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Juror Misconduct - A Restriction on Post-Trial Impeachment of Jury Verdicts Based on Juror Misconduct

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I. INTRODUCTION

In United States v. Gilsenan, 1 the United States Court of Appeals for the Third Circuit addressed the effect of juror exposure to allegedly prejudicial pretrial publicity. 2 Several newspaper articles, published during the jury selection process, detailed a guilty plea proposal rejected by the trial judge the day before trial. 3 The Third Circuit held that the district court properly denied both the appellants' motion for a new trial and their request for an evidentiary hearing. 4 In its analysis, the Gilsenan court factually distinguished precedent and evidenced a reluctance to entertain post-verdict claims of juror misconduct. 5

While courts generally consider information concerning a failed guilty plea to be presumptively prejudicial, 6 the Gilsenan court emph-
ized that inquiries concerning prejudice nonetheless require a case-by-case analysis. In affirming the denial of appellants' motion for a new trial, the Third Circuit held that the information to which the jurors were exposed was not substantially prejudicial and could not have impacted the verdict. The court distinguished Third Circuit precedent requiring a new trial based on the trial court's failure to hold an evidentiary hearing on the grounds that in such cases, the court was aware of the jury's exposure to prejudicial extra-record information before the end of the trial. The court also stressed the importance of the policies militating against a recall of discharged jurors.

Perhaps the most instructive premise that practitioners can extract from Gilsenan is the Third Circuit's reluctance to require inquiry of the jury when the defense raises allegations of juror misconduct after the trial is over. As a result, Third Circuit practitioners may now presume that most post-verdict allegations of juror misconduct based on extra-record information will fall on deaf ears. Not only must the post-Gilsenan practitioner show "substantial prejudice" to his or her client in a jurisdiction and reference to defendant as gangster not substantially prejudicial), cert. denied, 419 U.S. 855 (1974).

7. Gilsenan, 949 F.2d at 95-94. When the court is forced to make a determination of prejudice arising from juror exposure to pretrial publicity or other extra-record information each case is "sui generis." Id.). In DiNorscio, the court emphasized that when analyzing precedent in the area of juror misconduct, "extreme care must be taken in assessing the precedential value of particular holdings" because such cases are quite fact-sensitive (citing United States v. Di Norscio, 661 F. Supp. 1041, 1043 (D.N.J. 1987), aff'd sub nom. United States v. DiPasquale, 864 F.2d 271 (3d Cir. 1988), cert. denied, 492 U.S. 906 (1989). The court stated that "considerations found controlling in one case involving an infiltration of extra[-]record facts concerning a defendant on trial are not necessarily controlling in another case involving such infiltration." Id.

8. Gilsenan, 949 F.2d at 95-96. The Gilsenan court assumed that all of the jurors were exposed to the plea proposal information. Id. The court made "this determination on the basis of an objective analysis by considering the probable effect of the allegedly prejudicial information on a hypothetical average juror." Id. at 95; see also United States v. Boylan, 898 F.2d 230, 262 (1st Cir.) (using same objective analysis in post-verdict evaluation of allegedly prejudicial extra-record information), cert. denied, 111 S. Ct. 139 (1990); United States v. Ianniello, 866 F.2d 540, 544 (2d Cir. 1989) (using same "hypothetical average juror" standard); United States v. Calbas, 821 F.2d 887, 896 (2d Cir. 1987) (same), cert. denied, 485 U.S. 937 (1988). For a discussion of the court's determination of the effect of the information on a hypothetical juror, see infra notes 36-48 and accompanying text.

9. Gilsenan, 949 F.2d at 95-97. For a general discussion of the facts and holding of Gilsenan, see infra notes 13-30 and accompanying text. For a discussion of how the court distinguished adverse precedent, see infra notes 69-76 and accompanying text.

10. Gilsenan, 949 F.2d at 95-97. For a discussion of the policies against recalling discharged jurors, see infra notes 77-81 and accompanying text.

11. Gilsenan, 949 F.2d at 96-97. Therefore, even if the defendant could not have known about the misconduct until after the verdict, the Gilsenan court's reasoning suggests that a post-verdict claim based on allegedly prejudicial extra-record information will not be successful. See id. at 95-97.
motion for a new trial, but he or she may also have to show such prejudice in order to sustain a motion for a hearing to determine the nature and extent of the extra-record information to which the jury was exposed. 12

12. See id. at 95 n.7. The Third Circuit employs a type of harmless error analysis to determine whether extra-record information had an effect on the verdict, i.e., whether the defendant has demonstrated "substantial prejudice" or whether any prejudice was, in fact, harmless to the defendant. See id. at 95 ("While the statement of the juror that '[t]hey had offered to settle, but the judge said no because no time would be served' cannot fairly be characterized as helpful to the appellants, neither was it substantially prejudicial."); Government of Virgin Islands v. Dowling, 814 F.2d 134, 138 (3d Cir. 1987) (holding that where jurors were exposed to extra-record information, whether "defendant's right to an impartial determination based upon record evidence" has been violated depends on "likelihood of substantial prejudice"); United States v. Armocida, 515 F.2d 29, 49 (3d Cir.) (concluding that, in case of possible juror exposure to prejudicial pretrial publicity, "new trial should be ordered only when substantial prejudice has occurred"), cert. denied, 423 U.S. 858 (1975); United States v. D'Andrea, 495 F.2d 1170, 1172 n.5 (3d Cir.) (same), cert. denied, 419 U.S. 855 (1974); United States v. Boscia, 573 F.2d 827, 831 (3d Cir.) (finding presumption of prejudice resulting from third party communications with jurors successfully rebutted by government), cert. denied, 436 U.S. 911 (1978); Government of Virgin Islands v. Gereau, 523 F.2d 140, 154 (3d Cir. 1975) (holding that government satisfied burden of proving jury attendant's remarks to jurors not prejudicial), cert. denied, 424 U.S. 917 (1976).

In determining whether the information had a prejudicial effect on the verdict, the Gilsenan court stated that "what really counts is whether the jury was influenced by the plea agreement when it deliberated and delivered its verdict." Gilsenan, 949 F.2d at 95-96. However, the court stressed that "[t]his concern of the effect on the verdict means the effect on the hypothetical average juror, not the actual effect." Id. at 96 n.9; see Fed. R. Evid. 606(b) (stating that "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... except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention"). For the full text of Rule 606(b), see infra note 40.

