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Casenotes: New Trials — Juror Misconduct — Evidence — Where Motion for New Trial Is Based on Jury's Exposure to Extraneous Matter during Deliberations, Movant Must Show Probable Prejudice — Jurors' Affidavits Are Incompetent Evidence. Wernsing v. General Motors Corp., 298 Md. 406, 470 A.2d 802 (1984)

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NEW TRIALS — JUROR MISCONDUCT — EVIDENCE — WHERE MOTION FOR NEW TRIAL IS BASED ON JURY'S EXPOSURE TO EXTRANEOUS MATTER DURING DELIBERATIONS, MOVANT MUST SHOW PROBABLE PREJUDICE — JURORS' AFFIDAVITS ARE INCOMPETENT EVIDENCE. *Wernsing v. General Motors Corp.*, 298 Md. 406, 470 A.2d 802 (1984).

In *Wernsing v. General Motors Corp.*,[1] a personal injury action, a major issue at trial was whether the defendants proximately caused the plaintiffs' injuries.[2] Following a verdict for the plaintiffs, the defendants learned that the jury had consulted a dictionary during its deliberations and had consequently arrived at an incorrect legal definition of the term "proximate cause."[3] The defendants moved for a new trial on the grounds of juror misconduct.[4] In support of their motion, the defendants offered three categories of evidence: jurors' affidavits describing their exposure to the dictionary; testimony by the court bailiff concerning his role in supplying the jury with a dictionary; and longhand notes written during the jury's deliberations, including an essentially verbatim copy of a definition contained in the dictionary.[5] The trial court denied the new trial motion,[6] but the court of special appeals reversed, basing its decision

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1. 298 Md. 406, 470 A.2d 802 (1984).
2. The defendants were General Motors Corp., Gladding Chevrolet, Inc., and Howard L. Seidel. Ms. Wernsing and her children brought suit when the car driven by Mr. Seidel struck Ms. Wernsing in a parking lot. General Motors and Gladding Chevrolet contended that Seidel's negligent driving caused the accident. Seidel, on the other hand, claimed the accident was caused by a defective cruise control mechanism. Both issues were submitted to the jury on special interrogatories. *Wernsing*, 298 Md. at 408-09, 470 A.2d at 803-04.
3. *Id.* at 408, 414, 470 A.2d at 803, 806.
4. *Id.* at 408-10, 470 A.2d at 803-04. At the outset of the trial, the judge specifically instructed the jury to refrain from consulting dictionaries, lawbooks, or records not in evidence. Brief for Appellee Seidel at 9, Wernsing v. General Motors Corp., 298 Md. 406, 470 A.2d 802 (1984).
5. *Wernsing*, 298 Md. at 410-11, 414, 470 A.2d at 804, 806. In the affidavits, four jurors swore that the dictionary definition caused them to respond affirmatively to the judge's special interrogatory inquiring whether the cruise control mechanism was defective and therefore proximately caused the accident. *Id.* at 411, 470 A.2d at 804. The defendants also offered the affidavit of a bystander who learned of the dictionary incident from a juror. *Id.* at 411-12, 470 A.2d at 804.

   The longhand notes established that during its deliberations, the jury requested further clarification of the term "proximate cause." In response, the judge instructed them that "proximate cause is legal cause." *Id.* at 413, 470 A.2d at 806. The trial judge considered supplying the jury with a dictionary definition of "proximately," but deferred to defendant Seidel's argument that such a definition might mislead the jury. Brief for Appellee Seidel at 9, Wernsing v. General Motors Corp., 298 Md. 406, 470 A.2d 802 (1984). Without the knowledge of court or counsel, the jury foreman then obtained a dictionary from the bailiff and, on the reverse side of the note to and from the judge, wrote: "page 482 Webster's Seventh New Collegiate dictionary/ *Legal cause*/ having a formal status derived from law often without basis in actual fact." Wernsing v. General Motors Corp., 298 Md. 406, 414, 470 A.2d 802, 806 (1984).
6. *Wernsing*, 298 Md. at 414, 470 A.2d at 806. The trial judge refused to consider the jurors' affidavits and the other evidence. *Id.*

on all of the proffered evidence.[7] Although the court of appeals determined that Maryland law required the exclusion of the jurors' affidavits,[8] the court held that the defendants' remaining evidence established a probability of prejudice sufficiently high to warrant remanding the case for a new trial.[9]

