NO JURY RIGGING IN THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT: AN ANALYSIS OF JURY TESTIMONY TO IMPEACH JURY VERDICTS

BRIAN W. REIDY*

Cite as: Brian W. Reidy, *No Jury Rigging in the Court of Appeals for the Seventh Circuit: An Analysis of Jury Testimony to Impeach Jury Verdicts*, 4 SEVENTH CIRCUIT REV. 428 (2009), *at* http://www.kentlaw.edu/7cr/v4-2/reidy.pdf.

I. INTRODUCTION

Following the conclusion of a federal jury trial, a unique tension exists between the notion of a "fair verdict" and the American legal system's historical veneration of private jury deliberations. When a litigant alleges that a fair trial was denied after jury deliberations have concluded, the resolution of this allegation directly conflicts with the systemic interest in verdict finality. Few would deny that a losing litigant deserves a new trial if the jury's verdict was tainted by something external to the protections of the courtroom.[1] Conversely, it is well-recognized that, unlike fine wine, steaks, and cheese, lawsuits do not improve with age because as time passes, memories fade,

* J.D. candidate, May 2009, Chicago-Kent College of Law, Illinois Institute of Technology. Special thank you to both my wife, Lizzie—I am nothing without you—and to my son, Owen—you inspire me every day. I love you both more than you will ever know!

[1] James W. Diehm, *Impeachment of Jury Verdicts:* Tanner v. United States *and Beyond*, 65 ST. JOHN'S L. REV. 389, 403 (1991) (noting that external influences would include: threats against jurors, outside or erroneous information provided to jurors, or other improper influences). *See, e.g.*, Gov't of Virgin Islands v. Gereau, 523 F.2d 140, 151 (3d Cir. 1975) (jurors learned extra-record facts about the case not introduced during trial).

witnesses become unavailable, and evidence is often lost.[2] The final result may not be a fair verdict, because it may have more to do with the good fortune of a party in obtaining evidence for the second trial rather than the actual merits of the case.[3] Accordingly, society has a substantial interest in assuring that judicial verdicts, at some point, are viewed as final.[4]

Federal Rule of Evidence 606(b)[5] attempts to mediate between these interests by recognizing the importance of verdict finality, but it also recognizes that due process[6] may trump verdict finality. Rule 606(b) maintains the viability of the jury system because it discourages the harassment of jurors by losing litigants, encourages free and open discussion among jurors during deliberations, reduces the incentive for jury tampering, and promotes verdict finality.[7] The Court of Appeals for the Seventh Circuit recently addressed Rule

---

[2] *Id.* at 402 (1991).

[3] *Id. See also* Barker v. Wingo, 407 U.S. 514, 520-21 (1972) (discussing the costs to society and litigants when trials become lengthy).

[4] *See infra* Part II. B.

[5] Federal Rule 606(b) states:

> 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.

FED. R. EVID. 606(b).

[6] U.S. CONST. amend. V ("No person shall be...deprived of life, liberty, or property, without due process of law"); U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process").

[7] United States v. Stansfield, 101 F.3d 909, 915 (3d Cir. 1996).

606(b) in *Arreola v. Choudry*,[8] where the plaintiff alleged that he was denied a fair trial, claiming that a juror's past experience with ankle injuries was "extraneous prejudicial information." The court, however, held that a juror's internal knowledge of ankle injuries was not extraneous prejudicial information, thus Rule 606(b) would not permit juror testimony to impeach[9] the verdict.[10] Although the holding in this case was correct, two issues concerning Rule 606(b) stem from this decision. First, would the result have changed had this been a criminal trial; in other words, does the Sixth Amendment[11] provide a sharper blade to pierce the shield of Rule 606(b)? Second, and perhaps more importantly, what qualifies as extraneous prejudicial information, how do courts determine extraneous prejudicial information, and how should courts proceed when extraneous prejudicial information was present during deliberations?

The confusion underlying the divergent approaches to the application of extraneous prejudicial information stems from the ambiguous language of Rule 606(b), the Supreme Court's limited and unclear pronouncements regarding this language, and the Court's failure to specifically address what constitutes "extraneous prejudicial information." While the protections of Rule 606(b) are vital to the jury system, an absolute prohibition of juror testimony could thwart one of the fundamental purposes of a criminal jury trial.[12] Therefore, courts throughout the Seventh Circuit need guidance as to what qualifies as

[8] 533 F.3d 601 (7th Cir. 2008), *cert. denied*, 2008 U.S. LEXIS 8576 (2008).

[9] *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (impeach, vb. 1. To charge with a crime or misconduct; 2. To discredit the veracity of; 3. To challenge the accuracy or authenticity of).

[10] *Arreola*, 533 F.3d at 607.

[11] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…to be confronted with the witnesses against him…and to have the Assistance of Counsel for his defense.").

[12] *See* Turner v. Louisiana, 379 U.S. 466, 472 (1965) ("The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.") (internal quotations omitted).

extraneous prejudicial information and how to proceed when extraneous prejudicial information is alleged to have tainted the jury's verdict.

Accordingly, this article attempts to provide the needed guidance on this important issue of jury impeachment, with a focus on criminal trials. While Rule 606(b) contains three distinct exceptions,[13] this article focuses on extraneous prejudicial information and its application during criminal jury trials. This article begins with a brief background of the common law prior to the enactment of Rule 606(b), the legislative history of Rule 606(b), and the subsequent interpretations thereof.[14] Next, it reviews the Seventh's Circuit's recent application of Rule 606(b) in *Arreola v. Choudry*. Finally, it provides guidance to the courts in addressing "extraneous prejudicial information" and how courts should proceed when extraneous prejudicial information has been alleged by a losing litigant.

II. IMPEACHMENT OF JURY VERDICTS AND FEDERAL RULE OF EVIDENCE 606(B)

A. The Tension Between a Criminal Defendant's Rights During Trial and the Policies of Rule 606(b)

A criminal defendant's right to a fair and impartial jury trial has been deemed one of the most fundamental American rights.[15] Jurors are chosen from the community at large and their verdicts are viewed as credible because they reflect the values of their community and

[13] *See* FED. R. EVID. 606(b).

[14] *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 211-29 (1989) (providing detailed explanation of the history of Rule 606(b)); 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, 1196-206 (1985) (same).