This analysis is substantially similar to that employed by other circuits in cases of alleged juror misconduct based on exposure to extra-record information. See, e.g., United States v. Thompson, 908 F.2d 648, 652-53 (10th Cir. 1990) (finding that once presumption of prejudice arises where jurors exposed to prejudicial newspaper article burden shifts to government to prove harmless error); United States v. Rowe, 906 F.2d 654, 657 (11th Cir. 1990) (concluding that in cases in which jurors are exposed to extrinsic evidence, defendant must show by preponderance of evidence likelihood of prejudice in order to shift burden to government to prove exposure harmless); United States v. Boylan, 898 F.2d 230, 262-63 (1st Cir.) (holding that when jurors exposed to allegedly prejudicial extra-record information court determines whether exposure is harmless), cert. denied, 111 S. Ct. 139 (1990); United States v. Thomas, 463 F.2d 1061, 1065 (7th
II. DISCUSSION

A. Facts

The appellants in Gilsenan were law enforcement officers employed by the Essex County, New Jersey Prosecutor's Office. Pursuant to a highly publicized police corruption investigation, the appellants were indicted in 1988 for several violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Hobbs Act. The government and the appellants reached a tentative plea agreement on October 2, 1989, one day before the jury trial was scheduled to begin. The agreement stipulated that the appellants would plead guilty to one count of conspiracy to violate the Hobbs Act and agree not to seek employment with the Essex County Prosecutor in exchange for five years of probation for each appellant. The district court rejected the plea pro-
proposal because "it regarded the proposed punishment as insufficient." 17

The television and print media publicized the plea agreement and the district court's rejection of it. 18 According to the Third Circuit, the newspaper articles reported that the government had proposed the plea because it had a weak case against the appellants. 19 However, the district court "angrily rejected" the agreement because of the light punishment. 20

The parties selected the jury on the day that most of the articles were published. 21 When the district court asked the potential jurors about whether they had heard or read anything about the case, six indi-

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17. Id. Specifically, the judge asked the government why this apparently lenient punishment was appropriate and the government stated that "the plea would demonstrate the appellants' guilt and would remove them as law enforce-

18. Id. at 92-93. The Third Circuit stated that there was television coverage of the failed plea proposal, but that the substance of the reports was not in the record. Id. at 92. For a discussion of the content of the newspaper articles, see infra note 20.


20. Id. (quoting STAR-LEDGER (Newark), Oct. 4, 1989). The court specifically addressed the contents of three articles. The first article appeared on the front page of the October 3, 1989 edition of the Star-Ledger. It began by stating that "[a] federal judge yesterday angrily rejected efforts by U.S. authorities to quietly dispose of a much-heralded police drug corruption cases by offering guarantees of freedom in exchange for their guilty pleas." Robert Rudolph, Judge Rips 'Quiet' Plea Bargaining in Drug Graft Case Against Lawmen, STAR-LEDGER (Newark), Oct. 3, 1989, at 1, 9 [hereinafter Rudolph, Plea Bargaining]. The article also quoted the judge as saying "I am not the least bit sure that a plea without punishment isn't worse than no plea at all." Id. at 1. The article also stated that the judge recognized "that there appeared to be 'a lack of confidence' by the government in its case." Id. It continued to detail the plea proposal stating that the defendants "would have been forced to admit to a single charge of ex-


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icated that they had.22 Of the six jurors, four were excused but two were not, as "they were 'utterly vague' about what they read or heard."23 The parties ultimately selected sixteen jurors.24 On December 8, 1989, the jury convicted both appellants in a fractured verdict after a six week trial and one week of deliberation.25

Almost a year after the verdict, one of the appellants' attorneys received an affidavit from Patricia Spraguer, one of the original sixteen jurors.26 The affidavit stated that on the second day of the trial several jurors knew about the failed plea agreement and discussed it in the jury room.27 Additionally, she also stated that one of the other jurors said "[t]hey [the government] had offered to settle, but the judge said no because no time would be served."28

As a result of this affidavit, the appellants filed motions for a new trial and, in the alternative, asked for an evidentiary hearing to "develop evidence which would be the basis for [granting] a new trial."29 The

22. Id. at 92.
23. Id. at 93 (quoting unpublished district court opinion).
24. Id. The court stated that the district judge then "instructed the jury not to read or listen to anything other than what was presented in court." Id. at 92.
25. Id. at 93. Specifically, "the jury convicted Gilsenan on thirteen counts and acquitted him on eleven, and convicted Cicalese on fifteen counts and acquitted him on six." Id. The appellants were sentenced to "long terms of incarceration" and the Third Circuit Court of Appeals "affirmed their convictions by judgment orders without opinion." Id. The court emphasized that the district court instructed the jury to decide the case only on the evidence presented in court, and that "the jury is presumed to have followed" that instruction. Id. at 96.
26. Id. at 93. Spraguer, now a law student at the University of North Carolina, explained in her affidavit that during a criminal law class she "realized 'that something that happened during the trial may [have been] a significant error.'" Id. Although Spraguer was one of the original sixteen jurors, she did not participate in the verdict because she "was excused after several weeks of service during the trial." Id. It is not clear from the record why she was excused.
27. Id. at 93. Spraguer also stated that "she believed that several jurors may have seen the report on television or read about it in the newspaper." Id. Spraguer said that she did not tell the judge about what she had heard because at the time she believed that it would not affect her ability to make a decision. Id.
28. Id. Spraguer stated that a juror named "George" made the statement. Id. One of the appellants' attorneys was apparently able to verify that there had been a juror named George serving on the jury. Id.
29. Id. Cicalese's attorney, who had received the affidavit, also supplied the court with an affidavit that indicated that he did not approach Ms. Spraguer for the information, but that one of her law professors called him on October 25, 1990 with the information. After discussing the situation with Gilsenan's attorney, they asked the law professor to prepare the affidavit. Id. The appellants filed motions for new trials based on this information and supporting affidavit pursuant to Federal Rule of Criminal Procedure 33. Id. Rule 33 provides in part:

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the
district court denied both the motion for a new trial and the request for an evidentiary hearing. The district court assumed that Sprague's affidavit was accurate but found "that [the] information not only did not prejudice the defendants but did not even have the potential for prejudice." Because the district court concluded that a new trial was not warranted even viewing all of the facts in a light most favorable to appellants, it also found that an evidentiary hearing would be unnecessary.

**B. Analysis**

On appeal, the Third Circuit rejected the district court's order denying the both arguments made by appellants and motion for a new trial and request for an evidentiary hearing. The appellants argued that judgment if entered, take additional testimony and direct the entry of a new judgment.

FED. R. CRIM. P. 33.

30. *Gilsenan*, 949 F.2d at 94 (discussing unpublished district court opinion). The district court took precautions to ensure that the jury either had not been exposed to the information, or if they had, that it would not interfere with their ability to be fair. *Id.* at 93. The court questioned the jurors about their exposure to newspaper and television accounts of the case in groups, although the size of the groups and whether they were questioned in the presence of the other groups is unclear from the opinion. *Id.*

31. *Id.* The district court concluded that the information did not prejudice the appellants in light of the actual content of the articles, the fact that there were no allegations that the jury discussed the matter again, and the fractured verdict and length of the deliberations. *Id.* But see United States v. Thompson, 908 F.2d 648, 653 (10th Cir. 1990) (holding possible juror exposure to newspaper article containing information about defendant's withdrawn guilty plea was not harmless error despite trial judge's cautioning instructions and general inquiry of jury as to prejudice); United States ex rel. Greene v. New Jersey, 519 F.2d 1356, 1357 (3d Cir. 1975) (holding new trial required where trial court failed to conduct voir dire of jurors concerning newspaper article which detailed defendant's attempt to plead non vult during trial). For a comprehensive review of recent federal cases where the courts have addressed the effect of juror exposure to extra-record information, see Joseph W. Rand, *Influences on the Jury*, 79 GEO. L.J. 1004 (1991).

