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Discharging *State v. Hurd*: Maine Rule of Evidence 606(B) Should Not Be Used to Prevent a Jury from Fully Reporting its Verdict

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DISCHARGING *STATE V. HURD*: MAINE RULE OF EVIDENCE 606(B) SHOULD NOT BE USED TO PREVENT A JURY FROM FULLY REPORTING ITS VERDICT

William Olver

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DISCHARGING *STATE V. HURD*: MAINE RULE OF EVIDENCE 606(B) SHOULD NOT BE USED TO PREVENT A JURY FROM FULLY REPORTING ITS VERDICT

*William Olver**

I. INTRODUCTION

In *State v. Hurd*,¹ the Maine Supreme Judicial Court, sitting as the Law Court, was asked to decide if a jury may correct a mistake in the reporting of its verdict, mere moments after leaving the courtroom, once the court had declared that the jury was “discharged.”² Ryan Hurd was charged with aggravated OUI, among other things, as a result of a crash involving Hurd’s car, which tragically resulted in one person losing his life.³ During the trial, because there was a dispute regarding whether Hurd was driving the car himself or asked a second person to drive the car, the trial court instructed the jury that Hurd could be found liable of aggravated OUI either as a principal or as an accomplice.⁴ After deliberations, the jury returned a verdict of not guilty with respect to aggravated OUI.⁵ However, moments after leaving the courtroom, the court received a note from the jury indicating that they had voted on the additional “charge” of accomplice liability.⁶ Over Hurd’s objection, the court allowed the jury to resume “deliberations” on this issue, and the jury returned a verdict of guilty for “aggravated operating under the influence—accomplice liability.”⁷

Hurd appealed on the basis that the jury should have been prevented from impeaching its own verdict.⁸ The majority agreed with Hurd and held that Maine Rule of Evidence 606(b) prohibited the court from acting on the communication it received from the jury regarding the verdict after the court had discharged the jury.⁹ The majority seemed to adopt a bright-line test for “discharge,” which occurred when the court originally announced that the jury was discharged.¹⁰ The dissent, while acknowledging the public policy rationales against inquiring into a jury’s verdict, would have analyzed the issue of discharge through a “functional

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1. 2010 ME 118, 8 A.3d 651 (5-2 decision).

2. *Id.* ¶ 1.

3. *Id.* ¶¶ 8, 11.

4. *Id.* ¶¶ 12, 14.

5. *Id.* ¶ 19.

6. *Id.* ¶ 20.

7. *Id.* ¶¶ 21-22.

8. *Id.* ¶ 25.

9. *Id.* ¶ 45.

10. *Id.* ¶ 19.

approach.”¹¹ In this case, because the jury had not yet separated and was still immune from any outside influences that might have pressured it to change its verdict, the dissent argued, discharge had not occurred, and the jury should have been allowed to correct its verdict.¹²

This Note begins, in Part II, by discussing the origins of the policy concerns surrounding juror testimony on deliberations and verdicts and then traces these concerns through the adoption of Rule of Evidence 606(b)¹³ to present. Part III will discuss the facts of *Hurd* as well as the majority’s and minority’s analyses. Part IV will look at the timing of jury discharge and its relation to 606(b) in several other jurisdictions, will delve more deeply into the applicability of the public policy concerns to the specific case of *Hurd*, and will also discuss several other issues regarding the handling of the *Hurd* trial. Part V will conclude that the policy reasons behind 606(b) have been grossly distorted through the years and will urge the court to re-examine its rationale for prohibiting juror testimony.

II. EVOLUTION OF MAINE RULE OF EVIDENCE 606(B)

Concerns regarding the use of juror testimony to impeach a verdict predate the Maine Rules of Evidence. This section will look at several pre- and post-606(b) cases to provide a basis for analyzing the *Hurd* decision. Beyond the text of the rule, historical and public policy concerns greatly influence 606(b) jurisprudence.

A. In the beginning, there was Lord Mansfield

In 1785, Lord Mansfield decided *Vaise against Delaval*,¹⁴ an English case that serves as the foundation for many subsequent decisions regarding juror testimony in the United States. In *Vaise*, a divided jury drew lots to decide the case, and the losing side wanted to use a juror’s testimony as the basis for an objection.¹⁵ Prior to *Vaise*, jurors were sometimes allowed to testify.¹⁶ However, Mansfield held that “[t]he Court cannot . . . receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor.”¹⁷ This established a bright-line rule generally prohibiting jurors from testifying regarding their deliberations. Although the States were no longer bound by English common law in 1785,¹⁸ the rule nevertheless gained wide acceptance.¹⁹

11. *Id.* ¶¶ 51, 60 (Jabar, J., dissenting).

12. *Id.* ¶¶ 51, 66.

13. Maine Rule of Evidence 606(b) is modeled after Federal Rule of Evidence 606(b), although the current federal rule permits a juror to testify about mistakes in verdict forms whereas the Maine rule does not allow such testimony. See FED. R. EVID. 606(b); ME. R. EVID. 606(b). To the extent that this Note discusses 606(b), it is referencing those portions of the text that are in accord.

14. (1785) 99 Eng. Rep. 944; 1 Term Rep. 11.

15. *See id.*

16. *McDonald v. Pless*, 238 U.S. 264, 268 (1915).

17. *Vaise*, 99 Eng. Rep. at 944, 1 Term Rep. at 11. Mansfield went on to suggest that a court may receive information regarding jury deliberations from a third party who witnessed them “through a window[] or by some . . . other means.” *Id.*

18. *See generally* Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6 (1910) (discussing the issues surrounding what was adopted from English common law and when it was adopted). For example, Florida adopted “the common law and statute laws of England which are of a

B. Pre-606(b) Supreme Court cases

Prior to the enactment of the Federal Rules of Evidence, the U.S. Supreme Court considered the issue of juror testimony in several cases. In the 1851 case *United States v. Reid*,²⁰ the Court considered whether a juror could testify about the effect of reading a newspaper article about the trial in the jury room.²¹ Although the Court avoided deciding the admissibility of the testimony, the Court did note that “[i]t would . . . hardly be safe to lay down any general rule upon this subject.”²² The Court suggested, however, that juror testimony could be admitted “with great caution,” particularly when “the plainest principles of justice” were implicated.²³ In the 1892 case *Mattox v. United States*,²⁴ the question was again raised regarding jurors testifying about outside information that they received during jury deliberations.²⁵ The Court held that the testimony of a single dissenting juror based on a subjective opinion should generally not be admitted to overturn a verdict, but a juror *may* testify to “overt acts,” that is, objective information that may be controverted by the other jurors.²⁶ In particular, a juror may not testify to the content of the deliberations, but a juror may testify as to any outside influences on the deliberations.²⁷ This viewpoint is echoed in two later Supreme Court cases from the 1910s. In 1912, *Hyde v. United States* prohibited the use of uncorroborated juror testimony regarding deliberations.²⁸ In 1915, *McDonald v. Pless* further articulated the general rule “that the losing party cannot, in order to

general and not of a local nature . . . down to the fourth day of July, 1776.” *Id.* at 25. In Kentucky, the common law was “as it existed [in England] prior to March 24, 1606.” *Id.* at 26 (referencing *Ray v. Sweeney*, 77 Ky. (14 Bush) 1 (1878)).