The rule that a juror will not be heard to impeach his own verdict originated with Lord Mansfield's opinion in *Vaise v. Delaval*.[10] Prior to *Vaise*, "the unquestioned practice had been to receive jurors' testimony or affidavits without scruple."[11] Currently, most American jurisdictions follow a general rule prohibiting the admission of jurors' post-verdict affidavits, but countenance exceptions.[12] For example, Federal Rule of Evidence 606(b),[13] adopted in some form by fifteen states,[14] permits jurors to describe exposure to extraneous prejudicial information or improper outside influences, but not the effect of such information or influences upon the jurors' votes. Other states employ a similar rule adopted by judicial fiat or legislation not expressly patterned after Federal Rule 606(b).[15] Other recognized exceptions to the nonimpeachment rule include an exception that permits juror affidavits sustaining the verdict,[16] and the *aliunde* rule which allows impeachment by jurors if the evidence of juror misconduct originates from a competent source outside of the jury.[17]

A small minority of states has rejected the general nonimpeachment rule in favor of a rule allowing impeachment, the "Iowa rule,"[18] under

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7. General Motors Corp. v. Wernsing, 54 Md. App. 19, 23-24, 30, 456 A.2d 939, 942, 945 (1983), *aff'd on other grounds*, 298 Md. 406, 470 A.2d 802 (1984).
8. 298 Md. at 411-12, 470 A.2d at 804-05. The court of appeals also excluded the affidavit of the bystander as merely attempting to prove the truth of the contents of statements made by the foreman in a post-verdict conversation between certain jurors. *Id.* at 412, 470 A.2d at 805.
9. *Id.* at 420, 470 A.2d at 809.
10. 99 Eng. Rep. 944, 944 (K.B. 1785). In *Vaise*, the court excluded jurors' affidavits establishing that they reached the verdict by flipping a coin. *Id.*
11. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2352, at 696 (J. McNaughton ed. 1961).
12. *Id.* at § 2354. For a state-by-state listing of the various rules and exceptions, see *id.* at note 2. For a summary of Supreme Court decisions dealing with the nonimpeachment rule, see Comment, *Impeachment of Jury Verdicts in Arizona*, 21 ARIZ. L. REV. 821, 824-27 (1979).
13. FED. R. EVID. 606(b).
14. J. WIGMORE, *supra* note 11, § 2354 n.2 (Supp. 1983).
15. *E.g.*, Nichols v. Seaboard Coastline Ry., 341 So. 2d 671, 673 (Ala. 1977); Khaalis v. United States, 408 A.2d 313, 359 (D.C. 1979), *cert. denied*, 444 U.S. 1092 (1980); People v. Brown, 48 N.Y.2d 388, 393, 399 N.E.2d 51, 53, 423 N.Y.S.2d 461, 463 (1979).
16. J. WIGMORE, *supra* note 11, § 2354 nn.9-10.
17. Wicker v. Cleveland, 150 Ohio St. 434, 436, 83 N.E.2d 56, 57 (1948), *codified in* OHIO R. EVID. 606(B). The Court of Appeals of Maryland rejected the *aliunde* rule in Oxtoby v. McGowan, 294 Md. 83, 101, 447 A.2d 860, 870 (1982).
18. Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866); *accord* State v. Green, 254 Iowa 1379, 121 N.W.2d 89 (1963); Gardner v. Malone, 60 Wash. 2d 836, 376 P.2d 651 (1962); FLA. STAT. ANN. § 90.607(2)(b) (West 1979).

which juror affidavits are competent to prove "any matter . . . which does not essentially inhere in the verdict itself," or those matters not "resting alone in the juror's breast."[19]

Maryland courts have long adhered to the principle that on a motion for new trial, a juror may not be heard to impeach his own verdict, regardless of whether the conduct objected to consists of misbehavior or mistake.[20] The first reported application of the rule by a Maryland court occurred in 1831,[21] and in 1864 the Court of Appeals of Maryland unequivocally adopted the rule.[22] Over the years, Maryland courts have invoked the nonimpeachment rule to exclude juror affidavits[23] pertaining to various forms of misconduct or mistake.[24]

Courts in Maryland have advanced a number of policy reasons in support of the absolute rule prohibiting a juror from impeaching his own verdict: the upholding of verdict finality,[25] the prevention of perjury by jurors,[26] the prevention of tampering with [27] or harrassment of jurors,[28] the preservation of public confidence in the judicial process,[29] and the

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19. Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195, 210 (1866).
20. *E.g.*, Oxtoby v. McGowan, 294 Md. 83, 101, 447 A.2d 860, 870 (1982); Williams v. State, 204 Md. 55, 67, 102 A.2d 714, 720 (1954); Bosley v. Chesapeake Ins. Co., 3 G. & J. 450, note at 473-74 (1831).

