2)(A) states that jurors may testify about "whether extraneous prejudicial information was improperly brought to the jury's attention…" "Extraneous prejudicial information is commonly understood to mean information the jury receives outside the courtroom." *United States v. Stewart*, 317 F.Supp.2d 426, 431 (S.D.N.Y. 2004). Put another way, extraneous prejudicial information is "information that was not admitted into evidence but nevertheless bears on a fact at issue in the case." *Robinson v. Polk*, 438 F.3d 350, 363 (4th Cir. 2006). Information does not need to appear overtly prejudicial to be deemed prejudicial under Rule 606(b)(1). Thus, for instance, in *Bauberger v. Haynes*, 666 F.Supp.2d 558 (M.D.N.C. 2009), the court reversed a petitioner's conviction for second degree murder and other crimes after receiving testimony regarding a juror reading to other jurors the dictionary definition of "malice," which competed with the legal definition of malice. In other words, if a juror uses any relevant information learned after the start of trial but not admitted at trial, she is using extraneous prejudicial information, and any juror can later impeach that verdict.

> **Hypothetical 3:** During an attempt to foil a kidnap and ransom attempt, Detective Sirk strikes Henry Bradford with his squad car twice. Bradford thereafter brings a § 1983 action against Sirk. At trial, Sirk testifies that he struck Bradford a second time to prevent him from escaping because Bradford got up after initially being struck. Bradford testifies during direct examination that he never got up after being struck the first time. During cross-examination, however, when questioned about events leading up to Sirk striking him, Bradford invokes his Fifth Amendment privilege against self-incrimination. On Sirk's motion, the judge strikes Bradford's testimony and instructs the jury to disregard Bradford's testimony. After the jury finds for Bradford, jurors submit affidavits indicating that they considered Bradford's stricken testimony despite the judge's instruction not to. Are the affidavits admissible under Rule 606(b)? *See Bradford v. City of Los Angeles*, 21 F.3d 1111 (9th Cir. 1994).
>
> **Hypothetical 4:** Toymaker Mattel sues MGA Entertainment, claiming that Carter Bryant, MGA's creator of Bratz dolls, created the

> doll's characters and the name Bratz while he was under contract as a Barbie designer at Mattel. The jury found in favor of Mattel. MGA subsequently moved for a mistrial. MGA's CEO was Iranian-born Isaac Larian, and it came out after trial that Juror No. 8 said with regard to Persians and/or Iranians that they "lie," "stole ideas" and were "stubborn" and "rude." According to several jurors, including Juror No. 8 herself, these opinions did not originate with Juror No. 8 but instead came from her husband when she asked him about the trial. Can the jurors impeach their verdict? *See Bryant v. Mattel, Inc.*, 2008 WL 3367605 (C.D. Cal 2008); Colin Miller, *In A Barbie World: Court Denies Motion For Mistrial In Bratz Lawsuit After Horribly Misguided Rule 606(b) Ruling*. EVIDENCEPROF BLOG, Aug. 17, 2008, http://lawprofessors.typepad.com/evidenceprof/2008/08/606b-bryant-v-m.html. What if these opinions originated with Juror No. 8, and she did not consult her husband? *See infra* VIII.D. What if Juror No. 8 indicated during *voir dire* that ethnicity would not influence her decision as a juror in any way? *See infra* VII.B.
>
> **Hypothetical 5:** A teenage boy from a city slum is charged with murdering his father with a switch-blade knife. The boy owned the same type of knife used in the murder and claimed that he lost it through a hole in his pocket before the murder. The prosecutor tried to establish the distinctiveness of the knife by having the storekeeper of the store where the boy purchased the knife testify that he had never seen another knife like it. During deliberations, Juror No. 8 displays to the other jurors a knife similar to the knife used in the murder which he purchased from a pawn shop two blocks from the boy's residence. Does the knife constitute extraneous prejudicial information? *See* the movie 12 ANGRY MEN (MGM 1957).