[15] Robinson v. Polk, 444 F.3d 225, 230 (4th Cir. 2006) (King, J., dissenting) ("the right to an impartial jury stands among those most revered by the founding generation.").

protect the accused against oppression by the government.[16] During a criminal trial, jurors are expected to weigh the evidence and arguments of counsel, assess the credibility of witnesses, listen to the instructions given by the court, and deliberate in hopes of rendering a just verdict.[17] Life experiences of jurors inevitably enter the jury room,[18] but the Sixth Amendment requires that jurors base their decisions solely on the facts and law presented during the trial, thus preserving the rights of confrontation, cross-examination, and counsel.[19] If extraneous information swayed the jury's verdict,[20] few would argue that the losing party should be denied a new trial if it can be unequivocally demonstrated that the verdict was tainted.[21]

Although the jury system is not perfect, a complete sanitizing of the jury room is impossible.[22] Jurors provide a vital public service in exchange for little or no compensation. Indeed, Congress has recognized the jury's importance to our system of justice and has

[16] *See* Williams v. Florida, 399 U.S. 78, 100 (1970) ("the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of…the community…that results from [the community's] determination of guilt or innocence."); Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968) (noting that the purpose of the jury trial is to prevent oppression by the Government).

[17] *See* Diehm, *supra* note 1, at 394–95.

[18] *See* J.E.B. v. Ala. *ex rel*. T.B., 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) ("Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them. Individuals are not expected to ignore as jurors what they know as [people]" internal citations omitted); Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987) (noting that human compassion is one of the strengths of our jury system).

[19] *See* Irvin v. Dowd, 366 U.S. 717, 722, (1961) (holding that the Impartial Jury Clause "guarantees . . . a fair trial by a panel of impartial, indifferent jurors."); Turner v. Louisiana, 379 U.S. 466, 472 (1965) (holding that the right of confrontation requires that "the evidence…against a defendant shall come from the witness stand …where there is full judicial protection of the defendant's rights.").

[20] *See* Diehm, *supra* note 1, at 403-404.

[21] *See id.* at 404. *But see* Ball v. United States, 163 U.S. 662, 671 (1896) (holding that a verdict of acquittal was final and could not be reviewed, on error or otherwise, without violating the Double Jeopardy Clause of the Fifth Amendment).

[22] United States *ex rel*. Owen v. McMann, 435 F.2d 813, 818 (2d Cir. 1970).

implemented other protection for jurors.[23] In order to safeguard the jury system, society must protect the jury and the deliberation process from outside scrutiny.[24] Accordingly, Rule 606(b) is designed not only to protect jurors from being pestered by lawyers after the verdict is rendered but also to protect the judicial process from efforts to undermine a verdict.[25] By prohibiting jurors from testifying as to matters which occurred during deliberations, Rule 606(b) discourages almost all inquires into the jurors' deliberative process once a verdict is rendered.[26]

B. The Juror Impeachment Rule and Its Underlying Polices

Protection of jury deliberations originated with the common law juror impeachment rule, which came from Lord Mansfield's decision in *Vaise v. Delaval*.[27] Under this rule, jurors were prohibited from testifying as to any matter related to their deliberations.[28] The policy behind the rigid Mansfield Rule was straightforward: if a juror was engaged in wrongful conduct during deliberations, then his subsequent testimony was considered untrustworthy.[29] Although this bright line rule is considered harsh under today's standards, courts continued to apply this rule through most of the twentieth century.[30] While the rule

---

[23] *See, e.g.*, 28 U.S.C. § 1875(a) (2008) (providing that employers may not fire an employee for serving as a juror).

[24] *See* Tanner v. United States, 483 U.S. 107, 125 (1987) (expressing concern whether the jury system could, in fact, survive if the deliberation process were exposed to public scrutiny after the verdict was rendered).

[25] Jong Hi Bek v. United States, 2008 U.S. Dist. LEXIS 96284 (N.D. IL 2008).

[26] *See id.*

[27] 99 ENG. REP. 944 (K.B. 1785).

[28] *Id.*

[29] Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 513-22 (1988).

[30] *See e.g.* McDonald v. Pless, 238 U.S. 264 (1915) (holding that jurors may not testify that they reached their decision by averaging the individual jurors' opinions on damages).

remained the same, the modern justifications of jury secrecy moved from juror credibility to more pragmatic and policy based reasons which include: the finality of verdicts, protection of jurors, promotion of full and frank deliberations, and the maintenance of the community's faith in juries and their verdicts.[31] These policies supporting jury secrecy help justify Rule 606(b)'s prohibitions on post-verdict juror testimony.[32] Therefore, a brief overview of the changes in common law policy provide a proper context for Rule 606(b) analysis.

Courts and scholars have recognized that verdict finality is important because, at some point, litigation has to end, and communities must be able to rely on court decisions as final.[33] Thus, preserving verdict finality outweighs the importance of uncovering improper juror behavior in some instances, because destructive uncertainty may develop if courts were viewed as indecisive or if verdicts were impeached months or years after the litigation has ended.[34] This is also consistent with the notion of a fair trial, because if a verdict is impeached and the judgment set aside, it may be years before the case is retried, which may not produce a just verdict.[35] If the verdict is viewed as final, losing litigants will have little incentive to threaten or harass jurors in order to elicit evidence that will impeach the verdict.[36]

---

[31] *See id.* (noting that if "verdicts solemnly made and publicly returned" could be attacked and set aside on the testimony jurors, jurors would be harassed by the defeated party in an effort to set aside a verdict).

[32] *See* United States v. Thomas, 116 F.3d 606, 618 (2d Cir. 1997) ("The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system.")

[33] *See* Diehm, *supra* note 1, at 402.

[34] *See* Tanner v. United States, 483 U.S. 107, 120(1987) ("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.").

[35] *See* Diehm, *supra* note 1, at 396. *But see* U.S. CONST. amend. V. (A jury verdict of "not guilty" is final and may not be impeached under the fifth amendment principles of double jeopardy).

[36] *See* James W. Diehm, *supra* note 1, at 403.

Impeachment based upon juror testimony would have a serious chilling affect upon jury deliberations if they were exposed to public scrutiny.[37] By preventing litigants from using juror testimony to impeach a verdict, Rule 606(b) protects jurors from harassment by a defeated party "in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict."[38] Without the restraints of Rule 606(b), members of the community may be reluctant to serve as jurors if there is a possibility that their comments will be made public, that they will be harassed after the verdict, or that they will be called to testify on matters pertaining to their jury service and deliberations.[39]

Moreover, in order to achieve a just verdict, deliberations must allow the jurors to speak freely so that all of the members of the jury can be heard.[40] Freedom to deliberate in secret is thought to promote good group dynamics within a jury, whereby jury members exchange ideas and concerns to reach a verdict that reflects community morals.[41]

---

[37] McDonald v. Pless, 238 U.S. 264, 267-68 (1915) (holding that if evidence from juror testimony could be 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."); *see also Tanner*, 483 U.S. at 120-21 (explaining that post-verdict scrutiny undermines public trust in the judicial system).