    The rule applies with equal force to jurors' post-verdict affidavits and to jurors' post-verdict testimony. Christ v. Wempe, 219 Md. 627, 641, 150 A.2d 918, 925 (1959). Similarly, the rule operates without regard to whether an action is civil or criminal. Williams v. State, 204 Md. 55, 72, 102 A.2d 714, 722 (1954). According to Poe, where a new trial is sought because one or more jurors lacked the requisite qualifications, the juror(s) may testify, but only upon that issue. 3J. POE, POE'S PLEADING AND PRACTICE § 352 (H. Sachs, Jr. 6th ed. 1975).
21. *See* Bosley v. Chesapeake Ins. Co., 3 G. & J. 450, note at 473-74 (1831). The Maryland cases do not refer to the principle as "Lord Mansfield's rule."
22. Browne v. Browne, 22 Md. 103, 113 (1864) ("To allow a verdict of a jury solemnly rendered, to be afterwards impeached . . . would, we think, be setting a dangerous precedent, tending in most cases to the defeat of justice."); *see also* Ford v. State, 12 Md. 514, 546 (1859) (jurors may not reconsider or alter verdict after it has been recorded).
23. The rule does not require exclusion of affidavits of bystanders having first-hand knowledge of the misconduct. Christ v. Wempe, 219 Md. 627, 642, 150 A.2d 918, 926 (1959); *cf.* Zeller v. Mayson, 168 Md. 663, 673, 179 A. 179, 184 (1935) (non-juror's affidavit attesting to juror misconduct excluded as pure hearsay).
24. *E.g.*, Oxtoby v. McGowan, 294 Md. 83, 99, 447 A.2d 860, 869-70 (1982) (coercion and intimidation of one juror by others; unauthorized medical treatise in jury room); Williams v. State, 204 Md. 55, 72, 102 A.2d 714, 722 (1954) (jury motivated by racial prejudice); Kelly v. Huber Baking Co., 145 Md. 321, 328-29, 125 A. 782, 785 (1924) (outsider tampered with jurors); Browne v. Browne, 22 Md. 103, 113 (1864) (jurors assented to verdict solely in order that ailing juror might go home); Dixon v. State, 27 Md. App. 443, 449, 340 A.2d 396, 400 (1975) (improper consideration of defendant's prior conviction for similar offense), *cert. denied*, 276 Md. 741 (1975).
25. Bosley v. Chesapeake Ins. Co., 3 G. & J. 450, note at 473-74 (1831).
26. Brinsfield v. Howeth, 110 Md. 520, 530, 73 A. 289, 294 (1909).
27. *Id.*
28. Williams v. State, 204 Md. 55, 67, 102 A.2d 714, 720 (1954).
29. *Id.*

promotion of frankness and freedom of discussion among jurors.[30] Despite the existence of dicta intimating that the nonimpeachment rule might be relaxed in appropriate circumstances,[31] Maryland courts have rigidly applied the rule.[32] At present, a mere handful of other states share Maryland's absolute ban on verdict impeachment by jurors.[33]

Prior to *Wernsing*, the Court of Appeals of Maryland had never addressed the problem of a jury's exposure to unauthorized dictionary definitions.[34] Courts in several other states, however, have dealt with the issue.[35] In the overwhelming majority of such cases, courts have granted

30. McDonald v. Pless, 238 U.S. 264, 267 (1915), *quoted in* Williams v. State, 204 Md. 55, 70, 102 A.2d 714, 721 (1954). For a discussion of the problems raised by jurors' revelations of their deliberations in the context of post-trial publicity, see Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886 (1983).

31. *E.g.*, Williams v. State, 204 Md. 55, 71, 102 A.2d 714, 722 (1954) (perhaps admissible in appropriate independent criminal proceeding); Dixon v. State, 27 Md. App. 443, 448, 340 A.2d 396, 400 (1975) (same).

32. *See supra* note 24 and accompanying text.

33. *E.g.*, Eichel v. Payeur, 106 N.H. 484, 486, 214 A.2d 116, 118 (1965); Barsh v. Chrysler Corp., 262 S.C. 129, 203 S.E.2d 107 (1974). In New Hampshire, although jurors may never impeach their verdict, they may sustain (i.e., defend) it. Palmer v. State, 65 N.H. 221, 222, 19 A. 1003, 1003 (1890).

34. The issue of improper exposure to definitions contained in D.E. AARONSON, MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY 18-28 (1978) has arisen in the context of a motion for mistrial in a criminal case. Hebb v. State, 44 Md. App. 678, 684, 410 A.2d 622, 625 (1980) (conviction reversed: as a "treasurehouse of confusion and misinformation," the book created a likelihood of prejudice to the defendant).