32. *Gilsenan*, 949 F.2d at 94. The court stated that "even assuming that at a hearing Miss Sprague's averments were tested under oath and found to be true, a finding I have already assumed, a new trial would not be warranted." *Id.* (quoting unpublished trial court order).

33. *Id.* at 98. The court reviewed the district court's denial of the appellants' motion for a new trial and request for an evidentiary hearing using an abuse of discretion standard. *Id.* at 95; see Government of Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d Cir. 1985) ("A motion for a new trial is addressed to the trial judge's discretion, and the scope of appellate review is whether such discretion is abused."); see also United States v. Boylan, 898 F.2d 230, 262 (1st Cir.) (holding that on motion for new trial due to alleged juror misconduct, court employs "abuse-of-discretion" standard), *cert. denied*, 111 S. Ct. 139 (1990). Commentators argue that vesting the trial court with so much discretion in determining whether to grant a post-verdict evidentiary hearing or new trial "may have a significant effect on the outcome of cases." James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 ST. JOHN'S L. REV. 389, 430 (1991).
the district court abused its discretion in failing to grant a new trial "because there was a reasonable possibility that the unrebutted information in Spraguer's affidavit prejudiced them by affecting the jury's verdict by enhancing the possibility of convictions." The appellants also argued that "assuming that presumptively prejudicial extraneous information concerning the plea proceeding was presented to the jury, the district court abused its discretion when it refused to conduct an evidentiary hearing to determine the precise nature, quality and extent of the jury breach."

The Third Circuit first addressed the motion for a new trial. In determining whether the appellants were "substantially prejudiced" by the information, the court employed an objective analysis of the probable effect the information would have on a "hypothetical average juror." The court concluded that the information in the newspapers concerning the plea agreement could not possibly have prejudiced the appellants. In fact, the court intimated that the information could have benefitted the appellants because the articles reflected that the government had a weak case and "wished to dispose of the case quietly." With respect to the juror's statement that the court rejected the plea because the appellants would not serve time, the court admitted that it "cannot fairly be characterized as helpful to the appellants," but concluded that it was not "substantially prejudicial."

34. Gilsenan, 949 F.2d at 94.
35. Id.
36. Id. at 95 (citing United States v. Boylan, 898 F.2d 230, 262 (1st Cir.), cert. denied, 111 S. Ct. 139 (1990)). For a list of decisions which applied this same standard, see supra note 12.
37. Gilsenan, 949 F.2d at 95.
38. Id. The court concluded that "from an objective point of view a defendant would be very happy to have a juror discover that the government was willing to admit on the eve of trial that it had a weak case." Id. However, the newspaper articles containing this information also detailed the trial judge's rejection of the agreement. Id. at 92-93. As the dissent pointed out, nothing in the record shows exactly to what information the jurors were exposed. Id. at 98 (Stapleton, J., dissenting). Therefore, the dissent concluded that the jurors may never have been exposed to the information in the newspaper articles referring to the government's case. Id. (Stapleton, J., dissenting). Instead, they may only have heard that the defendants had offered to plead guilty and that the trial judge rejected the plea because the defendants would not spend any time in jail. Id. (Stapleton, J., dissenting). "This is the kind of understanding that would stay with an average juror and color his or her view throughout even the longest of trials." Id. (Stapleton, J., dissenting). For a full discussion of the dissenting opinion, see infra notes 82-96 and accompanying text.
39. Gilsenan, 949 F.2d at 95 (emphasis added). The court contended that the statement did not infer that the appellants admitted their guilt, but simply that "they wanted to dispose of the case without incarceration." Id. The court also stressed that the district court continually cautioned the jury throughout the trial to disregard any extraneous information. Id. However, the results of a recent comprehensive study suggest that judicial cautionary instructions are an ineffective judicial remedy for prejudicial pretrial publicity. Geoffrey P. Kramer et al., Pretrial Publicity, Judicial Remedies, and Jury Bias, 14 Law & Hum. Behav. 409.

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The court also concluded that the information was not only not prejudicial to the appellants, but it also could not have affected the final verdict. In light of the length of the trial and jury deliberation, the cautioning instruction from the district court, and the fractured nature of the verdict itself, the court held that the information could not have impacted the verdict.

The Gilsenan court emphasized that under Federal Rule of Evidence 606(b), a court not consider a former juror's testimony about the effect that extra-record information had on his or her decision to convict the

40. Gilsenan, 949 F.2d at 96. In determining the effect of juror misconduct on a verdict, courts are constrained by Federal Rule of Evidence 606(b). Rule 606(b) provides:

(b) Inquiry into Validity of Verdict or Indictment. Upon 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, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter which the juror would be precluded from testifying be received for these purposes.

FED. R. EVID. 606(b) (emphasis added); see generally 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, 218-33 (1989) (providing critical analysis of courts' refusal to impeach jury verdicts); 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, 512-13 (1988) (providing comprehensive analysis of common law rules, federal rules and policies behind them with respect to allegations of juror misconduct); The Supreme Court, 1987 Term—Leading Cases, 99 HARV. L. REV. 119, 250-60 (1987) (discussing Rule 606(b) and its application to juror impeachment of verdicts in conjunction with Tanner decision); John K. Vawter, Comment, Tanner v. United States: Does Fed. R. Evid. 606(b) Foreclose Postverdict Inquiry Into Juror Intoxication?, 10 W. ST. U. CRIM. JUST. J. 347, 358-63 (1988) (discussing extraneous influence exception to Rule 606(b)). Although jurors may not testify as to how extraneous prejudicial information may have affected their deliberations or verdict, the rule does allow testimony as to whether the jury was exposed to such information and the nature of that information. FED. R. EVID. 606(b); see also Tanner v. United States, 483 U.S. 107, 121 (1987) ("Federal Rule of Evidence 606(b) is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences."). For a discussion of the Supreme Court's decision in Tanner, see infra note 80.

41. Id. at 96. Specifically, the court noted that the government and the defense had presented evidence to the jury over a twenty-four day period and the fractured verdict demonstrated that the jury "carefully delineated among the offenses and between the appellants." Id.
defendants. Therefore, the Gilsenan court concluded that normally it would not consider the affidavit of a former juror, such as the affidavit of Patricia Spraguer in the present case, in determining the effect of allegedly prejudicial pretrial publicity on a jury verdict. However, because Patricia Spraguer was excused during the trial and did not actually deliberate on the Gilsenan verdict the court determined that it could at least consider her affidavit. Although Patricia Spraguer came forward on her own initiative with an affidavit in which she explained that a juror named "George" had told the other jurors about the failed plea proposal, the Gilsenan court concluded that she only found that the information could have had a prejudicial effect on the verdict after she went to law school. Thus, the court concluded that "we know that Spraguer as a juror did not find it prejudicial."