It could be said that the modern counterpart to the situation in *12 Angry Men* is the "Google mistrial," *i.e.,* jurors using internet searches to learn information about a case. *See* John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, March 17, 2009. To remedy this problem, some judges have begun instructing jurors "not to Google the case online." *See* Colin Miller, *Avoiding The Google Mistrial: Story Reveals Measures Oklahoma Judge Has Taken In Light Of New Technologies*, EVIDENCEPROF BLOG, Oct. 1, 2009, http://lawprofessors.typepad.com/evidenceprof/2009/10/jury-technologyhttpwwwnewson6comglobalstoryasps11226092.html. Another problem is jurors improperly e-mailing each other during trial and deliberations. *See* Colin Miller, *In Birmingham, They Love The Governor: HealthSouth Appeal Prompts Interesting Hearsay And Jury Impeachment Rulings*,

EVIDENCEPROF BLOG, March 8, 2009, http://lawprofessors.typepad.com/evidenceprof/2009/03/co-conspirator.html. Would Rule 606(b) prevent testimony regarding such e-mails?

B. 606(b)(2)(B): Improper Outside Influences

Rule 606(b)(2)(B) states that jurors may testify about "whether any outside influence was improperly brought to bear upon any juror." An improper outside influence "is an outside influence upon the partiality of the jury, such as 'private communication, contact, or tampering...with a juror….'" *Robinson v. Polk*, 438 F.3d 350, 363 (4th Cir. 2006). Conversely, jurors cannot testify concerning *internal* influences from other jurors, no matter how improper. *See, e.g., Dickson v. Subia*, 2010 WL 1992580 (E.D. Cal. 2010) (precluding jury impeachment concerning allegations that a juror who wanted to vote "not guilty" was verbally harassed and physically threatened by other jurors).

> **Hypothetical 6**: Paul Lewis is charged with first-degree sexual offense, robbery with a dangerous weapon, and felony breaking and entering. Among the jurors hearing the case was Deputy Eddie Hughes. Deputy Hughes actually knew Lewis because he transported him to Central Prison after his arrest. While Hughes transported Lewis, Lewis disclosed to him that he had failed a polygraph test. However, despite Hughes admitting these facts during *voir dire*, Lewis' attorney did not use a preemptory challenge to remove Hughes. After Lewis was convicted, defense counsel learned that during a break in Lewis' trial, Deputy Hughes went to the Sheriff's Department, where a detective said to him, "[I]f we have...a deputy sheriff for a juror, he would do the right thing. You know he flunked a polygraph test, right?" Can Hughes impeach the verdict? What about if Hughes was unaware of the failed polygraph test before trial? *See State v. Lewis*, 654 S.E.2d 808 (N.C.App. 2008); Colin Miller, *Do the Right Thing: Court Finds Detective Pressure Constitutes an Improper Outside Influence Under Rule 606(b)*. EVIDENCEPROF BLOG, Jan. 22, 2008, http://lawprofessors.typepad.com/evidenceprof/2008/01/do-the-right-th.html.

> **Hypothetical 7:** Joaquin Valenica-Trujillo is charged with money laundering and several drug crimes. On the fourth day of deliberations, the jury finds him guilty of these crimes. After Valencia-Trujillo is convicted, defense counsel learns that the jury foreman booked a flight to Las Vegas which departed on the fourth day of deliberations and pressured other jurors to find the defendant guilty so