[38] *See McDonald*, 238 U.S. at 267 (expressing concern that jurors might manufacture evidence to set aside the verdict).

[39] *See* Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 314 (noting that if jury deliberations became public knowledge, "previously anonymous jurors, reaching a group decision based on 'community values,' and lay perspectives, will feel they must justify it in the court of public opinion."); *see also* Diehm, *supra* note 1, at 394–95.

[40] *See* Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987) ("fruitful exchange of ideas and impressions among jurors is thought to hinge heavily on some assurance that what is said in the jury room will not reach a larger audience."); *see also* Diehm, *supra* note 1, at 400.

[41] *See* Clark v. United States, 289 U.S. 1, 13 (1933) ("[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."); *see also* Tanner v. United States, 483 U.S. 107, 120-21 (1987) (noting that "full and frank

Jury privacy and secrecy may encourage more sensitive jurors to express their opinions freely by giving them the security that their views will remain private.[42] Without secret deliberations, jurors will be less willing to express their views candidly and freely because they may be concerned that members of their community would learn of their individual position, which, in turn, could lead to the suppression of meritorious but unpopular views, or, worse yet, jurors may feel compelled to render a popular verdict rather than a just verdict.[43] Finally, the community's trust in the jury system could be undermined because exposure of jury deliberations could potentially "unravel the distinctive [irrational] and intuitive 'genius' of this lay tribunal," and undermine the jury's role as a final decision maker. [44]

C. Early Common Law Exceptions to the Juror Impeachment Rule

A brief overview of the common law and its underlying policies prior to the enactment of Rule 606(b) in 1975 will provide the context needed for this analysis. As previously mentioned, common law established a rigid rule that jurors, either through testimony or affidavit, were incompetent to impeach a verdict.[45] This rule was designed to protect jurors in the hope that such protection would breed a truthful and just verdict.[46] It follows that such a rigid rule may, in

discussion in the jury room" would be undermined if jurors' views could be scrutinized after a trial).

[42] *See id.*

[43] *See* Diehm, *supra* note 1, at 396.

[44] *See* John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUD. SOC'Y 166, 170 (1929) ("The jury and the secrecy of the jury room, are the indispensable elements in popular justice."); *see also* Goldstein, *supra* note 39, at 314.

[45] *See* McDonald v. Pless 238 U.S. 264, 269 (U.S. 1915); Hyde & Schneider v. United States, 225 U.S. 347 (U.S. 1912).

[46] *See id.* (recognizing that if "verdicts solemnly made and publicly returned" could be attacked and set aside on the testimony jurors, jurors would be harassed by the defeated party in an effort to set aside a verdict).

fact, deny a fair trial as juror misconduct inevitably occurs because juries are comprised of imperfect human beings.[47]

As the common law developed, it became clear that exceptions must be made to such a rigid rule. Early exceptions to the juror impeachment rule took two forms: (1) the Iowa Rule,[48] which excluded juror testimony about matters that "essentially adhere in the verdict itself," but admitted testimony relating to an "independent fact," and (2) the *Mattox* Rule,[49] which permitted jurors to testify to "external influences" that might have affected the jury's decision but not to any "internal influences" relating to the jury's deliberation process.[50] A further evaluation of the common law cases reveals that the Supreme Court continued to apply the external influences of *Mattox*, but not the Iowa Rule.

In *McDonald v. Pless*,[51] the court made clear that, even if jurors awarded damages that are inconsistent with the jury instructions, the general rule is that losing litigant cannot use juror testimony to impeach a jury verdict. In *Remmer v. United* States,[52] an unnamed person attempted to bribe a juror, and the juror reported the bribe to the trial judge before the verdict was returned.[53] The judge informed

---

[47] Dean Sanderford, *The Sixth Amendment, Rule 606(b), and the Intrusion into Jury Deliberations of Religions Principles of Decision*, 74 TENN. L. REV. 167, 173 (2007) ("A juror's reliance on personal beliefs and experiences, while recognized as one of the great strengths of the jury system, also enhances the risk that the ultimate decision will be unfaithful to the law and facts of the case.").

[48] Wright v. Ill. & Miss. Tel. Co., 20 Iowa 195, 210-11 (1866) (permitting testimony that a jury had reached a quotient verdict because this testimony was objectively verifiable and not based on the jury's thought processes during the deliberations.).

[49] Mattox v. United States, 146 U.S. 140, 150-51 (1892) (classifying both outside information provided by a bailiff and newspapers brought into the jury room as "external influences.").

[50] *See id.*

[51] 238 U.S. 264, 269 (U.S. 1915) (Jurors had assessed damages based on the average of the individual juror's opinions.); *see also* Hyde & Schneider v. United States, 225 U.S. 347 (U.S. 1912)

[52] 347 U.S. 227 (1954)

[53] *Id.* at 228.

the prosecutor and called the FBI to investigate, but the defendant was not informed of the incident until after the trial.[54] In reversing the trial court's decision, the Court concluded that a hearing was required to determine whether the bribe involved private communication, contact, or tampering with a juror.[55]

The Court also allowed testimony about the influence of third parties in both *Turner v. Louisiana*[56] and *Parker v. Gladden*.[57] In *Turner*, the Court held that the defendant had been denied the right to an impartial jury trial when two deputy sheriffs, who presented key testimony for the State during the trial, supervised and socialized with jurors outside of the courtroom.[58] In *Parker*, the bailiff responsible for overseeing the sequestered jurors, told jurors that the "wicked fellow" was guilty and that if the jury made a mistake, the Supreme Court would correct it.[59] In both cases, the Court focused on the Sixth Amendment's promise of an impartial jury trial and the related requirement that all evidence considered by the jury be presented during the trial.[60] The Court underscored the importance of the Sixth Amendment's right to a jury trial, stating that "at the very least…the evidence developed against a defendant shall come from the witness

---

[54] *Id.* (The trial judge did not inform the defendant because the investigation revealed that the bribe was not credible.)

[55] *Id.* at 229-230 (holding that "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury . . . presumptively prejudicial."). The Court was also troubled by ex parte actions of trial judge and prosecutor. *Id.*

[56] 379 U.S. 466 (1965).

[57] 385 U.S. 363 (1966).

[58] *Turner*, 379 U.S. at 473 (The jurors' interaction with the sheriffs potentially prejudiced the jurors by bolstering the credibility of the sheriffs' testimony, thus subverting the defendant's right to challenge the sheriffs' credibility meaningfully through cross-examination during the trial.).

[59] *Parker*, 385 U.S. at 364.