19. *McDonald*, 238 U.S. at 268. For a more in-depth discussion regarding the “Mansfield Rule,” see Lisa A. Prager, *Juror Privilege: The Answer to the Impeachment Puzzle?*, 3 W. NEW ENG. L. REV. 447, 450-57 (1981). However, the Mansfield Rule is not without its critics. See, e.g., *Sopp v. Smith*, 377 P.2d 649, 651-54 (Cal. 1963) (Peters, J., dissenting).

20. 53 U.S. (12 How.) 361 (1851).

21. *Id.* at 362.

22. *Id.* at 366.

23. *Id.*

24. 146 U.S. 140 (1892).

25. See *id.* at 142.

26. *Id.* at 148-49.

27. See *id.* The Court was undoubtedly guided in this decision by the experience of two current Justices who had previously addressed similar issues while they were members of state supreme courts. Justice Brewer authored an opinion in *Perry v. Bailey*, 12 Kan. 539 (1874), and Justice Gray wrote as part of the decision in *Woodward v. Leavitt*, 107 Mass. 453 (1871). *Mattox*, 146 U.S. at 148-49.

28. 225 U.S. 347, 383-84 (1912). In *Hyde*, the question of jury testimony was the seventeenth of many issues raised on appeal, and it is unclear if the Court’s discussion rises to the level of precedent. *Id.* at 381. It is particularly curious that the Court cited two state supreme court cases, *Wright v. Ill. & Miss. Tel. Co.*, 20 Iowa 195 (1866), and *Gottlieb Bros. v. John Jasper & Co.*, 27 Kan. 770 (1882), instead of its own early cases. *Hyde*, 225 U.S. at 383-84. However, both cases are consistent with the principle that jurors cannot testify about their verdicts but can testify to other facts of improper influence. See *Wright*, 20 Iowa at 211-12; *Gottlieb*, 27 Kan. at 775-76. *Wright* also notes that Lord Mansfield’s ruling is the “leading case” on jury affidavits but seems to have some reservations on the broad exclusion on all juror testimony. *Wright*, 20 Iowa at 211-12.

secure a new trial, use the testimony of jurors to impeach their verdict.”²⁹ *McDonald* noted that “the principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict.”³⁰ *Mattox*, *Hyde*, and *McDonald*, served as the justification for prohibiting juror testimony for several decades.

C. Adoption of Rule 606(b)

In 1965, the federal judiciary’s Advisory Committee on Rules of Evidence met for the first time to develop a set of “uniform rules of evidence for federal courts.”³¹ The Committee proposed Rule 606 to address the competency of jurors testifying as witnesses.³² Subsection (b) in particular codified the holdings of prior cases, including *Hyde* and *McDonald*.³³

In the Advisory Committee’s Notes, the Committee recognizes that the oft-cited doctrine that “a juror may not impeach his own verdict . . . is a gross oversimplification.”³⁴ In reality, the decision to prevent or allow a juror to testify requires a balance of addressing public policy concerns, including stability in verdicts and protecting jurors from outside influences, with preventing “irregularity and injustice.”³⁵ The Committee clearly intended to prevent jurors from testifying about the thoughts of the jury during its deliberations; however, jurors *may* testify as to outside influences on the deliberations. The Committee did not directly address whether jurors may testify to all objective facts observed during deliberations.³⁶

Once the Advisory Committee had completed its proposals for the Rules, it transmitted those suggestions to Congress. When the House Committee considered the language of 606(b), it would have added a provision that “allow[ed] a juror to testify about objective matters”³⁷ Inquiries into mental processes would still be prohibited, but “[a]llowing . . . [testimony] as to matters other than [jurors’] reactions involves no particular hazard to the values sought to be protected.”³⁸

29. 238 U.S. 264, 269 (1915). The Court acknowledged Lord Mansfield’s principle and recognized the strong argument in favor of admitting juror testimony, albeit not strong enough for state legislatures to modify the entrenched doctrine. *Id.* at 268-69.

30. *Id.* at 269.

31. Advisory Comm. on Rules of Evid., Minutes: Meeting Held on Friday, June 18, 1965, at 2, available at http://federalevidence.com/pdf/FRE_Amendments/Pre1975/EV06-1965-min.pdf.

32. Advisory Comm. on Rules of Evid., Draft Minutes of the Advisory Committee on Rules of Evidence: Meeting of May 18, 19 and 20, 1967, at 2, [hereinafter 1967 Advisory Committee Meeting], available at http://federalevidence.com/pdf/FRE_Amendments/Pre1975/EV05-1967-min.pdf.

33. See generally FED. R. EVID. 606 advisory committee’s note.

34. *Id.*

35. *Id.*

36. There is, however, some anecdotal evidence that at least some members of the Committee only meant Rule 606(b) as a narrow exclusion. For instance, Professor Edward Cleary proposed adding the following to the rule: “otherwise a juror is competent to testify upon an inquiry into the validity of the verdict” See 1967 Advisory Committee Meeting, *supra* note 32, at 2. Dean Charles Joiner did not want “a rule that would prohibit testimony as to observable facts.” *Id.* at 3. Judge Simon Sobeloff wanted to add a clause that a juror may “testify as to any relevant objective fact” except for those prohibited by the rule. *Id.* at 4.

37. H.R. REP. NO. 93-1597, at 8 (1974) (Conf. Rep.), reprinted in 1974 U.S.C.C.A.N. 7098, 7102.

38. H.R. REP. NO. 93-650, at 9-10 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7083-84.

However, the Senate version, which was eventually adopted, did not include this provision.³⁹ The Senate was concerned that the broader version of the rule “would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors.”⁴⁰

In 1975, Maine adopted its Rules of Evidence, which were largely modeled on the Federal Rules of Evidence.⁴¹ Currently, Maine Rule 606(b) reads:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that juror’s or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning any 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 about which the juror would be precluded from testifying be received.⁴²

Maine Rule 606(b) was consistent with Maine’s existing common law regarding impeachment of a verdict through juror testimony.⁴³ Several years would pass until anyone would test either rule on the issue of whether a juror may testify about objective events that occurred during deliberations.