that he could make his flight. Can a juror impeach the verdict? *See United States v. Valencia-Trujillo*, No. 09-15766 (11th Cir. 2010) 2010 WL 2163105; Colin Miller, *Travel Plans: Eleventh Circuit Precludes Jury Impeachment Regarding Foreman with Flight on 4th Day of Deliberations Pressuring Jury to Hurry*. EVIDENCEPROF BLOG, June 5, 2010, http://lawprofessors.typepad.com/evidenceprof/2010/06/606b-vacation--us-v-valencia-trujilloslip-copy-2010-wl-2163105ca11-fla2010.html. What if a juror admitted that he changed his vote from "not guilty" to "guilty" solely so that he could make an annual fishing trip? *See State v. Miller*, 772 N.W.2d 188 (Wis.App. 2009); Colin Miller, *I'd Rather be Fishing: Court Refuses to Allow Jury Impeachment Based Upon Juror Changing Vote to Guilty to Make Annual Fishing Trip*. EVIDENCEPROF BLOG, May 13, 2009, http://lawprofessors.typepad.com/evidenceprof/2009/05/606b--state-v-millerslip-copy-2009-wl-1081745wisapp2009.html.

C. 606(b)(2)(C): Mistake in Entering the Verdict on the Verdict Form

When Rule 606(b) was initially enacted, it only contained the previous two exceptions. Nonetheless, many courts began creating an exception to the Rule for clerical errors in entering the verdict on the verdict form. In 2006, the Rule was amended to allow jurors to testify about "whether there was a mistake in entering the verdict onto the verdict form." The accompanying Advisory Committee's Note indicates that

> In adopting the exception for proof of mistakes in entering the verdict on the verdict form, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon….The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon….

Instead, according to the Note, "the exception established by the amendment is limited to cases such as 'where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty.'"

Hypothetical 8: Emily Kennedy, the administratrix of the estate of Helen A. Hopkinson, brings an action against Stanley Sticker sounding in trespass and wrongful cutting of timber. At the end of trial, the jury purportedly awards the plaintiff $5,000 in damages. It is later determined that the jury agreed to award the plaintiff $500 in damages, with the foreperson erroneously reducing that verdict to the verdict form. Can jurors testify about the error? *See Kennedy v. Stocker*, 70 A.2d 587 (Vt. 1950).

Hypothetical 9: A plaintiff seeks $50,000 in damages from a defendant, and the defendant counterclaims for $50,000 in damages. The jury's verdict form appears to award the plaintiff $20,000 in damages and the defendant $30,000 in damages (*e.g.,* $10,000 to the defendant). After the verdict is entered, jurors come forward and claim that the $20,000 in damages listed for the plaintiff was the net amount that they intended to award it, and the $30,000 allegedly awarded to the defendant was intended to be the amount deducted from the $50,000 sought by the plaintiff to reach the total final billing of $20,000. Will the juror affidavits be admissible to "correct" the verdict? *Cf.* *Carolina Homes by Design, Inc. v. Lyons*, No. COA09-74 (N.C.App. 2010) 2010 WL 2367110; Colin Miller, *Standard Deduction: Court Of Appeals Of North Carolina Precludes Jury Impeachment Regarding Incorrect Damages Being Awarded*. EVIDENCEPROF BLOG, June 16, 2010, awprofessors.typepad.com/evidenceprof/2010/06/606b--carolina-homes-by-design-inc-v-lyonsslip-copy-2010-wl-2367110-tablencapp2010.html.

VII. Situations Where Rule 606(b) Does Not Apply

A. Testimony by Nonjurors

As the text of Rule 606(b) and Justice O'Connor's opinion in *Tanner* make clear, Rule 606(b) only governs testimony by *jurors*. Therefore, if a nonjuror observes jury misconduct, she can impeach the jury's verdict. For example, in *Tanner*, Justice O'Connor cited to the Fourth Circuit's opinion in *United States v. Taliaferro*, 558 F.2d 724 (4th Cir. 1977), in which a judge sent a Marshal to accompany jurors to a private club to deliberate and the Marshal was allowed to impeach their verdict through testimony regarding their consumption of alcoholic beverages during deliberations.