[60] *See id.* at 364-65 ("We have followed the undeviating rule that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial.") (internal quotation marks and citations omitted); *see also Turner*, 379 U.S. at 472.

stand in a public courtroom where there is full judicial protection of the defendant's rights."[61]

These common law cases, as reflected by the subsequent legislative history, provided foreshadowing for what became the exceptions in Rule 606(b). Accordingly, an outside influence is when someone or something attempts to sway the jury (such as a bribe or a threat), thus depriving a defendant of an impartial jury.[62] Whereas extraneous prejudicial information is akin to "testimonial"[63] information introduced without an opportunity for cross-examination.[64] It is also possible that an event could be both an outside influence and extraneous prejudicial information.[65]

D. The Legislative History of Rule 606(b) and the Subsequent Applications

Adopted in 1975, Rule 606(b) codified both the common law juror impeachment rule and the exceptions carved out by subsequent decisions.[66] Its legislative history shows a debate over whether to adopt the more expansive policy of the Iowa Rule or to adopt the narrower "external influences" approach.[67] In the preliminary draft of Rule 606(b), the Supreme Court Advisory Committee allowed juror

---

[61] *Turner*, 379 U.S. at 472-73 (internal quotation marks omitted); *see id.* ("[I]t would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution.").

[62] *See* Remmer v. United States, 347 U.S. 227, 229-230 (U.S. 1954).

[63] *See* Crawford v. Washington, 541 U.S. 36, 61–62 (2004) (holding that the Confrontation Clause is a procedural guarantee that the reliability of testimonial evidence will be tested through the "crucible of cross-examination").

[64] *See* Mattox v. United States, 146 U.S. 140 (1892) (jury learn information about the case from the newspaper).

[65] *See Parker*, 385 U.S. 363 (1966) (information about the defendant's guilt came from the bailiff outside of the courtroom).

[66] *See* Diehm, *supra* note 1, at 413.

[67] *See id.* at 413-14 (providing a detailed explanation of the legislative history); *Tanner*, 483 U.S. at 122-25 (same); s*ee also supra* Part II. C. (discussing the Iowa Rule and the Mattox Rule).

testimony as to statements or acts occurring during deliberations and precluded only testimony concerning the effect that such statements or acts had on the juror's mind or the decision, but its final draft only permitted juror testimony on external influences that were brought to bear upon any juror.[68] Congress was initially split on the different versions but ultimately enacted the committee's final draft which reflects the more restrictive approach to Rule 606(b).[69] The core pronouncement of the rule closely resembles the early American common law rule that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict.[70] The exceptions, "extraneous prejudicial information"[71] and "outside influence,"[72] generally track the common law exceptions provided in *Mattox*, *Remmer*, *Turner*, and *Parker*.[73]

The Court first addressed the application of Rule 606(b) in *Tanner v. United States*,[74] where the defendant sought an evidentiary hearing, claiming that the jury's alleged drug and alcohol use during the trial was an outside influence and a violation of the Impartial Jury Clause.[75] The Court denied relief because the alleged drug and alcohol use was "internal" to the deliberation process and an evidentiary hearing would allow inquiry "into the internal processes of the jury."[76] In reaching this conclusion, the Court appeared to adopt the "external/internal influence test" used by the lower courts that had applied Rule 606(b).[77] Under this test, an "outside influence"[78] is not

[68] *Id.*

[69] *Id.*

[70] *See* McDonald v. Pless, 238 U.S. 264, 269 (U.S. 1915); Hyde & Schneider v. United States, 225 U.S. 347 (U.S. 1912).

[71] FED. RULE. EVID. 606(b)(1).

[72] FED. RULE. EVID. 606(b)(2).

[73] *See* Sanderford, *supra* note 47, at 181.

[74] 483 U.S. 107 (1987).

[75] *Id.* at 117.

[76] *Id.* at 117, 120.

[77] *Id.* at 127 (recognizing other aspects of the trial process that protect the defendant's right to an impartial jury, such as voir dire, the ability of jurors to report

on based on whether the influence literally occurred inside or outside the jury room; rather courts must assess "the nature of the influence."[79] In other words, courts must evaluate each allegation on a case-by-case basis to determine whether they should admit juror testimony. This test recognizes that Rule 606(b) prohibits jurors from testifying about "internal" influences, but it also recognizes that jurors may testify about "external" influences.[80] While the Court mainly addressed outside influences, it did discuss extraneous prejudicial information.

III. THE SEVENTH CIRCUIT'S DECISION IN ARREOLA V. CHOUDRY

A. Northern District of Illinois - Judge Kennelly Presiding

In 2003, Gilbert R. Arreola, a prisoner at Hill Correctional Center, injured his ankle and was taken to the prison infirmary for treatment where Doctor Mohammed Choudry examined him, diagnosed him with a sprained ankle, ordered him back to his cell, and scheduled a follow-up visit in seven to ten days.[81] A few days later, Arreola was transferred to Cook County Jail, had an x-ray of his ankle taken, learned that it was broken, and sued Dr. Choudry.[82]

During voir dire, potential jurors were asked, "Have you or any family member ever had a broken or severely sprained ankle, foot, or

any misconduct before the conclusion of the trial, jurors are under oath to uphold the law, and they are observable by the court, by counsel, and by other jurors).

[78] *See* FED. R. EVID. 606(b)(2).

[79] *Tanner*, 483 U.S. at 117.

[80] *See id.* (explaining that the proper test for allegations of "outside influence" under Rule 606(b) is for courts to determine the "nature of the influence").

[81] Arreola v. Choudry, 533 F.3d 601, 603 (7th Cir. 2008) *cert. denied*, 2008 U.S. LEXIS 8576 (2008).

[82] *Id.* The suit was brought under 42 U.S.C. §1983; Arreola claimed that Dr. Choudry's, the prison doctor, treatment of his injured ankle was a deliberate indifference to a medical need in violation of the Eighth Amendment of the United States Constitution.

leg?" Juror Laterza, later elected foreperson, answered "no."[83] Fourteen prospective jurors, six of whom sat as jurors during trial, answered this question affirmatively.[84] Arreola challenged two jurors for cause based on their personal experiences with ankle sprains suffered by family members but later withdrew his challenge when they said that they would be able to put aside those experiences.[85]

Following a two day trial, the jury found Dr. Choudry not guilty and, after the verdict was returned, the parties were permitted to speak to the jurors.[86] Following conversations between Arreola's lawyer and members of the jury, Arreola motioned for a new trial supported by an affidavit stating that Juror Laterza based the verdict on her personal experience with an ankle injury and used her experience to influence other jurors.[87] In particular, Arreola alleged that Laterza "had no problem believing that Dr. Choudry could press on Arreola's ankle without finding tenderness."[88]

Based upon this motion, Judge Kennelly investigated further and coordinated a telephone conversation with Laterza.[89] Prior to this telephone conversation, he permitted both lawyers to submit questions for him to ask Laterza, but he rejected questions involving juror deliberations.[90] Following his telephone interview with Laterza, Judge Kennelly concluded that a new trial was not warranted because there was no proof that she lied during voir dire and her previous injury was not extraneous prejudicial information; thus, no further inquiry was required.[91]

---

[83] *Id.*

[84] *Id.*

[85] *Id.* Judge Kennelly asked follow up questions pertaining to ankle injuries to all that answered affirmatively, each juror that answered affirmatively assured the judge that they would be impartial if selected to serve.