D. Post-606(b) Cases

After the adoption of FRE 606(b) and the state rule modeled after it, courts had to consider whether juror testimony was permissible under 606(b)’s framework. At the federal level, the U.S. Supreme Court looked at Federal Rule 606(b) in the 1987 case of *Tanner v. United States*.⁴⁴ The defendants in *Tanner* were convicted of conspiracy and mail fraud.⁴⁵ During the trial, defense counsel raised as a concern to the court that several jury members appeared sleepy.⁴⁶ No one inquired further into this issue, and no one brought forth any information as to the cause of the apparent drowsiness.⁴⁷ After the jury returned its verdict, Tanner’s attorney received information that the jury had consumed alcohol during the trial.⁴⁸ The attorney sought to interview the jurors on this issue, but the court held that “juror

39. See H.R. REP. NO. 93-1597, at 8 (1974) (Cong. Rep.) reprinted in 1974 U.S.C.C.A.N. 7098, 7102.

40. S. REP. NO. 93-1277, at 13 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7060.

41. Peter L. Murray & John C. Sheldon, *Should the Rules of Evidence be Modified for Civil Non-Jury Trials?*, 17 ME. BAR J. 30, 30 (2002).

42. ME. R. EVID. 606(b). The current Maine rule does not completely mirror the federal rule, which also allows a juror to “testify about . . . whether there was a mistake in entering the verdict onto the verdict form.” FED. R. EVID. 606(b).

43. See ME. R. EVID. 606 advisory committee’s note (citing *Patterson v. Rossignol*, 245 A.2d 852, 856 (Me. 1968)). *Patterson* set forth a number of public policy concerns related to receiving juror testimony to impeach a verdict. See *infra* Part IV.B.

44. 483 U.S. 107 (1987) (5-4 decision).

45. *Id.* at 109-10.

46. See *id.* at 113-14.

47. See *id.* at 114-15.

48. *Id.* at 113.

testimony on intoxication was inadmissible under Federal Rule of Evidence 606(b).⁴⁹ While on appeal to the Eleventh Circuit, Tanner's attorney received additional information that several jurors had consumed alcohol, marijuana, and cocaine.⁵⁰ Tanner made another motion to the District Court for a new trial, which was denied.⁵¹ The Eleventh Circuit affirmed, holding that "[the District Court] did not abuse its discretion in refusing to conduct an evidentiary hearing [into allegations of juror misconduct]."⁵²

On appeal, the Supreme Court agreed with the District Court, citing cases such as *Mattox*, *Hyde*, and *McDonald*, in addition to public policy, as support for 606(b)'s prohibition on juror testimony impeaching a verdict.⁵³ The Court reasoned that 606(b) only allowed testimony on *outside influences* on jury deliberations, and "[h]owever severe their effect and improper their use, drugs or alcohol voluntarily ingested by a juror seems no more an 'outside influence' than a virus, poorly prepared food, or a lack of sleep."⁵⁴ The Court also noted that the Senate declined to accept the House's version of 606(b), which "would [have] permit[ted] the impeachment of verdicts by inquiry into, not the mental processes of the jurors, but what happened in terms of conduct in the jury room."⁵⁵

At the state level, the Law Court considered the limits of Maine Rule 606(b) in the 1997 case of *Taylor v. Lapomarda*.⁵⁶ Taylor sued Lapomarda for negligence after Taylor fell from a staircase on Lapomarda's property.⁵⁷ The jury returned a verdict in Taylor's favor, indicating on a special verdict form that "Taylor's total damages were \$8,500 and that her damages minus a sum for her contributory negligence equaled \$500," even though "Taylor's negligence was equal to or greater than Lapomarda's negligence."⁵⁸ If the jury had found that Taylor's negligence was greater than Lapomarda's, then it should not have awarded any

49. *Id.*

50. *Id.* at 115-16.

51. *Id.*

52. *United States v. Conover*, 772 F.2d 765, 770 (11th Cir. 1985).

53. *Tanner*, 483 U.S. at 117, 119-20.

54. *Id.* at 122. The Court also cited the House Judiciary Committee's report on the effect of the adopted version of 606(b) on testimony regarding juror intoxication: "nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations." *Id.* at 123 (emphasis omitted) (citing H.R. REP. NO. 93-650, at 9-10 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7083). Unquestionably, consumption of drugs or alcohol would have had some influence on those jurors, but the primary effect would have been on the intoxicated jurors' mental processes. How intoxication may or may not have affected the mental process of a juror during deliberations is properly excluded by 606(b).

55. *Id.* at 123 (quoting S. REP. NO. 93-1277, at 13 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7060). Although the adopted version of 606(b) protects the mental processes of jurors during deliberations, the bare text of the rule does not create an impenetrable shield around the jury room—surely drug use by jurors within the jury room is unrelated to its deliberations. *See id.* at 140-41 (Marshall, J., dissenting) (discussing several sources that suggest that jurors may testify to jury misconduct, regardless of where it occurred).

56. 1997 ME 216, 702 A.2d 685. The Law Court had previously analyzed its Rule 606(b) in several cases. *See State v. Fuller*, 660 A.2d 915 (Me. 1994); *Marr v. Shores*, 495 A.2d 1202 (Me. 1985); *Cyr v. Michaud*, 454 A.2d 1376 (Me. 1983).

57. *Taylor*, 1997 ME 216, ¶ 2, 702 A.2d 685.

58. *Id.* ¶ 3.

damages.⁵⁹ Taylor moved for a mistrial based on this inconsistency, and the court responded by re-instructing the jury and having them fill out a second verdict form.⁶⁰ The jury's second verdict form was nearly identical to the first, except this time it stated that "Taylor's negligence was not equal to or greater than Lapomarda's negligence."⁶¹ At this point, the trial court discharged the jury.⁶² A couple of minutes later, however, the jury contacted the court and indicated that they had "messed up really bad": they had intended to award Taylor a sum of \$8,000, which was based on \$8,500 total damages minus \$500 for Taylor's comparative negligence.⁶³ The court declined to modify the jury's original \$500 amount based on this new information.⁶⁴

On appeal, the ruling of the trial court was affirmed because "[policy considerations] prohibit[] correcting a mistake in the recording of a verdict by using evidence, obtained after juror discharge, to establish that the jury misunderstood the verdict form provided to them."⁶⁵ Because the jury's misunderstanding of the verdict form "[was] not the product of an outside influence or of external juror misconduct," the Law Court held that the trial court correctly refused to hear any testimony as to why the verdict was inaccurate.⁶⁶ The *Taylor* court relied on its prior precedents for its decision as opposed to the text of 606(b), just as the *Tanner* court had.⁶⁷ However, the result was the same: a court may not receive any information from jurors that would affect the verdict after the conclusion of the trial.

III. STATE V. HURD

A. Facts

On October 16, 2007, friends and colleagues Ryan Hurd, Chad Bernier, Terry "TJ" Richardson, Jr., and Terry Richardson Sr. were enjoying a crisp fall afternoon with a barbeque behind their hotel in Kingfield after a hard day's work.⁶⁸ The men

59. *Id.* ¶ 2 n.1 (citation to footnote only).