The court next addressed the appellants’ request for an evidentiary hearing to determine the nature and extent of the jury’s exposure to the allegedly prejudicial information. The court began by recognizing that "[u]ndoubtedly there is precedent to support the conclusion that in some cases the district court will abuse its discretion in not ordering a hearing to ascertain what extra-record information the jury has received." The court then factually distinguished two Third Circuit

42. Id. at 95-96. For the text and a discussion of Federal Rule of Evidence 606(b), see infra note 40.
43. Gilsenan, 949 F.2d at 96.
44. Id. The court pointed out that "we are not barred by Rule 606(b) from considering Spraguer’s affidavit as she was excused during the trial and thus her mental state had nothing to do with the verdict." Id. However, the court refused to base its determination of the effect of the information on the verdict on Spraguer’s perception of the material because the test is whether a hypothetical average juror would find the information prejudicial, not whether a law student would. Id. The court noted that Spraguer only perceived the information as prejudicial "after she went to law school." Id. In her affidavit, Spraguer stated "that she did not report the receipt of the information to the court when asked if she knew anything that would affect her opinion because she honestly felt that what she had heard would have no such effect." Id. But see Government of Virgin Islands v. Dowling, 814 F.2d 134, 141 (3d Cir. 1987) (holding new trial required because trial judge impermissibly delegated to jury determination of its own impartiality when he asked jury if any extra-record information affected their ability to be fair; judge should have "ascertain[ed] whether the jury had been exposed to extra-record information and the nature of that information"). For the full text of Rule 606(b), see infra note 40.
45. Gilsenan, 949 F.2d at 96. Patricia Spraguer explained in her affidavit that during her criminal law class she realized that the jury’s exposure to the extra-record information could have been a serious error. Id. at 93. Apparently, Ms. Spraguer became a law student after the Gilsenan trial. Id. at 93 n.2.
46. Id. at 96.
47. Gilsenan, 949 F.2d at 95-98.
48. Id. at 96; see, e.g., United States v. Thompson, 908 F.2d 648, 653 (10th Cir. 1990) (holding trial court abused its discretion when it failed "to inquire whether any jurors were exposed to the [prejudicial newspaper] article"); United States v. Ianelli, 866 F.2d 540, 544 (2d Cir. 1989) (finding evidentiary hearing was required to determine extent and nature of ex parte communications be-
cases in which the court held that the trial court abused its discretion in failing to grant an evidentiary hearing.49

In United States ex rel. Greene v. New Jersey,50 the Third Circuit held that a new trial was required where the trial court failed to conduct a voir dire inquiry to determine the effect on the jury of various newspaper articles.51 The articles detailed the defendant’s failed attempt to plead *non vult* in exchange for life imprisonment in the middle of his murder trial.52 The *Greene* court agreed with the district court’s finding that the information was “undoubtedly prejudicial,” especially because

tween trial judge and jury); Government of Virgin Islands v. Dowling, 814 F.2d 134, 141 (3d Cir. 1987) (holding new trial was required where trial court “failed to develop a record sufficient to permit evaluation of the potential prejudice to the defendant”); United States v. Davis, 583 F.2d 190, 198 (5th Cir. 1978) (holding reversal of convictions was required where trial judge “did not make sufficient inquiry into the possibility of prejudice” resulting from possible juror exposure to prejudicial publicity); United States ex rel. Greene v. New Jersey, 519 F.2d 1356, 1357 (3d Cir. 1975) (holding new trial was required where trial judge failed to interview jurors regarding newspaper article detailing defendant’s midtrial attempt to plead *non vult*); United States v. Thomas, 463 F.2d 1061, 1065 (7th Cir. 1972) (holding new trial required where trial judge did not determine level of juror exposure to prejudicial newspaper article; court found evidentiary hearing “would be fruitless at this point” because more than two years elapsed since verdict).

To determine whether the jury can render a fair and impartial verdict after exposure to extra-record information, the judge must “evaluate the credibility of the jurors’ tacit protestations of impartiality.” Government of Virgin Islands v. Dowling, 814 F.2d 134 (3d Cir. 1987) (finding trial judge improperly “transferred to the jury the responsibility of determining its own impartiality”); see also United States v. Davis, 583 F.2d 190, 197 (5th Cir. 1978) (same). For a discussion of *Greene* and *Dowling*, see infra notes 50-68 and accompanying text.

49. Gilsenan, 949 F.2d at 96-97; see Greene, 519 F.2d 1356; Dowling, 814 F.2d 134.

50. 519 F.2d 1356 (3d Cir. 1975).

51. The court explained that “voir dire is a preliminary examination to ascertain the qualifications of potential jurors as well as any disqualifying bias or prejudice.” *Id.* at 1357 (quoting United States v. Wooton, 518 F.2d 943, 945 (3d Cir.), cert. denied, 423 U.S. 895 (1975)).

52. *Id.* at 1356-57. In *Greene*, the Third Circuit affirmed the decision of the federal district court granting the defendant a writ of habeas corpus and a new trial. *Id.* at 1357. The defendant was on trial for the murder of his girlfriend. *Id.* at 1356. His defense was temporary insanity. *Id.* In the middle of the trial in the New Jersey state court, the defendant attempted to plead *non vult* in exchange for life imprisonment. *Id.* at 1356-57. However, the trial court rejected his plea because the defendant “contended that his action was not willful, deliberate or premeditated.” *Id.* at 1356. All of this information was subsequently published in various articles in area newspapers. *Id.* The defendant immediately moved for a mistrial based on the possible juror prejudice created by the newspaper articles. *Id.* The state court denied the motion and did not interview the jurors. *Id.* The state court concluded that even if the jurors had read the prejudicial articles, it would not affect their ability to decide the case fairly. *Id.* at 1357. The Third Circuit agreed that the information in the articles was prejudicial but concluded that the trial court should have conducted a voir dire inquiry. *Id.*
the defendant was pleading temporary insanity as a defense.\textsuperscript{53} The Greene court concluded that the trial court should have immediately conducted a voir dire inquiry to determine whether any of the jurors were exposed to the prejudicial information, and if so, "whether they could nonetheless render a fair and true verdict."\textsuperscript{54} Therefore, the Greene court held that "because we cannot speculate what the jurors' responses would have been to an appropriate inquiry, we conclude that the appellee must be afforded a new trial."\textsuperscript{55}

The Third Circuit came to a similar conclusion in Government of Virgin Islands \textit{v.} Dowling.\textsuperscript{56} In Dowling, one of the jurors informed the district judge before closing arguments that the jury had been exposed to extra-record information.\textsuperscript{57} The information concerned the facts of the case and the defendant's criminal record, including a prior conviction for bank robbery, the same crime for which he was then on trial.\textsuperscript{58} One of the jurors discussed this information, which had been published in several newspaper articles, in front of the other jurors.\textsuperscript{59} The district court then asked all of the jurors, together, if they had received any extra-record information that would interfere with their ability to be fair and impartial.\textsuperscript{60} None of the jurors responded.\textsuperscript{61} The defense moved for a mistrial on the ground that the jury had been prejudiced by the extra-record information and "that the court's general inquiry was insufficient to determine the extent of the prejudice."\textsuperscript{62} The district court denied the motion and the jury convicted the defendant.\textsuperscript{63}

On appeal, in an opinion authored by Judge Stapleton, the dissent-

\textsuperscript{53} Id. at 1357.