[86] *Id.*

[87] *Id.* at 603-04

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 605.

B. Seventh Circuit Court of Appeals

Arreola appealed the district court's refusal to grant a new trial, arguing that his due process rights were violated and that the court misapplied the standard for evaluating juror bias.[92] In particular, he claimed that Laterza was not truthful during voir dire when she did not reveal her previous ankle injury.[93] In affirming the decision of the district court, the Seventh Circuit showed significant deference to Judge Kennelly's findings of fact.[94]

The first issue addressed on appeal was Areola's due process claim.[95] Due process requires a jury capable and willing to decide the case solely on the evidence before it, and a trial judge to watch for prejudicial occurrences and to determine the effect of such occurrences when they happen.[96] Contrary to Arreola's demand, due process does not require a new trial every time jurors have been placed in a potentially compromising situation.[97] The court conceded that while due process may require a hearing to determine if extraneous contacts had affected the jury's ability to be fair, a hearing is not required for pre-existing bias, because pre-existing bias should be discovered during voir dire.[98] If a hearing was needed, the nature of the hearing should allow all interested parties to participate and, to some extent, should include a determination by the trial judge of the circumstances,

---

[92] *Id.* at 604-05.

[93] *Id.* at 604.

[94] *Id.* (citing United States v. Medina, 430 F.3d 869, 875 (7th Cir. 2005) ("[T]here are compelling institutional considerations…in favor of appellate deference to the trial judge's evaluation of … juror bias.") (citing United States v. McClinton, 135 F.3d 1178, 1186 (7th Cir. 1998) ("Trial courts have wide discretion in deciding a motion for a new trial.")).

[95] *Id.* at 604-06.

[96] *Id.* at 605 (citing Oswald v. Bertrand, 374 F.3d 475, 478 (7th Cir. 2004)).

[97] *Id.* (citing Rushen v. Spain, 464 U.S. 114, 118, 104 S. Ct. 453 (1983)).

[98] *Id.* at 606 (citing United States v. Connolly, 341 F.3d 16, 34-35 (1st Cir. 2003) (holding that a juror's notes are an intrinsic influence on a jury's verdict, thus an evidentiary hearing is not required).

the impact of those circumstances on the jury, and whether or not the result of those circumstances prejudiced the verdict.[99]

Deferring to the district court's findings, the court held that Laterza's prior experience with an ankle injury was an "intrinsic influence" and that Rule 606(b) prohibits using the jurors to impeach the verdict.[100] The court further acknowledged that jurors are expected to evaluate the evidence presented at trial in light of their own experiences and common sense when deliberating; however, jurors may not go beyond the record to develop their own evidence.[101] The Seventh Circuit held that the trial judge's post-verdict voir dire satisfied due process because he investigated "the allegation of bias in a direct and conscientious manner, keeping in mind that the integrity of jury proceedings must not be jeopardized by unauthorized invasions."[102] Any further inquiry into the jury's thought processes concerning deliberations would have violated Rule 606(b); thus, Judge Kennelly correctly treated the allegation as an "internal matter."[103]

IV. QUESTIONS REMAINING AFTER ARREOLA

While the Seventh Circuit correctly held that Laterza's knowledge of ankle injuries was not extraneous prejudicial information, it declined to explain what would qualify as extraneous prejudicial

---

[99] *Id.* at 604 (citing Smith v. Phillips, 455 U.S. 209, 215 (1982)).

[100] *Id.* at 606 (citing Marquez v. City of Albuquerque, 399 F.3d 1216, 1223 (10th Cir. 2005) ("[A] juror's personal experience does not constitute extraneous prejudicial information."); Peterson v. Wilson, 141 F.3d 573, 577-78 (5th Cir. 1998) (holding that juror discussion of personal past experience is not "extrinsic" evidence that requires a new trial)).

[101] *Arreola*, 533 F.3d at 606 (citing Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987) ("We cannot expunge from jury deliberations the subjective opinions of jurors, their attitudinal expositions, or their philosophies. These involve the very human elements that constitute one of the strengths of our jury system.")).

[102] *Id.* at 607.

[103] *Id.* citing United States v. Briggs, 291 F.3d 958, 963-64 (7th Cir. 2002) (holding that post-verdict allegations of juror intimidation during the deliberative process were not extraneous prejudicial information or an outside influence, thus under Rule 606(b) neither a hearing nor a new trial was warranted).

information. Additionally, the court declined Arreola's request for cross-examination and the ability to call witnesses, but in declining his request the court cited a Supreme Court case in which an evidentiary hearing was held.[104] Finally, the court did not set forth a procedural standard for the district courts to follow when applying Rule 606(b). This section will attempt to address these issues. Under this proposed solution, courts must first determine whether information presented is extraneous prejudicial information under Rule 606(b) by applying a totality of circumstances test. If it is, this section will then attempt to provide procedural guidance to determine whether a hearing is required.

A. Extraneous Prejudicial Information

The exceptions under Rule 606(b) do not apply to every instance in which a juror considers facts or data outside the record, yet what qualifies as extraneous prejudicial information is far from clear. While the language of Rule 606(b) is vague in some contexts, it is fairly clear that general influences on a verdict, such as values or biases applied by the individual jurors, are not within the scope of this language because this is expected of jurors.[105] However, a line is crossed when they become investigators of the case.[106] In general, courts have interpreted "extraneous prejudicial information" as evidence that was not presented at trial and, therefore, not subject to challenge in open

[104] *Id.* at 605 (citing Smith v. Phillips, 455 U.S. 209, 217 (1982)).

[105] *See e.g.* United States v. O'Brien, 14 F.3d 703, 708 (1st Cir. 1994) ("[I]n gauging witness credibility and choosing from among competing inferences, jurors are entitled to take full advantage of their collective experience and common sense."); Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987) (noting that the subjective opinions of jurors, their attitudinal expositions, or their philosophies, including racial biases are not extraneous prejudicial information).