60. *Id.* ¶ 4.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* ¶ 11 (quoting *Cyr v. Michaud*, 454 A.2d 1376, 1383 (Me. 1983)) (internal quotation marks omitted). *Cyr* also dealt with a similar damages calculation issue. Out of \$100,000 total damages, the jury awarded the plaintiff \$80,000. *Cyr*, 454 A.2d at 1379. Later, after the trial had concluded, information got back to the court that the jury's intention was to reduce the \$100,000 total by \$80,000, thus only awarding \$20,000. *Id.* Public policy barred any post-discharge correction. *Id.* at 1383. Of course, *Cyr*, where a third party attempts to impeach a verdict through juror testimony, presents different concerns than *Taylor*, where an unprovoked jury attempts to correct an error in its verdict. Oddly, *Cyr* did not consider Rule 606(b), even though it was in effect at the time, beyond its codification of public policy concerns. *Id.*

66. *Taylor*, 1997 ME 216, ¶10, 702 A.2d 685.

67. *See id.*

68. Brief of Appellant at 1, *State v. Hurd*, 2010 ME 118, 8 A.3d 651 (No. FRA-09-560) [hereinafter Brief of Appellant]. The weather around the Farmington area, including Kingfield, on October 16, 2007 was in the 50's with no precipitation. *History for Waterville, ME*, WEATHER UNDERGROUND (Oct. 16, 2007), <http://www.wunderground.com/history/airport/KWVL/2007/10/16/DailyHistory.html>.

consumed a few drinks with their dinner.⁶⁹ After they finished the meal, the four men headed inside the motel where they drank a couple bottles of whiskey.⁷⁰ At this point, Hurd, Bernier, and TJ Richardson decided to continue their evening at the Dugout Bar & Grill in Farmington, Maine; they got in Hurd's car, and Hurd drove them all to Farmington.⁷¹ Once at the bar, the men stayed there and continued drinking until closing time.⁷² During the drive home, the car spun out of control, crashed into a telephone pole, hit a tree stump, and eventually landed on its roof.⁷³ Although it is unclear who drove the vehicle as the men left the bar, it is clear that the vehicle was travelling at an excessive rate of speed, more than 40 miles over the posted speed limit.⁷⁴ TJ Richardson tragically lost his life as a result of the accident.⁷⁵

During the crash, Hurd was likely ejected from the vehicle.⁷⁶ Hurd managed to walk to a nearby house, where the owner called 911, and then continued down the road until Hurd was picked up by a police officer more than 30 minutes later.⁷⁷ When questioned by the officer regarding the crash, Hurd said in separate statements that he, Bernier, and Richardson were all driving the car; Hurd also said that he could not remember who was driving.⁷⁸ As he was being transported to a nearby hospital, Hurd told a paramedic both that he could not remember who was driving the vehicle and that "they made [him] drive."⁷⁹ Bernier believed that Richardson was driving when the three left the bar but later traded seats with Hurd, who continued driving until the time of the crash.⁸⁰ Hurd was charged with manslaughter (Class A) and aggravated OUI (Class C).⁸¹

B. The Trial

During the trial, the central issue revolved around who was driving the car.⁸² Based on the testimony, the jury could have reasonably concluded that either Hurd or Richardson was driving at the time of the accident.⁸³ With respect to the

69. Brief of Appellant, *supra* note 68, at 1.

70. *Id.*

71. *Id.* at 1-2. According to Google Maps, the Dugout Bar & Grill is approximately 22 miles from Kingfield. *Google Maps*, GOOGLE, <http://maps.google.com/> (select "Get Directions" then type "Kingfield, ME" and "Dugout Bar & Grill" into the search boxes) (last visited Sept. 30, 2011). At the trial, Bernier testified that "they all had a decent buzz on." Brief of Appellant, *supra* note 68, at 1 (internal quotation marks omitted). This seems reasonable given the amount of alcohol consumed during and after the barbecue. It is very likely that Hurd was operating under the influence as he drove the group to Farmington.

72. Brief of Appellant, *supra* note 68, at 2.

73. *Hurd*, 2010 ME 118, ¶ 7, 8 A.3d 651.

74. Brief of Appellant, *supra* note 68, at 3.

75. *Id.*

76. *Hurd*, 2010 ME 118, ¶ 8, 8 A.3d 651.

77. Brief of Appellant, *supra* note 68, at 3.

78. *Id.* at 3-4.

79. *Id.* at 4.

80. *Hurd*, 2010 ME 118, ¶ 10, 8 A.3d 651.

81. *Id.* ¶ 11. Hurd was also charged with OUI (Class D), but the State dismissed this charge at the beginning of the trial. *Id.*

82. *Id.* ¶ 12.

83. *Id.*

aggravated OUI charge, the State requested a jury instruction on accomplice liability.⁸⁴ With this instruction, the jury had two options to find Hurd guilty of aggravated OUI.⁸⁵ First, Hurd would have been liable as a principal if he himself were driving at the time of the crash, or, second, Hurd would have been liable as an accomplice if he aided or encouraged Richardson to drive while intoxicated.⁸⁶ This instruction seems to suggest that aggravated OUI – accomplice liability was a separate count from aggravated OUI – principal liability.⁸⁷ Although the jury could have found Hurd guilty of aggravated OUI either through principal, accomplice liability, or a combination of the two, jurors were not given that clarifying instruction.⁸⁸

After deliberations, the jury returned a verdict of not guilty for the manslaughter charge.⁸⁹ When asked about the aggravated OUI charge, the foreperson also returned a not guilty verdict.⁹⁰ In response to this, there was an outburst in the courtroom where upon several people began crying.⁹¹ The court thanked the jury and excused them from the room.⁹² Shortly after this, within one to two minutes, the court was alerted that the jury had something to communicate.⁹³ The judge went into the jury room, spoke to the jury, and then asked the jury to communicate its message in writing.⁹⁴ The jury indicated that it “understood there to be 3 charges,” which were “1. Manslaughter 2. Aggravated OUI 3. Accomplice liability.”⁹⁵ In response, the court asked the jury to “return to the jury room for further deliberations,” this time with a special verdict form, and answer whether Hurd was guilty or not guilty for both “aggravated operating under the influence” and “aggravated operating under the influence—accomplice liability.”⁹⁶ A short time later, the jury “found Hurd guilty of aggravated operating under the influence—accomplice liability.”⁹⁷ Hurd objected on the grounds that the jury should not be able to “impeach[] its own verdict,” and moved for the court to

84. *Id.* ¶ 13.

85. *Id.* ¶ 14.

86. *Id.* ¶¶ 13-15. The court’s instruction on accomplice liability was as follows:

In Maine, a person commits OUI . . . aggravated operating under the influence as an accomplice if that person . . . solicits, aids, agrees to aid or attempts to aid such other person to operate a motor vehicle, [and] such other person does operate the motor vehicle while under the influence of intoxicants . . . and such operation by the other person causes serious bodily injury or the death of another person.

Brief of Appellant, *supra* note 68, at 8-9.

87. *See Hurd*, 2010 ME 118, ¶ 17, 8 A.3d 651.

88. *Id.* In the majority opinion, the Law Court takes issue with the fact that a verdict form was not used in this case. *See id.* ¶ 19 n.7 (citation to footnote only). This will be discussed further in Part IV.C, *infra*.

89. *Id.* ¶ 19.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* ¶ 20.