Hypothetical 10: Robert Lamb is convicted of the first-degree murder of his sister. After Lamb was convicted, he brought a motion for a new trial based upon the following facts: The trial judge, who had a scheduling conflict, left the jury in another judge's charge on its

> second day of deliberations. Thereafter, the foreman told the bailiff he had a note for the judge. The bailiff saw the note, which asked about the difference between first- and second-degree murder, but he neither took possession of it nor alerted the parties or either judge. Instead, taking matters into his own hands, the bailiff told the jury the judge was out of the jurisdiction and to read the jury instructions. Can the bailiff testify concerning these facts? *See* *Lamb v. State*, No. 51457 (Nev. 2011) 2011 WL 743193; Colin Miller, *No One But the Bailiff: Supreme Court of Nevada Finds Bailiff's Improper Behavior Insufficient to Award New Trial*. EVIDENCEPROF BLOG, Mar. 18, 2011, awprofessors.typepad.com/evidenceprof/2011/03/606b-lamb-v-state-p3d-2011-wl-743193nev2011.html.

B. Juror Testimony Not Offered to Impeach a Verdict

Rule 606(b) only applies when a party seeks to impeach a verdict after a verdict has been entered. Before a verdict has been entered, Rule 606(a) governs juror testimony. Even after a verdict has been entered, Rule 606(b) only governs juror testimony when offered as part of an inquiry into the validity of the verdict. Thus, most courts have held that if a juror makes a claim during *voir dire* (*e.g.,* that race would not influence his decision) and then contradicts that claim during deliberations (*e.g.,* by making racist comments), another juror may testify concerning the contradiction. Indeed, in *State v. Hidanovic*, 747 N.W.2d 463, 474 (N.D. 2008), the Supreme Court of North Dakota noted that "[c]ourts have universally held that provisions similar to N.D.R.Ev. 606(b)…do not preclude evidence to show that a juror lied on *voir dire*…." Even though such testimony would be offered as part of an inquiry into whether a juror lied during *voir dire*, it could have the effect of invalidating the verdict because, as the United States Supreme Court held in *McDonough Power Equipment, Inc. v. Greenwood*, 454 U.S. 548, 556 (1984), a party can obtain a new trial by demonstrating that a juror failed to answer honestly a material question on *voir dire* and that a correct response would have provided a basis for a challenge for cause. *See, e.g., Merchant v. Forest Family Practice Clinic, P.A.*, No. 2009-CA-01622-SCT (Miss. 2011) 2011 WL 3505309.

But if the court's conclusion in *Hidanovic* about courts universally reaching this conclusion were once true, it is no longer true. In *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008), no juror responded "yes" when asked on *voir dire:* "Would the fact that the defendant is a Native American affect your evaluation of the case?" and "Have you ever had a negative experience with any individuals of Native American descent? And, if so, would that

experience affect your evaluation of the facts of this case?" The day after Benally, a Native American man, was convicted of assaulting a BIA officer, a juror told defense counsel, among other things, that during deliberations some jurors discussed the need to "send a message back to the reservation." and one juror said that …."[w]hen Indians get alcohol, they all get drunk," and that when they get drunk, they get violent….

The district court allowed Benally to use juror affidavits to this effect in support of his motion to vacate the verdict and receive a new trial. The United States Court of Appeals for the Tenth Circuit, however, reversed and deemed the affidavits inadmissible because it found that Benally was using the affidavits to show that jurors lied during *voir dire* as a vehicle for "question[ing] the validity of the verdict." The court did acknowledge, though, that the affidavits would have been admissible in contempt proceedings against any dishonest jurors. Nonetheless, most courts still allow jurors to testify regarding jury deliberations to prove that a jury lied during *voir dire*. *But cf.* *United States v. Snipes*, No. 10-15573 (11th Cir. 2011) 2011 WL 3890354 (ignoring an argument by actor Wesley Snipes that he should be granted leave to interview jurors concerning whether they lied during *voir dire* regarding their acceptance of the presumption of innocence); Colin Miller, *A Taxing Matter, Take 2: 11th Circuit Affirms District Court's Ruling Denying Wesley Snipes' Motion For A New Trial*. EVIDENCEPROF BLOG, Sep. 7, 2011, http://lawprofessors.typepad.com/evidenceprof/2011/09/yesterday-the-eleventh-circuit-decided-united-states-v-snipes-2011-wl-3890354-11th-cir-2011-in-the-opinion-the-court.html.