\textsuperscript{54} Id. at 1357. The Third Circuit held that the district court did not err "in finding the disseminated material 'undoubtedly prejudicial.'" Id. The district court concluded that the articles were prejudicial in light of the widespread dissemination of the articles, the defendant's defense of temporary insanity, and the fact that he was exposing himself to life in prison with the plea offer. Id.

\textsuperscript{55} Id.

\textsuperscript{56} 814 F.2d 134 (3d Cir. 1987).

\textsuperscript{57} Id. at 140.

\textsuperscript{58} Id. at 140-41. The court noted that after the defendant in Dowling had been arrested for armed robbery, "he received considerable publicity in the local press." Id. at 135. Several newspaper articles detailing Dowling's prior criminal record, which included a conviction for bank robbery and an acquittal for a murder during a robbery, were published before the trial. Id. One article indicating the same basic information was published during the trial. Id. at 136.

\textsuperscript{59} Id. at 136. Ms. Diane Delgado, an alternate juror, sent a note before closing arguments to the district judge informing him that another juror had discussed the extra-record information in the presence of all of the jurors. Id. The prejudiced juror, Carmencita Richardson, was excused and the district court replaced her with Ms. Delgado after questioning her at a sidebar conference about her ability to remain impartial. Id. at 137.

\textsuperscript{60} Id. at 137.

\textsuperscript{61} Id.

\textsuperscript{62} Id.

\textsuperscript{63} Id. at 195, 137.
ing judge in Gilsenan, the Dowling court held that the district court’s inquiry was insufficient to determine whether any of the jurors were prejudiced by the extra-record information. The Dowling court found that “[i]nformation about prior criminal convictions or activities is the kind of information that carries great potential for prejudicing the jury.” Therefore, the trial court must decide whether the jury has been prejudiced by the information. In making this determination, it is important that the trial court know exactly “what information the jurors received and how they received it.” Therefore, the Dowling court held that the defendant was entitled to a new trial because the district judge improperly “transferred to the jury the responsibility of determining its own impartiality.”

The Gilsenan court distinguished Greene and Dowling on two grounds. First, the court concluded that the extra-record information in Gilsenan was not nearly as serious or potentially damaging as that in Greene or Dowling. The court noted that the plea agreement in Gilsenan

64. Id. at 141. The court held that “the trial judge erred when he failed to develop a record sufficient to permit evaluation of the potential prejudice to the defendant and failed to make a finding regarding the jurors’ ability to perform their assigned task which took into account whatever information they had received.” Id.

65. Id. at 138; see also United States v. Marshall, 360 U.S. 310, 312-13 (1959) (holding that new trial was required where jurors’ given knowledge of defendant’s criminal record and despite jurors’ declarations of impartiality); United States v. Gray, 468 F.2d 257, 260 (3d Cir. 1972) (same). Whether extra-record information has a “likelihood of substantial prejudice turns on all of the surrounding circumstances, the most important being the nature of the information learned by the jurors and the manner in which it was conveyed.” Dowling, 814 F.2d at 138. In certain circumstances, “the jury’s improper receipt of such information can be cured by a cautionary instruction.” Id. However, in other circumstances, “[e]xtra-record information about the case may also prejudice the jury.” Id. at 139 (citing United States ex rel. Greene v. New Jersey, 519 F.2d 1356, 1356-57 (3d Cir. 1975)); see also United States ex rel. Doggett v. Yeager, 472 F.2d 229, 239 (3d Cir. 1973) (concluding that jury’s possible knowledge of defendant’s prior guilty plea and escape attempt required new trial).

66. Dowling, 814 F.2d at 139. The Third Circuit has consistently held that “voire dire is the appropriate method for inquiry into possible prejudice or bias on the part of . . . jurors, and the procedures used must provide a reasonable assurance for the discovery of prejudice.” Id. (emphasis added) (quoting Martin v. Warden, 653 F.2d 799, 807 (3d Cir. 1981), cert. denied, 454 U.S. 1151 (1982)).

67. Id. at 139 & n.2. The court stated that “[b]y stressing the importance of determining what information members of the jury received and how they received it, we do not suggest that the failure to make such determinations is always reversible error.” Id. at 139 n.2.

68. Id. at 141. The Dowling court went on to state that “by failing to ascertain whether the jury had been exposed to extra-record information and the nature of that information, if any, the trial judge was in no position to evaluate the credibility of the juror’s tacit protestations of impartiality.” Id. The court concluded that “[i]n the context of a case in which the potential for prejudice was as great as it was here, this delegation constituted reversible error.” Id.

69. Gilsenan, 949 F.2d at 96-97.
70. Id. at 96 n.11, 97 n.12.
would have resulted in no incarceration for the appellants, unlike a life sentence in the plea in *Greene*. 

Moreover, the publicity in *Greene* indicated that the defendant had initiated the plea agreement; whereas in *Gilsenan*, the government initiated the plea, arguably creating a less incriminating impression of the defendants. 

Similarly, the court concluded that "[a]s in *Greene* the extra-record information in *Dowling* was far more serious than here as it involved, in addition to the conviction, information that the defendant had been charged with attempted armed robbery and murder but acquitted." 

Second, the *Gilsenan* court noted that in *Greene* and *Dowling* the allegations of juror exposure to the prejudicial information came to the court's attention during the trial, whereas in *Gilsenan*, the claim arose months after the trial had ended. In spite of this distinction, the court recognized that holding a hearing to determine exactly what happened does have "an inherently reasonable ring to it." However, because

71. Id. at 96 n.11.

72. Id. The *Gilsenan* court stated that "in *Greene* the thrust of the publicity was that the defendant, unlike the appellants here, initiated the plea negotiations." 

73. Id. at 97 n.12. In addition, the *Gilsenan* court stated that "[i]n *Dowling* we considered that the information had the potential for substantial prejudice because it related to the facts of the case and because the defendant had a prior conviction for bank robbery, the same charge as in the case being tried." 

74. *Gilsenan*, 949 F.2d at 97. However, the court stressed that "not every exposure to extra-record information about the case will require a new trial." 