94. *Id.*

95. *Id.*

96. *Id.* ¶ 21.

97. *Id.* ¶ 22 (internal quotation marks omitted).

reinstate the jury's original verdict.⁹⁸ The court denied that motion, and Hurd appealed.⁹⁹

C. Majority

In its decision on appeal, the majority's analysis focused on the issue of the second "accomplice liability" verdict and whether the trial court violated Maine Rule of Evidence 606(b) through its ruling following the communication with the jury after the jury had been discharged.¹⁰⁰ "Post-discharge inquir[ies] into jury verdicts" are barred primarily for public policy considerations, which include the need for finality in litigation and a desire to protect jurors and their deliberations from post-trial scrutiny.¹⁰¹ Although 606(b) specifically says that "a juror may not testify," this has been expanded over the years to include "any post discharge communication" regarding jury deliberations.¹⁰²

To illustrate these points, the majority recounted *Taylor*, where the jury similarly attempted to impeach its verdict minutes after leaving the courtroom.¹⁰³ Although *Taylor* was a civil case, the majority noted that 606(b) is "equally applicable to criminal cases."¹⁰⁴ Based on the principles set forth in *Taylor* and *Tanner*, the majority held that the court is barred from acting on any communication received from the jury once the jury has reached its verdict, other than what is allowed for by 606(b).¹⁰⁵ Because the *Hurd* jury did not inform the court about any inappropriate "outside influence or external juror misconduct," 606(b) did not allow for any further action.¹⁰⁶ The majority went on to establish the bright-line rule that 606(b) is in effect once a jury is discharged, which is based on a court's declaration of "discharge" and is not based on a fact-specific inquiry.¹⁰⁷

D. Dissent

The dissent agreed with the majority that 606(b) prohibited the court from acting on post-discharge communications with jurors regarding their deliberations.¹⁰⁸ However, the dissent disagreed with the majority on whether the jury was in fact discharged.¹⁰⁹ In contrast to the majority's holding, the dissent would have adopted a "functional approach" to determine when the jury had been

98. *Id.* ¶ 23. Hurd also objected on the basis that the jury was never reimpaneled after discharge and any further proceeding would violate the Double Jeopardy Clauses of the Maine and United States Constitutions. *Id.*

99. *Id.* ¶ 24.

100. *See id.* ¶¶ 30-31.

101. *Id.* ¶ 32 (referencing *Ma v. Bryan*, 2010 ME 55, ¶ 9, 997 A.2d 755). These public policy considerations are discussed more in depth in Part IV.B *infra*.

102. *Hurd*, 2010 ME 118, ¶ 33, 8 A.3d 651 (internal quotation marks omitted).

103. *Id.* ¶ 37 (referencing *Taylor v. Lapomarda*, 1997 ME 216, 702 A.2d 685).

104. *Id.* ¶ 41 (citing *Tanner v. United States*, 483 U.S. 107, 121-22 (1987)).

105. *Id.* ¶ 42.

106. *Id.*

107. *See id.* ¶ 44.

108. *See id.* ¶ 47 (Jabar, J., dissenting).

109. *See id.* ¶ 51.

discharged and thus when 606(b) would apply.¹¹⁰ The dissent put forth a three part test to determine when discharge had occurred: first, whether the jury “continues to function as an undispersed unit”; second, whether the jury “is . . . subject to any outside pressures, communications, or influences”; and third, whether the jury “remains under the control of the court.”¹¹¹ The dissent argued that even once the jury retired to the jury room, it was still assembled, immune from any outside influences, and under control of the court; therefore it was not functionally discharged.¹¹²

The rationale for this functional approach was based on several ideas. First, the public policy reasons behind Rule 606(b), “namely, the dangers of uncertainty and of tampering with the jurors . . . disappear in large part if such investigation . . . is *made by the judge* and takes place *before the jurors’ discharge and separation.*”¹¹³ Second, if the foreperson had made some sort of objection in the moments between when the verdict was announced and the court said “discharge,” there would have been no question that 606(b) was inapplicable.¹¹⁴ Third, the court is normally given great discretion to decide issues during a trial, including the admissibility of evidence, determinations on objections, and the character of limiting objections, and there is no reason to take away that discretion in this instance in order to allow the court “to correct obvious mistakes.”¹¹⁵ Fourth, there is a greater “societal interest in punishing one whose guilt is clear after he has obtained a fair trial.”¹¹⁶ Although the dissent did acknowledge and generally support the policy reasons behind 606(b), the dissent did not believe they were “furthered by the result reached in [*Hurd*]” and would have affirmed the trial court’s judgment.¹¹⁷

IV. ANALYSIS

Hurd presents a unique factual situation for applying 606(b). Historically, testimony of a single juror was prohibited for impeachment purposes, particularly if it was offered several days after the conclusion of a trial. In *Hurd*, a unanimous jury attempted to report its entire verdict *moments* after the court had declared them discharged. The importance of “discharge” in *Hurd* and the applicability of the public policy underlining 606(b) to *Hurd*, as well as several unique procedural issues, warrant a closer look.

A. Timing of “Discharge”

Through its decisions in *Taylor* and *Hurd*, the Law Court appears to have established a bright-line rule that a jury may not impeach its verdict at any point

110. *Id.*

111. *Id.* ¶ 57.

112. *Id.* ¶ 57, 60.

113. *Id.* ¶ 47 (emphasis in original) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2350, at 691 (McNaughton rev. 1961)).

114. *Id.* ¶ 51.

115. *Id.* ¶ 57.

116. *Id.* ¶ 60 (quoting *Brown v. Gunter*, 562 F.2d 122, 125 (1st Cir. 1977)).

117. *Id.*

after it has been discharged, unless the impeachment is for a reason outlined in 606(b). Although the word “discharge” does not appear within the text of 606(b), the precise timing is critical because prior to discharge, a jury may impeach its verdict, whereas after discharge, impeachment is forbidden.¹¹⁸ However, the exact point when a jury is discharged was not clearly articulated in any of these cases. The majority in *Hurd* laid out the following timeline: “the jury rendered a verdict in open court . . . acknowledged the verdict as [its] verdict and [was] discharged”¹¹⁹ Therefore, it appears that a jury in Maine is discharged once the court utters the word “discharge.” The Law Court’s reluctance to conduct a more fact-specific inquiry on the issue of discharge is based on the fact that “courts of other jurisdictions have taken a wide variety of approaches to deciding whether to permit jury reassembly after discharge, . . . [which] evidences the impossibility of drawing a line which properly fits all of the points upon which parties may urge revisiting jury verdicts.”¹²⁰ In fact, the court failed to explicitly draw any line of any sort.¹²¹