In Maryland, as in most states, statutes prescribe what jurors may take with them into the jury room. The statutes in effect during the *Wernsing* trial, Md. R.P. 558 (civil) and 758 (criminal), provided that jurors were entitled to their personal notes, but that the court had to approve all other items. The pertinent revised rules of Maryland procedure, 2-521 and 4-326, contain the same provisions.

A few general principles have evolved from Maryland cases dealing with other forms of juror misconduct. Once the Maryland litigant seeking a new trial on the basis of juror misconduct offers evidence originating from a source other than jurors, the issues become: "whether the alleged misconduct is sufficiently made out; and . . . whether it affected the verdict." J. POE, *supra* note 20, at 696. In motions both for new trial and for mistrial, the movant bears the burden of showing the requisite degree of injury — there is no presumption of prejudice. *See, e.g.*, Presley v. State, 224 Md. 550, 555, 168 A.2d 510, 512 (1961) (in motion for mistrial based on prejudicial publicity, movant must show juror read and was influenced by prejudicial matter), *cert. denied*, 368 U.S. 957 (1962); Christ v. Wempe, 219 Md. 627, 642, 150 A.2d 918, 926 (1959) (not every act of misconduct requires a new trial). Misconduct warrants a new trial if it "justif[ies] the belief that the fairness of the trial is impaired and injury resulted." *Christ*, 219 Md. at 643, 150 A.2d at 926 (citing Rent-A-Car Co. v. Globe & Rutgers Fire Ins. Co., 163 Md. 401, 409, 163 A. 702, 705 (1933)). The trial court's ruling on either motion will be disturbed only where the court has clearly abused its discretion. State v. Devers, 260 Md. 360, 376, 272 A.2d 794, 802 (1971); Martin v. Rossignol, 226 Md. 363, 366-67, 174 A.2d 149, 151 (1961); *Rent-A-Car*, 163 Md. at 409, 163 A. at 705. Motions for mistrial differ from motions for new trial in a crucial respect: jurors may supply testimony or affidavits regarding their misconduct in the former context but not in the latter. *See, e.g.*, Safeway Trails, Inc. v. Smith, 222 Md. 206, 159 A.2d 823 (1960); *Rent-A-Car*, 163 Md. 401, 163 A. 702 (1933); J. POE, *supra* note 20, at § 348.

35. *See generally* Annot., 54 A.L.R.2D 738 (1957 & Supp. 1978).

new trials only upon a satisfactory showing that the dictionary's presence had or could have had a prejudicial effect.[36] The reported decisions diverge on the type of proof necessary to show prejudice or the lack of prejudice, and on the requisite degree of prejudice.[37]

In a minority of states, proof of the mere presence of a dictionary in the jury room creates a presumption of prejudice.[38] The majority position is that the movant must produce sufficient evidence to create an inference of prejudice for the court to award a new trial.[39] In Kansas, the movant must show that the misconduct resulted in essentially prejudice in fact.[40] Several courts, perhaps because the nonimpeachment rule prevents a more certain proof of prejudice in fact, speak in terms of probability. Rather than prejudice in fact, the movant must show, for instance, that "injury probably resulted" to him;[41] "the probable effect upon a hypothetical average jury would be prejudicial";[42] "the extraneous matter could have a tendency to influence the jury in . . . a manner inconsistent with the legal proofs and the court's charge";[43] or that the extraneous matter "relates to the issues of the case and there is a reasonable possibility of prejudice."[44]

Courts applying these probable prejudice standards have resorted to numerous factors, singly and in combination, to decide whether the requisite degree of prejudice (probable prejudice) to justify a new trial can be inferred from competent evidence proving that the jurors used a dictionary. In addition, courts in minority states use the same factors to determine whether the presumption of prejudice is rebutted. First, some courts consider whether the trial judge and counsel approved the delivery of the dictionary to the jury.[45] Second, the opportunity for and the giving of curative instructions is another relevant factor.[46] Third, courts may assume that the jury already knew the meanings of ordinary words[47]