[106] *See* People v. Wadle, 97 P.3d 932 (Colo. 2004) (finding "extraneous prejudicial information" when a juror conducted an internet search regarding the drug allegedly taken by the defendant).

court.[107] Accordingly, these courts have permitted juror testimony as to the jury's consideration of extra-record information derived from books, newspapers and other public media, court documents, other objects not in evidence, experiments or investigations, or views of the relevant scene or premises.[108] Courts have not allowed, on the other hand, juror testimony as to the effect of security measures taken at trial, events that took place in open court, intra-jury influences such as intimidation or harassment, the use by a juror of notes, and other matters not classifiable as either information or evidence.[109]

While the text of Rule 606(b) states that information must be prejudicial to allow juror testimony, the determination of prejudicial information is far from clear.[110] In attempting to define "extraneous prejudicial information," some courts have distinguished between "general information," which is not covered by the exception, and "specific facts," which are covered.[111] Some courts conflate the two exceptions of Rule 606(b) and form a hybrid test, referring to both

[107] *See* Sanderford, *supra* note 47, at 182; Mattox v. United States, 146 U.S. 140 (1892) (newspaper article about the case considered by the jury).

[108] *See* 27 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 6075 (2nd ed. 2009) (synthesizing factors used in lower court decisions).

[109] *See id.*

[110] *See, e.g., In re* Beverly Hills Fire Litigation, 695 F.2d 207, 215 (6th Cir. 1982) (allowing juror's letter stating that he considered extraneous information about the case and it effected his decision); United States v. Vasquez, 597 F.2d 192 (9th Cir. 1979) (jurors read a file with highly prejudicial information about the defendant). *But see, e.g.*, United States v. Paneras, 222 F.3d 406 (7th Cir. 2000) (cartoon depicting events at trial drawn by juror was not an extraneous influence); United States v. Calbas, 821 F.2d 887 (2d Cir. 1987) (holding that the jury's consultation telephone directory was not prejudicial information).

[111] *See, e.g.*, Government of Virgin Islands v. Gereau, 523 F.2d 140, 151 (3rd 1975) (holding that a verdict is not invalid merely because the jurors' generalized knowledge about the parties, or some other aspect of the case); Morgan v. Woessner, 997 F.2d 1244, 1261 (9th 1993) ("The type of after-acquired information that potentially taints a jury verdict should be carefully distinguished from the general knowledge, opinions, feelings and bias that every juror carries into the jury room.").

exceptions under the umbrella of "external influences."[112] One circuit court has taken the position that extraneous information under Rule 606(b) only applies to matters that could not have been discovered during voir dire, either because the juror's exposure to extra-record evidence occurred after voir dire or the juror lied during that process.[113] Another circuit has made clear that the information must bear on a fact at issue in the case and anything else is extraneous prejudicial information.[114]

The general knowledge/fact specific test begs the question of what is "general knowledge"[115] and it has been criticized as vague and unworkable.[116] The hybrid test fails to recognize that Congress created two distinct exceptions and while some instances may be both an outside influence and extraneous prejudicial information, nonetheless, courts must recognize that there are two different exceptions and two different analytical frameworks. Finally, the rigid requirement that the information bear on a fact at issue in the case does not recognize that jurors may be influenced by other information.

---

[112] *See* Robinson v. Polk, 438 F.3d 350, 363 (4th Cir. 2006) ("We use the term "external influence"…to refer to both extraneous prejudicial information and outside influences.); *see also* United States v. Logan, 250 F.3d 350, 380 (6th Cir. 2001).

[113] *See* United States v. Thomas, 946 F.2d 73, 75 (8th Cir.1991) (holding that the trial court did not err in finding that the comments of a juror that she had talked with an attorney was not extraneous information sufficient to invalidate the verdicts against the defendant because the juror "did not have any contact with any attorney during the progress of the case or deliberations, and did not speak with anyone in a manner inappropriate or inconsistent with proper jury service.").

[114] *Robinson*, 438 F.3d at 363 n.15 (Under Rule 606(b) "prejudicial" means that the information bears on a fact at issue in the case otherwise the list of ingredients on the packs of coffee provided for jurors would be extraneous prejudicial information because it is 'extraneous' to the evidence presented in the case and because it is 'information.).

[115] *Compare* Fields v. Brown, 503 F.3d 755, 780 (9th Cir. 2007) (holding that Bible passages used by the jury were "notions of general currency that inform the moral judgment [of jurors]…"), *with* Oliver v. Quarterman, 541 F.3d 329, 339 (5th Cir. 2008) ("when a juror brings a Bible into the deliberations and points out to her fellow jurors specific passages that describe the very facts at issue in the case, the juror has crossed an important line.").

[116] *See* Crump, *supra* note 29, at 540.

Because these tests do not appear to be workable for all future cases, the Seventh Circuit should adopt a "totality of circumstances" test[117] in determining whether information is extraneous and prejudicial. The factors the court should consider include: (1) the importance of the issue to which the information related, (2) the nature of the information, (3) the strength of the admitted evidence supporting the verdict, (4) the number of jurors exposed to the information, (5) when the jury was exposed to the information, (6) how long the jury discussed these matters during deliberations, (7) the manner in which the court dealt with the information at trial, (8) and any other matters which might have a bearing on the effect of the information or influence on the jury.[118]

Application of the totality of circumstances allows courts more flexibility than any of the aforementioned tests, especially when the alleged information is a close call. For instance, courts appear split whether Rule 606(b) authorizes the receipt of testimony that jurors consulted a Bible during deliberations.[119] The application of these factors could change the outcome depending upon the unique circumstances of the case.[120] For example, how the information reached the jury is critical because a juror's internal knowledge of the Bible is less likely to be extraneous.[121] However, just because the information is "internal" to the juror does not make the information per se internal to the deliberation process. For example, in *Oliver v.*

---

[117] *Cf.* Rogers v. McDorman, 521 F.3d 381, 396 (5th Cir. 2008) (examining the "totality of circumstances" in determining whether a jury reached a compromise verdict).

[118] *See* 27 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 6075 (2nd ed. 2009) (providing a synthesis of factors used in lower court decisions).

[119] *See Oliver*, 541 F.3d at 339 n. 11 ("The Second, Third, Seventh, Eighth, Tenth, and D.C. Circuits have not spoken on this issue.").

[120] *See* United States v. Lara-Ramirez, 519 F.3d 76, 89 (1st Cir. 2008) (noting that there exists no per se rule of the Bible's effect in the jury room).

[121] *See* Mattox v. United States, 146 U.S. 140 (1892) (holding that information was prejudicial when bailiff provided it to the jury); *cf.* J.E.B. v. Alabama, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) (discussing that it is expected of jurors to uses their past knowledge when deliberating).