Several courts have dealt with similar fact patterns to *Hurd* and have generally come to similar conclusions regarding the applicability of 606(b), albeit on slightly different grounds. For example, in *People v. Rushin*,¹²² a Michigan case, a jury was called back into the courtroom by the judge approximately two minutes after it had been discharged.¹²³ The initial verdict was not guilty, but after the jury was recalled, a single juror stated his disagreement with the verdict.¹²⁴ After further deliberations, the jury could not agree, and a mistrial was declared.¹²⁵ During the subsequent trial, the defendants were found guilty.¹²⁶ On appeal, the Michigan Court of Appeals held that a jury may not “alter, amend or impeach a verdict in a criminal case” after it has been “officially discharged and left the courtroom.”¹²⁷ This is because the jury “no longer functions as a unit” and “[t]he [c]ourt cannot ascertain the influence to which the jury has been subjected after it has left the courtroom.”¹²⁸

In another case, *State v. Green*,¹²⁹ a Tennessee jury was recalled to the

118. The Law Court’s focus on “discharge” appears related to the validity of the verdict, which makes sense because ME. R. EVID. 606(b) prohibits “inquiry into the validity of a verdict.” However, rather than focusing on “discharge” to determine the validity of the verdict, the court could have adopted a rule that the verdict is valid once it has been recorded. See, e.g., *Commonwealth v. McDaniels*, 886 A.2d 682, 686 (Pa. Super. Ct. 2005) (quoting *Commonwealth v. Johnson*, 59 A.2d 128, 129 (Pa. 1948)) (“The established rule is that the verdict as recorded is the verdict of the jury . . .”).

119. *Hurd*, 2010 ME 118, ¶42, 8 A.3d 651 (majority opinion).

120. *Id.* ¶38 (quoting *Taylor v. Lapomarda*, 1997 ME 216, ¶8 n.4, 702 A.2d 685 (internal quotation marks omitted) (citation to footnote only)).

121. The issues of reassembling a jury and receiving juror testimony, although connected, are separate problems with which a court must deal. Specifically, reassembling a jury post-verdict does not by itself raise the sorts of evidentiary issues that receiving juror testimony post-verdict does.

122. 194 N.W.2d 718 (Mich. Ct. App. 1971).

123. *Id.* at 719.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 721 (adopting the rule set forth in *Melton v. Commonwealth*, 111 S.E. 291, 294 (Va. 1922)).

128. *Id.* at 721-22.

129. 995 S.W.2d 591 (Tenn. Crim. App. 1998).

courtroom after less than two minutes had passed.¹³⁰ Initially, the jury found the defendant not guilty on the two charged counts, which elicited an emotional response from the audience.¹³¹ While the jurors were in the process of exiting the courtroom, some inside and some outside, one juror walked out shaking his head saying, “No way.”¹³² The court was immediately notified, and the jury was recalled.¹³³ Once recalled, the jury clarified that they had found the defendant not guilty for the charged offenses but had found the defendant guilty on lesser included offenses.¹³⁴ The corrected verdict was allowed, and the defendant was found guilty.¹³⁵ Reversing on appeal, the Tennessee Court of Criminal Appeals laid out two important factors for determining when a discharge had occurred: whether the jury had separated “from the presence and control of the trial court” and whether the jury had been subjected to any “outside contacts or influence[s].”¹³⁶ Regarding the issue of control, the court found that the jurors were not under control of the court, even though court officers were still present, because “upon discharge, the relationship between the jurors and the court officers was that of third persons.”¹³⁷ Regarding the issue of outside influence, the court stated that “the relevant inquiry [is] the *possibility* of outside contact or influence.”¹³⁸ Because the jurors *may* have been subjected to outside influence once released from the courtroom, any determination into what actually happened was barred.¹³⁹

In *Hurd*, *Rushin*, and *Green*, the courts are clearly concerned with the potential for outside influences affecting jury members after they render their verdicts, possibly causing them to change their minds. This was a historical policy concern underlying 606(b). However, all three courts have tipped the balance too far towards exclusion to the detriment of allowing a jury to accurately report its intended verdict. The mere possibility that a juror was or will be subjected to some sort of outside influence after the jury rendered its verdict was enough for these courts to establish a line at “discharge.” In fact, drawing such a line is arbitrary and irrelevant. Many cases prohibiting impeachment of a verdict occur after members of the jury are clearly reintegrated with the public, several days after discharge.¹⁴⁰ In the rare case where the jury, of its own accord and *before* such reintegration, attempts to clarify or correct a verdict shortly after the court has uttered “discharge,” the policy considerations behind protecting jurors would not preclude a brief, fact-specific inquiry to determine the nature of the discrepancy. If, for example, upon further examination, a single juror indicated that he or she was

130. *Id.* at 608.

131. *Id.* at 607. Similar to *Hurd*, the trial court in *Green* did not use a written verdict form. *Id.*

132. *Id.*

133. *Id.* at 607-08.

134. *Id.* at 608. The defendant was initially charged with facilitation of first degree murder, on which the jury acquitted, but they also voted on, and found him guilty of, facilitation of second degree murder and facilitation of attempted second degree murder. *Id.* at 598.

135. *Id.* at 609.

136. *Id.*

137. *Id.* at 613.

138. *Id.* (emphasis in original).

139. *See id.* at 614.

140. *See, e.g.,* *Tanner v. United States*, 483 U.S. 107 (1987).

confused about the meaning of something that materially affected deliberations, then that testimony is barred under traditional 606(b) principles. If, on the other hand, the entire jury is unanimous that the *result* of their deliberations was not accurately reported, particularly in cases such as *Hurd* and *Green* where the jury clearly intended to return a guilty verdict,¹⁴¹ then the court should allow the jury to report its true verdict in the interests of justice. This approach would not create any incentive for parties to influence jurors once trials had concluded because any actual outside influences that affect a juror's mental processes regarding the verdict would still act as a bar on subsequent testimony.

B. Dissecting the Policy Behind 606(b) and the Court's Decision

Public policy concerns permeate Rule 606(b) and its rationale for restricting juror testimony. In Maine, the Law Court has articulated five reasons why public policy prohibits a court from either allowing a jury to impeach its verdict or eliciting any information regarding jury deliberations. The reasons, as stated in *Hurd*, are as follows:

- (1) the need for stability of verdicts; (2) the need to conclude litigation and desire to prevent any prolongation thereof; (3) the need to protect jurors in their communications to fellow jurors made in the confidence of secrecy of the jury room; (4) the need to save jurors harmless from tampering and harassment by disappointed litigants; (5) the need to foreclose jurors from abetting the setting aside of verdicts to which they may have agreed reluctantly in the first place or about which they may in the light of subsequent developments have doubts or a change of attitude.¹⁴²

Many of these policies are implicit in Rule 606(b), particularly the need to prevent third parties from using any post-trial testimony by jurors as grounds for appeal.¹⁴³ This rationale was at the heart of Lord Mansfield's decision, where testimony about the methods behind the jury's verdict was inadmissible.¹⁴⁴ This

141. In *Rushin*, although it is unclear if the entire jury agreed to the "guilty" verdict, it does seem clear that at least one juror did not agree to the "not guilty" verdict based on his failure to assent when the jury was polled. *People v. Rushin*, 194 N.W.2d 718, 719 (Mich. Ct. App. 1971).