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36. *Id.* at 739.
37. *See generally* Annot., 54 A.L.R.2D 738 (1957 & Supp. 1978).
38. *E.g.*, Grissinger v. Griffin, 186 So. 2d 58 (Fla. Dist. Ct. App. 1966); Dongo v. Banks, 448 A.2d 885 (Me. 1982); Daniels v. Barker, 89 N.H. 416, 200 A. 410 (1938); State v. Holmes, 17 Or. App. 464, 522 P.2d 900 (1974); State v. Holt, 79 S.D. 50, 107 N.W.2d 732 (1961). The presumption of prejudice in these and similar cases does not appear to be conditioned upon the allowance or disallowance of jurors' affidavits. All five states listed recognized exceptions to the nonimpeachment rule. None of the cases states that the presumption is irrebuttable.
39. *See generally* Annot., 54 A.L.R.2D 738 (1957 & Supp. 1978).
40. Pulkrabek v. Lampe, 179 Kan. 204, 209, 293 P.2d 998, 1002 (1956).
41. TEX. R. CIV. P. 327; *see also* Kaufman v. Miller, 405 S.W.2d 820, 826 (Tex. Civ. App. 1966), *rev'd on other grounds*, 414 S.W.2d 164 (Tex. 1967).
42. State v. Ott, 111 Wis. 2d 691, 696, 331 N.W.2d 629, 632 (1983).
43. Palestroni v. Jacobs, 10 N.J. Super. 266, 271, 77 A.2d 183, 185 (1950).
44. Kirby v. Rosell, 133 Ariz. 42, 45, 648 P.2d 1048, 1051 (1982).
45. Dulaney v. Burns, 218 Ala. 493, 497, 119 So. 21, 25 (1928); Smith v. State, 95 So. 2d 525, 527-28 (Fla. 1957).
46. Schreiner v. State, 155 Neb. 894, 898, 54 N.W.2d 224, 226 (1952); State v. McLain, 10 N.C. App. 146, 148, 177 S.E.2d 742, 743 (1970).
47. Dulaney v. Burns, 218 Ala. 493, 497, 119 So. 21, 25 (1928); *In re* Estate of Cory, 169 N.W.2d 837, 846 (Iowa 1969). In denying the motion for a new trial in

or that the jury comprehended and followed the court's instructions.[48] Fourth, if the weight of evidence strongly supports the verdict, some courts deny the new trial motion regardless of the potentially prejudicial manner in which the jury reached the verdict.[49] Finally, courts frequently emphasize the specific words or terms involved. Where the word has no special legal meaning or has little relevance to the issues of the case, the verdict will stand.[50] Even where the word is a term of art or highly relevant to the case, many decisions require an injurious and demonstrable disparity between the dictionary definition and the court's definition. Thus, a court affirmed a verdict due to a lack of inconsistency between the dictionary definition of "proximate" and the court's explanation of proximate cause.[51] Conversely, a court ordered a new trial after determining that several standard dictionary definitions of "depravity" encompassed a broader range of conduct than the court's definition.[52] Should the legal and lay definitions differ substantially, courts may nevertheless ignore the disparity on the ground that the jury presumably relied on the court's definition[53] or that the evidence overwhelmingly supported the verdict.[54] Some courts have found prejudice by speculating as to what words the jury used a dictionary to define and then comparing the court's charge to the dictionary definition.[55]

The court of appeals in *Wernsing*[56] agreed with the court of special

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Wernsing, the trial court relied on this factor. Brief for Appellee Seidel at 16, Wernsing v. General Motors Corp., 298 Md. 406, 470 A.2d 802 (1984).

48. Dulaney v. Burns, 218 Ala. 493, 497, 119 So. 21, 25 (1928); *In re* Estate of Cory, 169 N.W.2d 837, 846 (Iowa 1969). *Contra* State v. Ott, 111 Wis. 2d 691, 696, 331 N.W.2d 629, 632 (1983).

49. Loucks v. Pierce, 341 Ill. App. 253, 93 N.E.2d 372 (1950); Amerine v. Hunter, 335 S.W.2d 643 (Tex. Civ. App. 1960); Rocky Mountain Trucking Co. v. Taylor, 79 Wyo. 461, 335 P.2d 448 (1959).

50. *See* Loucks v. Pierce, 341 Ill. App. 253, 260, 93 N.E.2d 372, 376 (1950) (if definition is innocuous, new trial unnecessary); *cf.* Palestroni v. Jacobs, 10 N.J. Super. 266, 271, 77 A.2d 183, 185 (1950) ("wainscot" not used in court's instructions but important to facts of case; new trial ordered). For a criticism of *Palestroni*, see Annot., 54 A.L.R.2D 738, 745 n.8 (1957 & Supp. 1978).

51. Pulkrabek v. Lampe, 179 Kan. 204, 208-09, 293 P.2d 998, 1002 (1956); *accord* Sims v. McKnight, 420 S.W.2d 173, 176 (Tex. Civ. App. 1967) (involving definition of "preponderance").

52. State v. Ott, 111 Wis. 2d 691, 693-96, 331 N.W.2d 629, 631 (1983); *cf.* Traveler's Ins. Co. v. Carter, 298 S.W.2d 231, 234 (Tex. Civ. App. 1956) (no prejudice where dictionary definition is more favorable to movant than definition given by court).