Quarterman the jury consulted a Bible passage with parallel facts to the underlying case and rendered a death sentence, just as the Bible proscribed.[122] The Fifth Circuit recognized that the Fourth Circuit's[123] rigid rule that the information must be about the case could deny a fair trial if jurors use a jury instruction from Jesus as opposed to the court's instruction.[124] While certain passages from the Bible may be considered common knowledge, others might not.[125] Because these questions cannot be answered in the abstract, courts must allow for juror questioning when information, such as the Bible, is used during deliberations. Thus, a hearing of some type is required.

The totality of circumstance test recognizes that mere allegations should not be sufficient to ignore the extensive history of juror incompetency, but it recognizes that the other protections, both before and during trial, may not be sufficient to assure a fair trial.[126] Therefore, juror testimony should be held incompetent unless it relates to overt matters that authoritatively inject facts not contained in the

[122] 541 F.3d at 340 (evaluating the nature of this passage, the court correctly held that this was extraneous prejudicial information).

[123] *See* Robinson v. Polk, 438 F.3d 350, 363 n.15 (4th Cir. 2006).

[124] *See Oliver*, 541 F.3d at 332 n. 3 (Defendant was on capital trial for murder, alleging beating the victim to death with end of a gun, and the jurors read and used a Bible passage from the Book of Number; "And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death.").

125 *Compare* Burch v. Corcoran, 273 F.3d 577, 591 (4th Cir. 2001) (noting that the certain passages such as "an eye for an eye" are "statements of folk wisdom or of cultural precepts"), *with Oliver*, 541 F.3d at 340 (holding that passage used by jurors paralleled the facts of the case and was not general knowledge because it taught that capital punishment is appropriate for a person who strikes another over the head with an object and causes the person's death).

[126] *See* Tanner v. United States, 483 U.S. 107, 127 (U.S. 1987) (discussing other protections available before and during the trial to ensure a fair trial).

evidence[127] or principles of decision not within the applicable law,[128] into the jury's deliberation.[129]

B. Procedural Issues with Rule 606(b)

Rule 606(b) is silent as to how courts should proceed once a trial has been completed and juror misconduct is alleged.[130] Prior to the enactment of Rule 606(b), if a criminal defendant demonstrated that extraneous information was present during deliberations it was deemed presumptively prejudicial and the burden shifted to the government to prove that the information was harmless.[131] Subsequent to the enactment of Rule 606(b) and the Supreme Court's interpretations thereof, trial courts appear split as to whether the presumption of prejudice still applies. Some courts have held that Rule 606(b) codified the entire common law, including the presumption of prejudice. Other courts have held that Rule 606(b) created a procedural change that places an initial burden on the moving party.[132]

The presumption of prejudice approach is flawed because it would create a blueprint for criminal defendants to impeach guilty verdicts if a mere showing of extraneous prejudicial information shifted the burden to the government to rebut. Hypothetically, a defendant accused of a felony could hire someone to "influence" a juror,

---

[127] *See* Mattox v. United States, 146 U.S. 140 (1892) (holding that information was prejudicial when bailiff provided it to the jury).

[128] *See Oliver*, 541 F.3d 329 (Bible passage commanded death for an act similar to the facts presented at trial).

[129] *See* Crump, *supra* note 29, at 540.

[130] *See* FED. R. EVID. 606(b).

[131] *See* Remmer v. United States, 347 U.S. 227, 229 (1954) ("any private communication, contact, or tampering directly or indirectly, with a juror during trial about the matter pending before the jury" is presumptively prejudicial.

[132] *Compare* United States v. Martinez, 14 F.3d 543, 551 (11th Cir. 1994) (examining the jury's use of a dictionary during deliberations under *Remmer's* presumption of prejudice), *with* United States v. Williams-Davis, 90 F. 3d 490, 503 (D.C. Cir. 1996) (holding that a juror's use of a dictionary did not raise a presumption of prejudice).

introduce the external influence after the verdict, and the government would have to rebut the presumption. The government would struggle to overcome this burden because the text of Rule 606(b) prohibits the questioning of jurors as to the affect of any such influence.[133] This defies the notion of a fair and just verdict.

Based on the policies of Rule 606(b)[134] and its subsequent case law, it appears that the proper procedure is to place an initial burden on the moving party to show (1) that information was presented to the jury outside of the courtroom and (2) that a reasonable probability exists that the information influenced the jury's verdict.[135] If the responding party can prove that the information was harmless, then the court should dismiss the motion and deny any further inquiry.[136] While this may sound simplistic in the abstract, the cases have proven that this can be a difficult task because there is a fine line between juror knowledge and extraneous prejudicial information.[137] There can be no bright line procedure in every case. However, where the court conducts an inquiry broad enough to lead it to a reasonable judgment that there has been no prejudice, it has fulfilled its procedural as well

[133] *See* United States v. Maree, 934 F.2d 196, 201 (9th Cir. 1991) (distinguishing between testimony concerning a statement and its impact).

[134] *See supra* Part II. B.

[135] *See* United States v. Pennell, 737 F.2d 521, 532 (6th Cir. 1984) (citing Smith v. Phillips, 455 U.S. 209, 215-16 (1982) for the proposition that Rule 606(b) created a substantive change in the law, eliminating any presumption of prejudice and placed a burden on the moving party); Tanner v. United States, 483 U.S. 107, 127 (U.S. 1987) ("even if Rule 606(b) is interpreted to retain the common-law exception allowing post-verdict inquiry of juror incompetence…*the showing made by petitioners falls far short of this standard*."(emphasis added)).

[136] *See* United States *ex rel*. Owen v. McMann, 435 F.2d 813, 818 (2nd Cir. 1970) ("The touchstone of decision…is thus not the mere fact of infiltration of some molecules of extra-record matter…but the nature of what has been infiltrated and the probability of prejudice.").

[137] *See* Wisehart v. Davis, 408 F.3d 321, 327 (7th Cir.2005) (deeming a juror's knowledge from outside sources that the defendant had taken a polygraph test during the trial to be an external influence).

as its substantive duty.[138] Ultimately, trial courts must use prudent discretion in assessing whether further inquiry is required, [139] but they should proceed cautiously.[140]

Even if the jury has been exposed to extraneous prejudicial information, some courts[141] have held that Rule 606(b) prohibits jurors from testifying as to the effects on the jury's decision, while other courts permit such testimony.[142] Some courts are concerned that the very holding of a hearing will give rise to the risks and problems that Rule 606(b) contemplates, especially if jurors are called to testify.[143] The only actual prohibition in the rule is the use of a juror's testimony as evidence to overturn a verdict or indictment, but after a trial is over, jurors are free to discuss their deliberations with litigants or the media without running afoul of Rule 606(b).[144] Moreover, Rule 606(b) does

[138] *See Smith*, 455 U.S. at 215-16; *see also* House v. Bell, 547 U.S. 518, 561 (2006) (Roberts, C.J., dissenting) (discussing evidentiary hearing for habeas corpus).