142. *State v. Hurd*, 2010 ME 118, ¶ 32, 8 A.3d 651. These policies were originally stated in *Patterson v. Rossignol*, 245 A.2d 852, 857 (Me. 1968), and have been referenced verbatim in subsequent cases. See *Ma v. Bryan*, 2010 ME 55, ¶ 9, 997 A.2d 755; *State v. Watts*, 2006 ME 109, ¶ 16, 907 A.2d 147; *Taylor v. Lapomarda*, 1997 ME 216, ¶ 8, 702 A.2d 685; *Marr v. Shores*, 495 A.2d 1202, 1205 (Me. 1985); *Cyr v. Michaud*, 454 A.2d 1376, 1383 (Me. 1983). Interestingly, the court in *Patterson* seemed to be collecting a number of public policy concerns that other courts had examined. See *Patterson*, 245 A.2d at 857. It did not directly summarize the public policy of Maine nor did it seem to establish a new set of public policies for Maine.

143. See ME. R. EVID. 606(b). See also *supra* Part II. The court in *Watts* incorrectly stated that "the policy considerations set out in *Patterson* are now codified in Rule 606(b)." *Watts*, 2006 ME 109, ¶ 16, 907 A.2d 147. The court in *Cyr* acknowledges that "[t]he rule articulated in *Patterson* is now codified," but does not suggest that broader policy concerns were incorporated into ME. R. EVID. 606(b). *Cyr*, 454 A.2d at 1383 n.3 (citation to footnote only). The Advisory Committee's note on 606(b) indicates that the rule "is in accord with Maine law," citing *Patterson*. ME. R. EVID. 606(b) advisory committee's note. *Patterson* simply "prohibited the use of juror testimony to impeach a verdict." *Cyr*, 454 A.2d. at 1383.

144. See *supra* Part II.A.

principle logically extends to prohibit testimony from jurors who gain more information after the conclusion of the case that clarifies or otherwise changes their perception on a particular issue. However, the policy considerations that apply once a jury has been disbanded should not have the same weight while the jury is still isolated from outside influences.

In *Hurd*, there is no evidence to suggest that the jury was influenced by an outside source between the time it left the courtroom and moments later when it contacted the judge. In fact, the only possible intervening force after the verdict was announced was the outburst in the courtroom. The majority approaches this “disturbance” from two angles. On the one hand, the majority acknowledges that “[t]he jury . . . would have had no way of knowing whether the spectators causing the disturbance were upset . . . or pleased with the verdict.”¹⁴⁵ Despite the fact that the jurors themselves stated that the disturbance had no effect on the verdict,¹⁴⁶ the majority nevertheless asserts that “[t]he Rule 606(b) ban on post-discharge juror impeachment . . . properly prevents reopening accepted verdicts,” especially in this instance where “the trial court perceived that the confusion reflected in the jurors’ faces after the verdict may have been based on fear generated by the outburst.”¹⁴⁷ The policies behind 606(b) primarily focus on actually protecting jurors from harassment or other outside influences once the trial has concluded, that is anything that may cause the jurors to change their minds about the verdict. The policies behind 606(b) do not prevent a judge from considering a juror’s testimony simply because there is a perceived influence, as there was in *Hurd*.¹⁴⁸ In fact, by its language, 606(b) expressly allows a trial judge to consider a juror’s testimony of an external influence, whether or not the judge perceived it.¹⁴⁹

If the jury were not susceptible to outside influences, then the need for stability in verdicts and the need to conclude litigation are the only two remaining policy concerns. However, these two policy concerns are undercut by the language of 606(b), which specifically allows verdicts to be upset and litigation prolonged when an outside influence affects jury deliberations.¹⁵⁰ Additionally, even for cases not explicitly covered by 606(b), such as those raising questions of racism, the Constitution’s protection of a fair trial could trump any other concerns.¹⁵¹ Furthermore, if the reverse situation had occurred in *Hurd*, and the jury had returned a guilty verdict and then immediately notified the judge that the intended verdict was not guilty, then the Constitution, irrespective of 606(b), may have required the judge to consider the jury’s statements.

145. *Hurd*, 2010 ME 118, ¶ 19 n.6, 8 A.3d 651 (citation to footnote only).

146. *Id.* ¶ 49 (Jabar, J., dissenting).

147. *Id.* ¶ 43 (majority opinion).

148. Naturally, some cases carry a high presumption of undue influence, such as when a jury has been discharged and allowed to reintegrate with the public. *See supra* Part IV.A. However, this is not applicable where the jury would be able to testify as to the effect of the courtroom outburst, as it was in *Hurd*. *See Hurd*, 2010 ME 118, ¶ 43, 8 A.3d 651.

149. ME. R. EVID. 606(b).

150. *See supra* Part II.

151. *See, e.g.*, Andrew C. Helman, Comment, *Racism, Juries, and Justice: Addressing Post-Verdict Juror Testimony of Racial Prejudice During Deliberations*, 62 ME. L. REV. 327 (2010). *See also* United States v. Villar, 586 F.3d 76, 87-88 (1st Cir. 2009) (holding that the Fifth and Sixth Amendments trump the Rules of Evidence and give a judge discretion in cases of racial bias).

This precise issue was dealt with in the New York case *People v. Addison*,¹⁵² where a jury returned a verdict of not guilty on two of three counts but guilty on the third.¹⁵³ When the jury was questioned moments after discharge, it was clear that they misunderstood the underlying law behind the third count.¹⁵⁴ The trial court “would [have] set aside this verdict as a matter of discretion in the interest of justice,” but ultimately felt bound to the doctrine that a jury was not allowed to impeach its verdict.¹⁵⁵ On appeal, the court reversed, “in the interest of justice, because the *unprompted* statements of the jurors, made almost immediately after the verdict was rendered, clearly establish that the verdict was a product of mistake.”¹⁵⁶ Rule 606(b) protects jurors from outside influences after the trial is concluded. The rule was not intended to protect the jury from itself. The policies underlying 606(b) are not offended by the rare case as in *Addison* or *Hurd* where a unanimous, unprompted jury attempts to report its true verdict.

C. Not-so-hidden Messages from the Court

The majority’s unwillingness to overrule the prior case law and affirm the lower court’s ruling in *Hurd* may have partially stemmed from a number of unfavorable procedural facts. Aside from its discussion on 606(b), the majority admonished (albeit subtly) the trial court and the lawyers for mishandling several key aspects of the case. First, the jury instruction on accomplice liability was worded extremely poorly. It instructed the jury that “if you find that the State has failed to prove . . . beyond a reasonable doubt all three of the elements of aggravated OUI . . . you must then consider if the State has proven beyond a reasonable doubt the defendant’s guilt as an accomplice to aggravated OUI.”¹⁵⁷ This instruction plausibly, and in fact probably, suggested that the jury must first consider principal liability and then, if necessary, consider accomplice liability. However, there was only one charge for aggravated OUI that could have been proved through *either* theory of liability or combination thereof.¹⁵⁸ If the State had clarified its instruction on accomplice liability or else asked for an additional instruction on how the jury could consider different theories of liability, it is very likely that the jury would have simply returned a verdict of guilty on the aggravated OUI charge.