75. *Gilsenan*, 949 F.2d at 97. The court held that "the purpose of a hearing is to determine what happened, that is to establish the historical record."
the district court had already assumed that the jurors were exposed to
the plea information and determined that it could not have prejudiced
the jury, the Third Circuit essentially deferred to the finding of the dis-
ctrict court and affirmed that a hearing was unnecessary.\footnote{76}

Additionally, the \textit{Gilsenan} court concluded that “there are compel-
ling reasons not to hold a hearing involving the recalling of discharged
jurors.”\footnote{77} In addition to maintaining the finality of jury verdicts
and preventing harassment of jurors, the court cited the interests of judicial
economy as a compelling reason to err on the side of refusing post-ver-
dict inquiries into alleged juror misconduct.\footnote{78} The court emphasized
that “it is at least fair to say that disappointed defendants serving
lengthy terms of incarceration will quite understandably use every
weapon at their disposal to set aside their convictions.”\footnote{79} Thus, the

\footnote{76. \textit{Id.} The court reasoned that a hearing was not necessary when the “allega-
tions if established would not entitle [the party] to relief.” \textit{Id.} In the present
case, the \textit{Gilsenan} court found that “a hearing was not needed to develop the
facts and the court did not abuse its discretion in not holding one.” \textit{Id.} How-
ever, in \textit{Dowling} the court “stressed the need for the trial court to determine on
the record precisely what happened.” \textit{Dowling}, 814 F.2d at 140. In fact, the
\textit{Dowling} court analogized to \textit{Greene} stating that instead of questioning the jurors
to determine exactly what information the jury had received and how they
received it, “the trial judge, jumping to the ultimate issue, ‘assume[ed] that some of
or all of [the] jurors did in fact read the article’ and made a factual determination
that the information ‘would not affect their deliberations.’ ” \textit{Id.} (quot-
ing United States \textit{ex rel. Greene v. New Jersey}, 519 F.2d 1356, 1356-57 (3d Cir. 1975)).
Therefore, in both cases the Third Circuit held that it was insufficient, if not
improper, for the trial court to “speculate what the juror’s responses would have
been to an appropriate inquiry.” \textit{Id.} (emphasis supplied by the court) (quot-
ing \textit{Greene}, 519 F.2d at 1357).

\footnote{77. \textit{Gilsenan}, 949 F.2d at 97. The \textit{Gilsenan} court quoted \textit{United States v. Ianni-
nello} to illustrate the compelling reasons for not holding post-verdict hearings
or inquiries:

\begin{quote}
We are always reluctant to ‘haul jurors in after they have reached a
verdict in order to probe for potential instances of bias, misconduct or
extraneous influences.’ As we have said before, post-verdict inquiries
may lead to evil consequences: subjecting juries to harassment, inhib-
it the juryroom deliberation, burdening courts with meritless applica-
tions, increasing temptation for jury tampering and creating
uncertainty in jury verdicts.
\end{quote}
\textit{Id.} at 97 (quoting \textit{United States v. Ianniello}, 866 F.2d 540, 543 (2d Cir. 1989)).
Additionaly, under Federal Rule of Evidence 606(b), the court pointed out that
it could not grant a hearing to ask the jury what effect the information had on
the verdict. \textit{Gilsenan}, 949 F.2d at 97.

\footnote{78. \textit{Id.} at 97-98. According to the \textit{Gilsenan} court, this rationale appears to
apply even in cases like \textit{Gilsenan}, where the former juror comes forward of his or
her own accord without any contact from the defendants, perhaps suggesting
that the interests in judicial economy outweigh the defendant’s right to a fair
and impartial jury. \textit{But see Dowling}, 814 F.2d at 138 (holding that “[a] criminal
defendant is entitled to a determination of his or her guilt by an unbiased jury
based solely upon the evidence properly admitted against him or her in court”).

\footnote{79. \textit{Gilsenan}, 949 F.2d at 98 (quoting United States \textit{v. DiNorscio}, 661 F.
271 (3d Cir. 1988), \textit{cert. denied}, 492 U.S. 906 (1989)). The \textit{Gilsenan} court empha-
court concluded that it is a "different thing to conduct a voir dire during an ongoing proceeding at which the jury is part of the adjudicative process than to recall a jury months or years later for that purpose."80 For sized its concern for the safety of jurors and stated that "[t]hus, we now in some circumstances approve the use of an anonymous jury, a practice that at one time might have been unthinkable." Id. The court stated that "in Scarfo we acknowledged that "[j]uror's fears of retaliation from criminal defendants are not hypothetical; such apprehension has been documented." Id. (quoting United States v. Scarfo, 850 F.2d 1015, 1023 (3d Cir.), cert. denied, 488 U.S. 910 (1988)). The Gilsenan court also concluded that "[w]e do not doubt that desperate criminals willing to commit violent crimes in the first place would think nothing of attempting to intimidate jurors in an effort to overturn verdicts." Id. at 98.

The Gilsenan court relied on the reasoning of the DiNorscio court to emphasize the dangers of recalling discharged jurors for post-verdict inquiries into alleged juror misconduct. Id. However, it is important to note the sharp differences between the post-verdict allegations of juror misconduct in DiNorscio and Gilsenan. In DiNorscio, the allegations of juror misconduct were entirely suspect. United States v. DiNorscio, 661 F. Supp. 1041, 1043 (D.N.J. 1987), aff'd sub nom. United States v. Di Pasquale, 864 F.2d 271 (3d Cir. 1988), cert. denied, 492 U.S. 906 (1989). The claim surfaced not because a juror came before the court without any contact from the defendant, but after an investigation was conducted by a relative of the defendant. Id. at 1043. This "investigation" resulted in a third party coming forward claiming that he had spoken to one of the jurors about the defendant during the trial. Id. at 1043-44. The court held that even if the alleged conversations occurred, the content of the conversations did not relate to the guilt or innocence of the defendant. Id. at 1047 (noting that statements were related to various possessions and properties of defendant, i.e., house, boat and cars). Moreover, the court concluded that these same matters were introduced in court through the testimony of government witnesses. Id. Therefore, the differences between the allegations in Gilsenan are clearly not comparable on any level to those in DiNorscio. See Gilsenan, 949 F.2d at 92-94.

For a discussion of the alleged prejudicial pretrial publicity and discussion in the juryroom in Gilsenan, see supra notes 18-32 and accompanying text.

80. Gilsenan, 949 F.2d at 98. The court then cited the heavily criticized Supreme Court decision, Tanner v. United States, as support for its reluctance to entertain post-verdict juror misconduct claims:

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.

Id. at 98 (quoting Tanner v. United States, 483 U.S. 107, 120 (1987)). The petitioners in Tanner were convicted by a jury of "conspiring to defraud the United States in violation of 18 U.S.C. § 371, and of committing mail fraud in violation of 18 U.S.C. § 1341." Id. at 109-10. On the day before the sentencing hearing, petitioners filed a motion "seeking continuance of the sentencing date, permission to interview jurors, an evidentiary hearing, and a new trial." Id. at 113. The petitioners had discovered from one of the jurors "that several of the other jurors had consumed alcohol during the lunch breaks at various times throughout the trial, causing them to sleep through the afternoons." Id. Later, the petitioners also discovered that several of the jurors had used drugs during the trial. Id. at 115-16. The district court denied the motion for a new trial and held that an evidentiary hearing in which "jurors would be witnesses is not required or appropriate." Id. at 115. The Eleventh Circuit affirmed the district court opin-
these reasons, the Third Circuit upheld the district court order denying
the defendants’ motion for a new trial and, alternatively, an evidentiary
hearing. 81

C. Dissent

In his dissenting opinion, Judge Stapleton agreed with the major-
ity’s view of the facts and “its conclusion that exposure to the full text of
the newspaper articles would be very unlikely to prejudice the defend-

ion. Id. at 116 (citing Tanner v. United States, 772 F.2d 765 (11th Cir. 1985)).
Before the Supreme Court, the “petitioners argue[d] that whether or not au-
thorized by Rule 606(b), an evidentiary hearing including juror testimony on
drug and alcohol use is compelled by their Sixth Amendment right to a trial by a
competent jury.” Id. at 116-17.