[139] *See* United States v. Sanders, 962 F.2d 660, 673 (7th Cir. 1992) ("The trial judge will always be in a better position…to assess the probable reactions of jurors in a case over which he has presided.").

[140] *See* United States v. Vitale, 459 F.3d 190, 197 (2d Cir. 2006) (instructing that district courts should be reluctant "to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences.").

[141] *See, e.g.*, McElroy v. Firestone Tire & Rubber Co., 894 F.2d 1504, 1511 (11th Cir. 1990) (Rule 606(b) precluded considering the emotional state of mind of the distraught juror and the possible effect of her state of mind on that of the other jurors); Brofford v. Marshall, 751 F.2d 845, 853 (6th Cir. 1985) (juror may be permitted to give statement that she had preconceptions concerning defendant's guilt, but she could not be asked the effect those preconceptions had on her verdict).

[142] *See, e.g., In re* Beverly Hills Fire Litigation, 695 F.2d 207, 215 (6th Cir. 1982)(admitting juror's letter stating that he not only considered extraneous prejudicial information but that it was a factor in his decision making); Krause v. Rhodes, 570 F.2d 563, 571 (6th Cir. 1977) (Rule 606(b) does not rule out permitting jurors to testify as to the effect on their decision of matters properly classifiable as outside influences).

[143] *See* United States v. Calbas, 821 F.2d 887, 896 (2d Cir. 1987) (holding that the trial court "wisely refrained from allowing the inquiry to become an adversarial evidentiary hearing, so as to minimize intrusion on the jury's deliberations.").

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

not impose any sanctions on parties who harass jurors, nor does it prohibit jurors from divulging details about their deliberations. Thus, according to these courts, Rule 606(b) can uphold its policies only if information gained from post-verdict contact with jurors is not used for any purpose, including the procurement of a hearing.[145] While a full hearing may be the best way to determine the impact of the alleged information, it is quite possible that a juror who has been compromised by threats or coercion will persist in the position induced, thus concealing the fact that he has been threatened or pressured, and even after a hearing, the court will remain unaware of the impropriety.[146]

C. Hearings under Rule 606(b)

Perhaps the most important issue to be decided in a case where a party is seeking to impeach a jury verdict is whether a court should hold a hearing.[147] Litigants can protect their constitutional rights only if they are permitted to take steps to determine whether any basis for jury impeachment exists; however, courts have consistently upheld rules and orders restricting communication between parties and jurors.[148] Even if the courts were to determine that a "hearing" is appropriate, the type of hearing is not found within the text of Rule 606(b).[149] The Supreme Court[150] stated that an evidentiary hearing or a *Remmer*[151] type of hearing is appropriate once the procedural

[145] *See* Diehm, *supra* note 1, at 401.

[146] *Id.*

[147] *See id.* (explaining that the party seeking to impeach the verdict often will request that the court hold a hearing to determine whether the allegations are well-founded, but such requests are usually denied).

[148] *See id.* at 405.

[149] *See* Goldberg v. Kelly, 397 U.S. 254, 262-71 (1970) (discussing the applicability of hearings to various situations and the general requirements of different hearings); *see also* Arreola v. Choudry, 533 F.3d 601, 605 (7th Cir. 2008) *cert. denied*, 2008 U.S. LEXIS 8576 (2008) (asking for a "meaningful hearing").

[150] Smith v. Phillips, 455 U.S. 209, 210 (1982) (hearing was required by a New York State law).

[151] Remmer v. United States, 347 U.S. 227, 229-230 (1954).

thresholds have been satisfied.[152] The benefits[153] of a hearing are obvious because it may be the best method of determining the merits of the alleged influence on the verdict.[154]

In *Arreola*, Arreola argued that due process required a meaningful hearing; specifically, he wanted an opportunity for cross-examination, an opportunity to call witnesses, and he felt that the juror should have been sworn in before questioning.[155] Contrary to this request, the Seventh Circuit correctly handled this situation and satisfied all constitutional challenges while following the text of Rule 606(b) because the remedy for allegations of juror partiality is the opportunity to prove actual bias.[156] Both parties were given the opportunity to participate by asking questions through the filter of the trial judge.[157] Although the trial judge did not ask all the questions presented by Arreola, due process does not require courts to ask every question to jurors.[158] Consistent with the demands of the Constitution and the precedent of the Supreme Court, Rule 606(b) does not demand a "meaningful hearing"[159] any time juror impartiality is alleged. Therefore, a hearing is not required per se; rather, trial courts must determine the circumstances on an ad hoc basis and then determine whether further inquiry is required.[160]

---

[152] *Smith*, 455 U.S. at 217 ("holding that "determinations [of jury verdict prejudice] may properly be made at a hearing like that ordered in Remmer" or if state law requires as in this case).

[153] *See supra* Part II. (discussing policy reasons for not allowing juror testimony).

[154] *See* Diehm, supra note 1, at 401-402.

[155] Arreola v. Choudry, 533 F.3d 601, 605 (7th Cir. 2008) *cert. denied*, 2008 U.S. LEXIS 8576 (2008).

[156] *See Smith*, 455 U.S. at 215-16.

[157] *Arreola*, 533 F.3d at 606.

[158] United States v. Meader, 118 F. 3d 876, 876, 878-81 (1st Cir. 1997) (holding that trial courts have no obligation to ask counsel's specific questions while conducting a post-verdict voir dire of a juror for potential bias).

[159] *See Arreloa*, 533 F.3d at 605.

[160] *See* Remmer v. United States, 347 U.S. 227, 229-230 (1954) (court must "determine the circumstances, the impact thereof upon the juror, and whether or not

V. CONCLUSION

While the Seventh Circuit correctly denied Arreola further relief, Rule 606(b) has yet to be fully defined by the Seventh Circuit. Consistent with the authority set forth in this article, the Seventh Circuit should formally adopt a totality of the circumstances test for "extraneous prejudicial information." Since Rule 606(b) is silent on procedure, the Seventh Circuit should place the initial burden upon the moving party to show that the extraneous information was prejudicial to the verdict; the burden would then shift to the responding party to prove that the information was harmless. Trial courts must allow the litigants an opportunity to prove juror bias but must exercise discretion so as not to disturb to underlying policies of Rule 606(b). While there may be some circumstances where Rule 606(b) must yield to Constitutional demands, courts should be reluctant to disturb jury verdicts based on the extensive history behind the rule of juror impeachment.

[the external influence] was prejudicial, in a hearing with all interested parties permitted to participate.").