VIII. Splits in Authority

A. States without Counterparts to Rule 606(b)

Some states, like Washington, do not have counterparts to Federal Rule of Evidence 606(b) and/or allow post-verdict juror testimony regarding overt acts during jury deliberations but disallow juror testimony regarding a juror's mental process in reaching a verdict. For instance, in Washington, a juror can impeach a verdict unless the information provided "inheres in the verdict," *i.e.,* unless it relates to "[j]uror motives, the effect the evidence had on the jurors, the weight given to the evidence by particular jurors, and the jurors' intentions and beliefs…." *State v. Rooth*, 121 P.3d 755, 760-61 (Wash.App. Div. 2 2005); *see also* Colin Miller, *A Trial That Will Live In Infamy?: Washington Case Reveals That The State Has No Version Of Rule 606(b)*, EVIDENCEPROF BLOG (February 18, 2009), http://lawprofessors.typepad.com/evidenceprof/2009/02/a-washington-ju.html.

B. Minnesota's Violence Exception to Rule 606(b)

In most jurisdictions, jurors cannot impeach their verdicts through allegations of actual or threatened violence against them by other jurors. Under Minnesota Rule of Evidence 606(b), however, jurors may …."testify as to any threats of violence or violent acts brought to bear on jurors, from whatever source, to reach a verdict."….

In *Gaines v. Tenney*, No. E2008-02323-COA-R3-CV (Tenn.Ct.App. 2010) 2010 WL 199628, a juror claimed that she changed her vote from "not guilty" to "guilty" because she was subjected to threatened and actual violence by other jurors, such as the foreman reaching across a table and throwing paper at her. The Court of Appeals of Tennessee refused to read a violence exception into Tennessee Rule of Evidence 606(b). Do you think that the juror should have been able to testify? What if the juror's claim was that the foreman stood between her and the door and prevented her from telling the judge that she was voting "not guilty"? *See* Colin Miller, *Turkey Of An Opinion: Court Precludes Jury Impeachment Despite Foreperson Blocking Door To Prevent Juror From Reporting "Not Guilty" Vote In Thanksgiving Related Case*, EVIDENCEPROF BLOG, Nov. 26, 2009, http://lawprofessors.typepad.com/evidenceprof/2009/11/thanksgivingpanella-v-marshallslip-copy-2009-wl-2475007edcal2009.html.

If you agree with Minnesota's version of the rule, do you believe that courts should draw the line at violence? According to the Committee Comment to Minnesota Rule of Evidence 606(b), …."The trial court must distinguish between testimony about 'psychological' intimidation, coercion, and persuasion, which would be inadmissible, as opposed to express acts or threats of violence."…. Do you see a distinction between a juror threatening another juror's physical well-being unless she changes her vote and a juror threatening another juror's mental or emotional well-being?

C. Testimony About the Effect on Deliberations of Extraneous Prejudicial Information/Improper Outside Influences

As noted above, jurors can impeach their verdicts based upon allegations of extraneous prejudicial information and/or improper outside influences. But can they testify about the effect of such information/influences on their deliberations? The courts are split. For instance, in the Bratz case, the United States District Court for the Central District of California allowed jury impeachment regarding the statements by Juror No. 8 and her husband regarding Persians and/or Iranians. *See* VI.0, Hypothetical 2, *supra* at 13,

The court, however, affirmed the verdict in favor of Mattel after it received testimony from jurors indicating that Juror No. 8's "remarks were made *after* agreement had been reached on all subjects upon which the jury ultimately reached a verdict." Other courts, however, hold that jurors can only testify concerning information/influences, and it is then up to the judge objectively to determine the probable effect that they would have on the average juror. *See* United States v. Lloyd, 269 F.3d 228, 238 (3rd Cir. 2001). In other words, in these jurisdictions, jurors could testify that they read an article that the defendant failed a polygraph test, but they could not testify that the article changed their vote from "not guilty" to "guilty" or that the jury was deadlocked before the article was read. Considering the language of Rule 606(b), which interpretation do you think is correct?