In its analysis, the Supreme Court traced the history of the rules governing
impeachment of jury verdicts at common law. Id. at 117-21. The Court began
with the original “near-universal and firmly established common-law rule in the
United States flatly prohibit[ing] the admission of juror testimony to impeach a
jury verdict.” Id. at 117. The Court also noted the only exception to the rule:
“Exceptions to the common-law rule were recognized only in situations in which
an ‘extraneous influence’ . . . was alleged to have affected the jury.” Id. (citing
Mattox v. United States, 146 U.S. 140, 149 (1892)). For example, in Mattox v.
United States, 146 U.S. 140, 149 (1892), the Court held that juror testimony
regarding exposure to prejudicial extra-record information was admissible to
impeach a jury verdict as an “extraneous influence.” The Tanner Court also
cited to other cases in which the Court has allowed juror testimony on various
extraneous influences. Tanner, 483 U.S. at 117; see, e.g., Smith v. Phillips, 455
U.S. 209, 212 (1982) (allowing testimony concerning juror application for em-
ployment at District Attorney’s Office during trial); Remmer v. United States,
347 U.S. 227, 228-30 (1953) (requiring hearing to determine whether third
party communications with juror “were harmful or harmless”).

The Tanner Court went on to distinguish between external and internal in-
fuences on the jury. Tanner, 483 U.S. at 117-20. The Court noted that an evi-
dentiary hearing may be required in the case of an external influence but not in
the case of an internal influence. Id. In addition, the Court emphasized that
federal courts have “treated allegations of the physical or mental incompetence
of a juror as ‘internal’ rather than ‘external’ matters.” Id. at 118. The Tanner
Court then reviewed the “[s]ubstantial policy considerations support[ing] the
common-law rule against the admission of jury testimony to impeach a verdict.”
Id. After thoroughly analyzing Rule 606(b) and its legislative history, the Tanner
Court concluded “that juror intoxication is not an ‘outside influence’ about
which jurors may testify to impeach their verdict.” Id. at 125.

In addition, the Tanner Court concluded that the Sixth Amendment does
not require a court “to hold an additional evidentiary hearing including one
particular kind of evidence inadmissible under the Federal Rules.” Id. at 127.
The Court held that the interests in an impartial and “unimpaired jury . . . are
protected by several aspects of the trial process.” Id. Therefore, the Court
stated that

[i]n light of these other sources of protection of petitioners’ right to a
competent jury, we conclude that the District Court did not err in de-
ciding, based on the inadmissibility of juror testimony and the clear
insufficiency of the nonjuror evidence offered by petitioners, that an
additional postverdict evidentiary hearing was unnecessary.

Id.

81. Gilsenan, 949 F.2d at 98.
ants in the eyes of a juror." However, the dissent argued that the court's analysis was problematic because it ignored the possibility that the jurors may have only been exposed to the "news according to [fellow juror] George" and not the full text of the newspaper articles.

Judge Stapleton correctly pointed out that if the jurors had read the full text of the newspaper articles, the prejudicial effect of the information regarding the district court's rejection of the plea proposal may have been tempered by the information in the article about the weakness of the government's case and the government's desire to enter into the plea agreement. In fact, nothing in the district court record supports the view that the jurors who heard this "news according to George" had actually read the newspaper articles themselves. The dissent contended then that these jurors would likely assume that "the defendants offered to plead guilty as part of a deal with the government but that the judge refused to go along because the stipulated punishment was too light." Therefore, the dissent concluded that this type of perception "would stay with an average juror and color his or her view throughout even the longest of trials."
The dissent stated that if "further development of the record is either precluded or imprudent, I would hold, in accordance with United States ex rel. Greene v. New Jersey, . . . that the current record requires a new trial." However, Judge Stapleton argued that the proper approach would be to remand for an evidentiary hearing to determine the precise nature and extent of the information received by the jury. He explained that it is possible that the jurors had an accurate understanding of what transpired at the plea hearing. If that were true then the dissent would agree that the conviction should not be disturbed.

Finally, the dissent noted that a post-verdict evidentiary hearing would not violate Federal Rule of Evidence 606(b) as the majority implied. As long as the court did not inquire into "the effect of anything upon . . . a juror's mind or emotions . . . or concerning his mental processes" with respect to reaching the verdict, a post-verdict evidentiary hearing to determine exactly what extra-record information the jury was exposed to "is expressly authorized" by Rule 606(b).

According to the extraneous information exception in Rule 606(b) and the United States Supreme Court in Tanner v. United States, the

88. Id. (Stapleton, J., dissenting).
89. Id. at 99 (Stapleton, J., dissenting). The dissent stated that "the sensible and entirely proper thing to do in these circumstances is to hold an evidentiary hearing and determine precisely what, if any, extraneous prejudicial information was brought to the attention of the members of the jury." Id. (Stapleton, J., dissenting).
90. Id. (Stapleton, J., dissenting).
91. Id. (Stapleton, J., dissenting).
92. Id. (Stapleton, J., dissenting). The majority implied that Federal Rule of Evidence 606(b) would preclude the type of post-verdict inquiry requested by the defendants when it stated:

Ordinarily it would not be possible to obtain such evidence following the return of the verdict because under Fed. R. Evid. 606(b) 'a juror may not testify . . . 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 concerning the juror's mental processes in connection therewith . . . .' Id. at 96 (quoting Fed. R. Evid. 606(b)). Therefore, the court concluded that because Ms. Spraguer did not participate in the verdict, her testimony did not violate 606(b). Id. In discussing the denial of the request for an evidentiary hearing, the Gilsenan majority also implied that a post-verdict inquiry would violate 606(b) when it stated that "[o]f course, under Fed. R. Evid. 606(b) a hearing could not be held for the court to ask the jury the effect of the information on its verdict." Id. at 97.

93. Id. at 99 (Stapleton, J., dissenting) (quoting Fed. R. Evid. 606(b)).
94. 483 U.S. 107 (1987). The Court in Tanner held that juror intoxication did not constitute an extraneous influence, and therefore juror testimony regarding intoxication was inadmissible to impeach the jury verdict. Id. at 125. However, the Court did recognize that its prior "holdings requiring an evidentiary hearing where extrinsic influence or relationships have tainted the deliberations do not detract from, but rather harmonize with, the weighty government interest in insulating the jury's deliberative process." Id. at 120. For a full discussion of Tanner, see supra note 80.
dissent noted that jurors may testify at a post-verdict hearing "concerning any 'extraneous prejudicial information . . . improperly brought to the jury's attention.'" 95 For these reasons, Judge Stapleton would have remanded the case for an evidentiary hearing to ascertain the exact nature and extent of the extra-record information brought before the jury. 96

III. Conclusion

In United States v. Gilsenan, the Third Circuit held that the district court did not abuse its discretion in denying the appellants' motion for a new trial and request for an evidentiary hearing based on juror exposure to allegedly prejudicial pretrial publicity. 97 The court concluded that even if the jury were exposed to the extra-record information regarding the failed plea agreement it was neither substantially prejudicial to the appellants nor could it have impacted the verdict. 98 The court recognized that Third Circuit precedent exists to support the contention that the district court can abuse its discretion by failing to hold an evidentiary hearing in this type of situation. 99 Nonetheless, the court concluded that requiring a post-verdict hearing in this case would be unnecessary and unwise. 100 Specifically, the court emphasized its reluctance to provide defendants with post-verdict relief from juror misconduct if it involves interviewing discharged jurors. 101

The Third Circuit's decision in Gilsenan is representative of a current trend in American jurisprudence severely limiting the impeachment of jury verdicts. 102 Commentators argue that the restriction on the im-

95. Gilsenan, 949 F.2d at 99 (Stapleton, J., dissenting) (quoting Fed. R. Evid. 606(b)); see also Tanner, 483 U.S. 107. For a discussion of Rule 606(b), see supra note 40.