53. *In re* Estate of Cory, 169 N.W.2d 837, 846 (Iowa 1969); *see also* Dulaney v. Burns, 218 Ala. 493, 497, 119 So. 21, 25 (1928).

54. State v. Duncan, 3 Kan. App. 2d 271, 593 P.2d 427 (1979); Rocky Mountain Trucking Co. v. Taylor, 79 Wyo. 461, 335 P.2d 448 (1959).

55. Gertz v. Bass, 59 Ill. App. 2d 180, 208 N.E.2d 113 (1965); Daniels v. Barker, 89 N.H. 416, 200 A. 410 (1938). *Gertz* was implicitly rejected in People v. Jedlicka, 84 Ill. App. 3d 483, 492, 405 N.E.2d 844, 851 (1980) (court declined to speculate whether jury looked up legal terms of art).

56. Wernsing v. General Motors Corp., 298 Md. 406, 470 A.2d 802 (1984).

appeals[57] that the trial judge abused his discretion in not awarding the defendants a new trial, but disapproved of the lower appellate court's consideration of the jurors' affidavits.[58] In holding the affidavits inadmissible, the court of appeals cited a long line of Maryland precedent.[59] The court viewed the affidavits as an impermissible attempt to undermine verdict finality by reconstructing individual jurors' mental processes.[60]

Furthermore, the court rejected two potential exceptions to the nonimpeachment rule. Contrary to the view of the court of special appeals, the affidavits were not admissible as corroboration of the independent, competent testimony of the bailiff.[61] Recognition of this exception would have contradicted the holdings of two earlier cases,[62] *Oxtoby v. McGowan*[63] and *Christ v. Wempe*.[64] Further, the court stated in dicta that it would not entertain jurors' affidavits supporting their verdict.[65] The court remarked that if jurors were allowed to support their verdict, it would be unfair to deny the losing party the use of countervailing affidavits, testimony, and cross-examination impeaching the verdict.[66]

The trial judge therefore properly declined to base his ruling on the affidavits. His abuse of discretion, however, lay in his failure to differentiate between competent and incompetent evidence.[67] The bailiff's testimony concerning his role in supplying the jury with a dictionary was competent under precedent set by *Christ v. Wempe*.[68] Additionally, the longhand notes were competent because they originated during, rather than after, deliberations.[69] The two categories of competent evidence established: "(1) that a dictionary was requested and received by the jury; (2) the particular dictionary supplied; (3) that it was used by at least one

57. General Motors Corp. v. Wernsing, 54 Md. App. 19, 456 A.2d 939 (1983), *aff'd on other grounds*, 298 Md. 406, 470 A.2d 802 (1984).
58. *Wernsing*, 298 Md. at 408, 470 A.2d at 803. The exclusion of the bystander's affidavit, *id.* at 412, 470 A.2d at 805, comports with Zeller v. Mayson, 168 Md. 663, 179 A. 179 (1935).
59. *Wernsing*, 298 Md. at 411-12, 470 A.2d at 805.
60. *Id.* at 412, 470 A.2d at 805. The court of special appeals reasoned that to exclude the affidavits in the face of the jurors' "manifest misinterpretation of legal terminology would be an unconscionable denial of the appellant's [sic] right to a fair trial." General Motors Corp. v. Wernsing, 54 Md. App. at 30, 456 A.2d at 945. Additionally, the court of special appeals admitted the affidavits on the ground that they merely corroborated the "errant" bailiff's testimony. *Id.* at 411-12, 470 A.2d at 805.
61. *Wernsing*, 298 Md. at 412, 470 A.2d at 805.
62. *Id.*
63. 294 Md. 83, 101, 447 A.2d 860, 870 (1982).
64. 219 Md. 627, 641, 150 A.2d 918, 925 (1959).
65. *Wernsing*, 298 Md. at 416, 470 A.2d at 807.
66. *Id.* There is an error in the text of the opinion. In the sentence beginning "If the lid on this can of worms is partially lifted," *id.*, the phrase, "the party opposing a new trial," should read "the party *seeking* a new trial."
67. *Id.* at 414, 470 A.2d at 806.
68. *Id.* at 413, 470 A.2d at 805 (citing Christ v. Wempe, 219 Md. 627, 642, 150 A.2d 918, 926 (1959)).
69. *Wernsing*, 298 Md. at 413, 470 A.2d at 805 (observing that the notes did not "suffer the taint of possible post-verdict importuning").

juror; and (4) the particular definition considered."[70]