D. Allegations of Juror Racial, Religious, or Other Bias When Jurors Are Not Questioned Regarding Bias on *Voir Dire*

As noted, in *Tanner v. United States*, the United States Supreme Court found that a defendant's right to a *competent* jury is not violated by the application of Rule 606(b) to allegations of jurors sleeping and using drugs and alcohol during trial and deliberations. But does application of the Rule to allegations of juror racial, religious, or other bias violate a defendant's right to an *impartial* jury or some other constitutional right? First, a few courts have found that the Rule does not apply to such allegations because they constitute extraneous prejudicial information. *See, e.g., State v. Bowles*, 530 N.W.2d 521, 536 (Minn. 1995). And at least one court has found that such bias constitutes an outside improper influence. *See United States v. Taylor*, 2009 WL 311138 (E.D. Tenn. 2009). Most courts, though, hold that juror bias is internal to the jury deliberation process and that allegations regarding such bias are inadmissible under Rule 606(b). *See also* Colin Miller, *Dismissed with Prejudice?: Eastern District of Tennessee Issues Strange Opinion in Appeal Alleging Juror Racial Bias*. EVIDENCEPROF BLOG, Feb. 14, 2009, http://lawprofessors.typepad.com/evidenceprof/2009/02/i-am-currently.html.

Some courts, though, hold that, despite the language of Rule 606(b), Constitutional considerations might allow or require courts to permit jury impeachment regarding such bias. For instance, in *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009), hours after a jury convicted a Hispanic man of bank robbery, a juror e-mailed defense counsel that another juror said during deliberations, "I guess we're profiling but they cause all the trouble." The district court allowed jury impeachment on this subject, and

the First Circuit affirmed, agreeing with the "[m]any courts [which] have recognized that Rule 606(b) should not be applied dogmatically where there is a possibility of juror bias during deliberations that would violate a defendant's Sixth Amendment rights."

Other courts, however, disagree, such as the Tenth Circuit in *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008). *See* VII.0 *supra* at 17. In addition to finding that Rule 606(b) prevented juror testimony regarding juror racial bias during deliberations to prove that jurors lied during *voir dire*, the court found that the Sixth Amendment right to an impartial jury did not trump Rule 606(b) and allow such testimony. Benally filed a petition for writ of certiorari regarding (1) whether jurors can generally testify about allegations of racial bias during deliberations under the Sixth Amendment, and (2) whether Rule 606(b) allows jurors to testify about allegations of racial bias during deliberations when jurors indicated during *voir dire* that race would not influence their decision as a juror in any way. The United States Supreme Court denied the petition. Which approach do you prefer?

IX. Jury Impeachment Pleadings

Some concise examples of motions connected to evidence sought to be admitted or excluded under Rule 606(b) can be found at:

- *Williams v. Hall*, 2009 WL 4060880 (D.Or. 2009) (Reply to Response in Opposition to Motion for Order Permitting Juror Interviews);
- *Pierson v. Ford Motor Co.*, 2009 WL 2704593 (N.D.Cal. 2009) (Plaintiff's Opposition to Defendant 's Third Motion to Adjust the Verdict Based on Clerical Error, and, in the Alternative, Request for Evidentiary Hearing); and
- *Fuller v. Fiber Glass Systems, L.P.*, 2009 WL 461992 (E.D.Ark. 2009) (Defendant's Response to Court's Query).