Second, no party asked for the jury to report its findings on a verdict form. The majority noted that “[u]se of written verdict forms is good practice when more than one charge is at issue in a criminal trial and there is *any* concern that a jury might possibly be confused in reporting a verdict.”¹⁵⁹ Of course, there is *always*

152. 667 N.Y.S.2d 208 (N.Y. Sup. Ct. 1997).

153. *Id.* at 209.

154. *Id.* at 209-10.

155. *Id.* at 211.

156. *People v. Addison*, 685 N.Y.S.2d 614, 614 (N.Y. App. Div. 1999) (emphasis added).

157. *State v. Hurd*, 2010 ME 118, ¶ 15, 8 A.3d 651.

158. *Id.* ¶ 17. *See also* *State v. Stratton*, 591 A.2d 246, 247-48 (Me. 1991) (discussing that a charge may be proved through either or both types of liability).

159. *Hurd*, 2010 ME 118, ¶ 19 n.7, 8 A.3d 651 (emphasis added) (citation to footnote only). Regarding verdict forms, the federal rules specifically allow jurors to testify as to “whether there was a mistake in entering the verdict onto the verdict form.” FED. R. EVID. 606(b). This illustrates the

some potential for jury confusion,¹⁶⁰ so it follows that it is *always* a good practice to use a verdict form whenever there are multiple charges, especially in criminal trials where the State only gets one shot at a conviction. In this case, if there were a verdict form listing the two charges of manslaughter and aggravated OUI, then the jury would have been alerted that there were not three charges and certainly would have asked for clarification on the distinction between principal and accomplice liability. Once the jury fully understood the charges it was voting on, it is very likely the jury would have returned a verdict guilty of aggravated OUI.

Third, the State had the opportunity to poll the jury after the verdict was announced but failed to do so.¹⁶¹ Maine Rule of Criminal Procedure 31(c) requires that “the jury *shall be polled* at the request of any party or upon the court’s own motion.”¹⁶² Again, there is always some potential for jury confusion, even though it may not be apparent to all parties at the time the verdict is announced. Similar to the verdict form, it would be a best practice to always poll the jury, particularly in criminal cases when the jury looks confused. If the jury had been polled in this case, it would have increased the chances that at least one juror would have spoken to the third charge they voted on and returned a verdict guilty of aggravated OUI.

V. CONCLUSION

Protecting jurors from intimidation or harassment after the conclusion of a case is one of the historical rationales behind 606(b). However, 606(b) specifically authorizes a court to investigate how outside influences may have affected jury deliberations during trial.¹⁶³ Courts have expanded their interpretations of 606(b) to *only* allow jurors to testify if the testimony relates to outside influences on jury deliberations. However, the Rules of Evidence plainly allow a juror to testify on an objective fact occurring outside deliberations, such as reporting whether the jury reached a verdict of guilty or not guilty. For example, in Maine, Rule 601(a) states that “[e]very person is competent to be a witness except as otherwise provided in these rules.”¹⁶⁴ Two exceptions prevent a juror from testifying: one, at the trial in which they are a juror;¹⁶⁵ and two, about the deliberations themselves or anything affecting a juror’s state of mind during deliberations.¹⁶⁶ Other than that, the Rules of Evidence do not prohibit juror testimony on events that occur outside deliberations.¹⁶⁷ The Rules of Evidence do not prohibit juror testimony on the

importance of allowing a jury to fully and accurately report its verdict. Maine has not yet adopted this improvement. See ME. R. EVID. 606(b).

160. Particularly when there is a complicated jury instruction, the potential for confusion is high. See John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187 (2002), for several suggestions on improving the jury instruction process.

161. *Hurd*, 2010 ME 118, ¶ 44 n.13, 8 A.3d 651 (citation to footnote only).

162. ME. R. CRIM. P. 31(c) (emphasis added).

163. See, e.g., ME. R. EVID. 606(b).

164. ME. R. EVID. 601(a).

165. ME. R. EVID. 606(a).

166. ME. R. EVID. 606(b).

167. The tension in *Hurd* was whether the jury was attempting to impeach its verdict for aggravated OUI or report a separate verdict for accomplice liability (even though it was not a separate charge). See *supra* Part III.

objective finding of “guilty” or “not guilty.” Although courts have found other reasons to prevent jurors from testifying, these reasons are simply unsupported by the plain language of the Rules.

The Law Court’s primary focus seems to be on judicial economy when interpreting 606(b), rather than justice. The artificial “discharge” time point has no bearing on the jury itself and completely ignores the entire history behind 606(b), which was intended to prohibit subjective but not objective inquiries of jurors. The public policy concerns of protecting jurors from outside influence are not implicated when a jury acts *sua sponte* to correct its own verdict nearly immediately after leaving the courtroom. Cases in Maine have consistently overstated the need to uphold public policy in 606(b) cases, and this has led to the contorted ruling present in *Hurd*. The issue of discharge has *never* been about magic words from the court but rather a distinct separation from the courtroom, i.e. days after the verdict.

The facts as presented in *Hurd* (and in *Taylor*) of a jury attempting to correct its own verdict moments after leaving the courtroom and before it had reintegrated with the general public present a challenge for 606(b). Although this bright line rule prohibiting all juror testimony to impeach a verdict has sound basis in public policy, this rule has less support within the text itself for the unique situation presented in *Hurd*. As the Law Court has articulated so eloquently: “Although it is the policy of the courts to abide by precedent and not to disturb a settled point, the doctrine of *stare decisis* does not require a mechanical formula of adherence to the latest decision.”¹⁶⁸ The limited exception suggested in this Note would not fundamentally undermine the rationales behind 606(b) nor would it cause an upheaval in the settled law. As such, the Law Court should consider overruling the holdings in *Taylor* and *Hurd* and create a very limited exception allowing a unanimous, unseparated jury to fully report its verdict, even if the court has uttered the word “discharge.”¹⁶⁹

168. *Eaton v. Town of Wells*, 2000 ME 176, ¶ 53, 760 A.2d 232 (Saufley, J., concurring) (quotation marks omitted) (quoting *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 935 (Me. 1982)). Justice Jabar also notes this principle in his dissent in *Hurd*. See *State v. Hurd*, 2010 ME 118, ¶ 59, 8 A.3d 651 (Jabar, J., dissenting).

169. Although this author believes that *Taylor* and *Hurd* should be governed by the same principle, Maine Rule of Evidence 606(b) does not allow corrections of mistakes in verdict forms. If the cases must be distinguished, then whether a jury calculated damages correctly, as in *Taylor*, comes too close to inquiring about the mental processes of jurors during deliberations (how did they arrive at the final number?) in violation of 606(b). In contrast, if a jury merely wants to report the results of its deliberations, as in *Hurd*, then hearing the jury’s complete verdict does not offend 606(b).