Considering the competent evidence, the court approved the "near universal" view that a jury's use of a dictionary warrants a new trial only if it results in prejudice to the movant.[71] The court next undertook the task of deciding the type of proof necessary to show prejudice. It rejected the minority approach of presuming prejudice from the mere presence of a dictionary in the jury room.[72] The court noted that when a jury's exposure to extraneous matter occurs before the jury retires, Maryland courts do not presume prejudice in ruling on a resulting motion for mistrial.[73] To presume prejudice in the context of a motion for new trial would be inconsistent with the approach used in mistrial motions.[74] More importantly, the *Wernsing* court sought to strike a balance between the strictures of the nonimpeachment rule and the right to a fair trial.[75] If the movant enjoyed a presumption of prejudice merely by establishing that the jury considered extraneous matter, Maryland's nonimpeachment rule would preclude successful rebuttal — the movant would almost invariably prevail.[76]

For a similar reason, the court rejected the Wernsings' argument that the movant must prove prejudice in fact. Under that standard, the nonimpeachment rule would block the movant's access to essential proof and the party opposing the motion would enjoy a disproportionate advantage.[77] In the interest of balance, therefore, the court adopted a test that "looks to the probability of prejudice from the face of the extraneous matter in relation to the circumstances of the particular case."[78]

The *Wernsing* court acknowledged that the case possessed unusual facts.[79] Due to the foreman's longhand copy of the dictionary definition, the evidence in *Wernsing* was similar to that which would be produced in a jurisdiction permitting jurors to describe extraneous matter but not its

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70. *Id.* at 418-19, 470 A.2d at 808.
71. *See id.* at 414-15, 470 A.2d at 806.
72. *Id.* at 416, 470 A.2d at 807.
73. *Id.*
74. *Id.* ("In those circumstances prejudice is not presumed; rather the test is 'whether the conversations [with non-jurors] were of such a nature that their effect must fairly be held to have been to deprive the injured party of a fair and impartial trial'") [punctuation omitted] (quoting Safeway Trails, Inc. v. Smith, 222 Md. 206, 217, 159 A.2d 823, 829 (1960) and Rent-A-Car Co. v. Globe & Rutgers Fire Ins. Co., 163 Md. 401, 409, 163 A. 702, 705 (1933)).

    The *Wernsing* court's analogy to mistrial motions is inappropriate because before ruling on a mistrial motion, trial judges may interrogate jurors, even as to their mental processes. Prejudice, therefore, need not be presumed because it can be affirmatively proven. *See supra* note 34.
75. *Wernsing*, 298 Md. at 419-20, 470 A.2d at 809.
76. *Id.* at 416, 470 A.2d at 807.
77. *Id.* at 418, 470 A.2d at 808 ("In effect petitioners urge that prejudice can only be shown by demonstrating that one or more jurors were in fact influenced by legally incorrect material found in a dictionary. As a practical matter, meeting such a standard would seem to be impossible . . . in Maryland . . . .").
78. *Id.* at 419-20, 470 A.2d at 809.
79. *Id.* at 420, 470 A.2d at 809.

impact on the verdict.[80] In formulating the probability of prejudice standard, the court relied heavily upon cases from two such jurisdictions,[81] as well as a case in which the court had effectively presumed prejudice by speculating as to which dictionary definitions the jury consulted.[82] These three decisions and others examined by the court[83] had assessed the potential for prejudice, in large measure, by comparing the dictionary definitions to the legally acceptable definitions. The court of appeals adopted this approach.[84] The possibility of even one juror having misconstrued proximate/legal cause as meaning "often without basis in actual fact," thus ignoring all of the evidence concerning one of the case's major liability issues, entitled the defendants in *Wernsing* to a new trial.[85]

The court of appeals's refusal to relax Maryland's rule excluding jurors' post-verdict affidavits is unfortunate. Courts and commentators have long criticized the rule:[86] it hypocritically tolerates eavesdropping by bailiffs and other non-jurors, yet silences honest jurors who would report their own misconduct.[87] The Iowa rule, permitting jurors to describe overt acts of misconduct, possesses sounder reasoning. Jurors can provide the best evidence of irregularities in the jury room[88] and fellow jurors can readily corroborate or contradict their evidence.[89] Furthermore, the Iowa rule does no disservice to the policies traditionally cited in support of Lord Mansfield's rule.[90] Indeed, allowing jurors to describe overt acts of misconduct would deter jury tampering, as well as harassment of and perjury by jurors, yet not inhibit frankness and freedom of proper discussion among them, thus ultimately promoting public confidence in the judicial process.[91]

Considering the refusal of the court of appeals to relax the strict nonimpeachment rule, its reasoning in adopting the probable prejudice test is suspect. In adopting that standard, the court relied upon prece-