96. Gilsenan, 949 F.2d at 99 (Stapleton, J., dissenting).

97. Id. at 94-98. For a full discussion of the majority's analysis, see supra notes 33-81 and accompanying text. For a discussion of the facts of the case, see supra notes 13-32 and accompanying text. For a discussion of the dissent's reasoning, see supra notes 82-96 and accompanying text.

98. Gilsenan, 949 F.2d at 95-96 & n.7. For a discussion of the Third Circuit's standard for reversal in the area of juror misconduct, see supra note 12.

99. Gilsenan, 949 F.2d at 96-97. For a discussion of Third Circuit precedent in this area, see supra notes 50-68 and accompanying text. For a discussion of the Gilsenan court's reasons for not requiring an evidentiary hearing, see supra notes 47-81 and accompanying text.

100. Gilsenan, 949 F.2d at 97.

101. Id. at 97-98. In its analysis, the court relied on the policies against recalling discharged jurors such as undermining the finality of verdicts, encouraging jury tampering and harassment, and burdening the court system with meritless claims. Id. For an in-depth analysis of all of the competing policy interests involved in impeaching jury verdicts, see Diehm, supra note 33, at 394-404. For a discussion of the court's reasons for holding that an evidentiary hearing was unnecessary, see supra notes 47-81 and accompanying text.

102. See Diehm, supra note 33, at 418-39 (analyzing how recent trend in law is moving toward restricting impeachment of jury verdicts); see also Tanner v.
The impeachment of jury verdicts represents a tension between two opposing viewpoints. The first view, embraced by academia, supports a liberal approach to post-verdict jury inquiries and impeachment of jury verdicts that is rooted in the Sixth Amendment to the United States Constitution. This approach places emphasis on "whether the verdict in a particular case was rendered by a fair and impartial jury, based solely on the evidence." The opposing view, embraced by most courts, supports severe limitations on post-verdict inquiries and impeachment of jury verdicts. This approach places emphasis on safeguarding "individual jurors and the jury system as a whole." Advocates of this view rely on the parade of horribles inherent in recalling discharged jurors and "main-
tain that impeachment of jury verdicts may lead to harassment and threats against jurors, thwart free discussion in the jury room, and erode public confidence in the judgments of the courts.”

In Gilsenan, the Third Circuit adopted the second view. The adoption of policies against impeaching jury verdicts along with the procedural requirements in juror misconduct cases as applied in Gilsenan are likely to restrict post-verdict inquiries and impeachment of jury verdicts in the Third Circuit. Specifically, procedural requirements such as giving broad discretion to the trial court, allocating the burden of demonstrating substantial prejudice on the moving party and the use of harmless error analysis make it virtually impossible for a defendant to overturn the denial of a request for a post-verdict evidentiary hearing or a motion for a new trial.

Although the Third Circuit has restricted the availability of post-verdict relief for defendants with allegations of juror misconduct, the court has left the door slightly ajar for certain post-verdict claims. To be successful, the claim would have to be made, at the latest, almost immediately after the trial has ended and involve a case where the prejudice to the defendant is egregious enough to overcome harmless error. However, in most cases, where the allegations of misconduct are borderline at best, a defendant’s best hope for post-verdict relief will lie in the trial court itself. Some district courts in the Third Circuit have been willing

107. Diehm, supra note 33, at 438. Professor Diehm concludes that “[t]hese developments have created a strong movement in this body of law, reflecting the courts’ increased focus upon the more universal concerns relating to the the [sic] preservation of the jury system, rather than the fairness and impartiality of the jury in a particular case.” Id. at 438-39. However, Professor Diehm does leave open the possibility for a shift in the course of the law. Id. at 439. He maintains that “this change will only come about if the courts and legislatures are convinced that individual jurors and the jury system as a whole are adequately protected.” Id. Other commentators argue that although “[s]ome monitoring is necessary to preserve the public’s confidence in the fairness of the system; if the public is aware that third parties or prejudicial news accounts may have influenced jurors, it will question their verdict.” The Supreme Court, 1987 Term—Leading Cases, 99 Harv. L. Rev. 119, 260 (1987).


109. See id. at 94-98; Diehm, supra note 33, at 427-34. In his article, Professor Diehm states that “[t]he application of procedural rules, such as requiring a threshold showing, allocation of burden of proof, vesting discretion in the trial court, and authorization of a finding of harmless error have led to restrictions on the impeachment of jury verdicts.” Id. at 427. He points out that “[t]hese rules will profoundly affect the outcome of a case and may even be determinative, particularly when they are applied together.” Id.

110. See, e.g., Gilsenan, 949 F.2d at 98 n.3, 94-98. In Gilsenan, the appellants were required to make a threshold showing of prejudice and overcome the burden of proving substantial prejudice, the district court had broad discretion in its determination and the prejudice to the appellants was subject to harmless error. Id. For a brief discussion of the standard of review in Gilsenan, see supra note 33. For a discussion of the level of prejudice the moving party is required to demonstrate, see supra note 12.
to grant post-verdict inquiries of discharged jurors after allegations of misconduct.111

In the case of juror exposure to prejudicial pretrial publicity, the best opportunity for the defendant to be successful on appeal would be in a case factually similar to Greene or Dowling.112 The allegations of misconduct would have to come to the trial court’s attention before the end of the trial, and the nature of the publicity would have to be extremely one-sided. Only then does it seem the Third Circuit would find that the trial court abused its discretion in failing to hold an evidentiary hearing or grant a new trial.

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111. See United States v. Small, 891 F.2d 53, 55-57 (3d Cir. 1989) (holding that district court’s post-verdict inquiry of jurors to determine whether jury was exposed to extra-record information was sufficient); United States v. Boscia, 573 F.2d 827, 830-31 (3d Cir.) (holding that district court’s post-verdict interviews of jurors were sufficient to make determination that presumption of prejudice was successfully rebutted), cert. denied, 436 U.S. 911 (1978). These cases indicate that at least some district courts in the Third Circuit have been willing to conduct post-verdict inquiries of jurors as a result of allegations of juror misconduct. Therefore, a defendant could attempt to argue that his or her case is analogous to those cases in which district courts have held post-verdict inquiries.

112. For a discussion of Greene and Dowling, see supra notes 55-68 and accompanying text.