80. *Id.* at 419, 470 A.2d at 808.
81. *Id.* at 419, 470 A.2d at 808-09 (citing Palestroni v. Jacobs, 10 N.J. Super. 266, 77 A.2d 183 (1950); State v. Ott, 111 Wis. 2d 691, 331 N.W.2d 629 (1983)).
82. 298 Md. at 418, 470 A.2d at 808 (citing Gertz v. Bass, 59 Ill. App. 2d 180, 208 N.E.2d 113 (1965)).
83. *Wernsing*, 298 Md. at 417, 470 A.2d at 807-08.
84. *Id.* at 417-18, 470 A.2d at 808 ("In the matter *sub judice* there is a very substantial difference between the trial judge's use of 'legal cause' as synonymous with proximate cause and the dictionary definition copied . . . .").
85. *Id.* at 420, 470 A.2d at 809.
86. Early criticisms by American courts occur, for example, in Smith v. Cheetham, 3 Cal. R. 57, 59 (N.Y. 1805); Crawford v. State, 10 Tenn. (2 Yer.) 60, 67 (1821). *See also*, J. WIGMORE, *supra* note ll, at 699.
87. J. WIGMORE, *supra* note 11, at 699. Wigmore also points out that the rule sprang from neither policy nor precedent. *Id.* at 696.
88. Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195, 211-12 (1866).
89. *Id.* at 211; Perry v. Bailey, 12 Kan. 539, 545 (1874); State v. Kociolek, 20 N.J. 92, 100, 118 A.2d 812, 816 (1955).
90. *E.g.*, Perry v. Bailey, 12 Kan. 539, 545 (1874); State v. Kociolek, 20 N.J. 92, 99, 118 A.2d 812, 816 (1955); *see supra* notes 25-33 and accompanying text (listing these policies).
91. *See* Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195, 211 (1866).

dent from jurisdictions in which jurors are permitted to describe extraneous matter, and upon a case in which the court effectively presumed prejudice. The court of appeals, however, refused either to presume prejudice or to permit any exception to the nonimpeachment rule.[92] The court's finding of probable prejudice thus resulted, and could only have resulted, from the unlikely existence of a juror's note that was competent even under the strict nonimpeachment rule. Absent such an unlikely circumstance, the court's adoption of the probable prejudice standard from precedent that also does not adhere to the strict nonimpeachment rule sets a standard difficult, if not impossible, to meet.

Given Maryland's rigid adherence to the nonimpeachment rule, the *Wernsing* court's probable prejudice test represents a conscientious attempt to compromise between the two extremes of presuming prejudice on one hand, and requiring proof of prejudice in fact on the other.[93] The probable prejudice test also comports with the extant Maryland law on juror misconduct.[94]

The facts of *Wernsing* and the language of the opinion compel the conclusion that in future "dictionary" cases, Maryland's appellate courts will interfere with the exercise of the trial court's discretion in ruling upon a new trial motion only where competent evidence completely identifies the extraneous definition. Because of the longhand copy, the *Wernsing* court knew precisely to which use the offending dictionary was put. Additionally, the test articulated by the *Wernsing* court — assessing the probability of prejudice "from the *face* of the extraneous matter"[95] (emphasis added) — seems to presuppose knowledge of the particular definition and dictionary involved. Jurors rarely make pre-verdict, longhand copies of the definitions they consult,[96] and Maryland's strict nonimpeachment rule bars them from revealing even that much information to the court. For these reasons, *Wernsing* is likely to have a very limited application.

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92. Wernsing v. General Motors Corp., 298 Md. 406, 418-19, 470 A.2d 802, 808-09.
93. *See supra* text accompanying notes 74-77.
94. *See supra* note 34.
95. Wernsing v. General Motors Corp., 298 Md. 406, 419-20, 470 A.2d 802, 809 (1984). In adopting the probability of prejudice test, however, the court of appeals gave considerable attention to two cases from other states in which the competent evidence was less thorough than that in *Wernsing*: Gertz v. Bass, 59 Ill. App. 2d 180, 208 N.E.2d 113 (1965), and State v. Ott, 111 Wis. 2d 691, 331 N.W.2d 629 (1983). The *Gertz* court in effect presumed prejudice by speculating which terms the jury looked up. *Gertz*, 59 Ill. App. 2d at 185, 208 N.E.2d at 116 ("It is reasonable to infer from the fact that the jury specifically requested the dictionary, that they made use of the volume in determining the meaning of the crucial terms and were influenced thereby . . . ."). The *Ott* court knew which term the jury looked up, but not the particular dictionary involved. *Ott*, 111 Wis. 2d at 695, 696, 331 N.W.2d at 631, 632 (holding probability of prejudice sufficient to warrant reversal).
96. *See, e.g.*, Annot., 54 A.L.R.2D 738 (1957).