JURY MISCONDUCT
WHAT HAPPENS BEHIND CLOSED DOORS

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INTRODUCTION

It was not exactly a summer vacation for Anthony Tanner or William Conover as they sat in the Florida courtroom. Tanner and Conover had been indicted on charges of mail fraud and conspiracy to defraud the federal government, endured a six-week trial, and were convicted by a federal jury.[1] Prior to being sentenced and in an attempt to obtain a new trial, they submitted the affidavits of two jurors, which described a jury gone wild.[2] According to the affidavits, jurors regularly drank alcohol, smoked marijuana, and snorted cocaine during lunch and recesses.[3] One of the jurors described himself as "flying" during the trial.[4] Another juror stated that he "felt like . . . the jury was on one big party."[5] Despite the juror misconduct, the United States Supreme Court barred the use of the juror

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1. Tanner v. United States, 483 U.S. 107, 110 (1987).
2. *Id.* at 115–16.
3. *Id.*
4. *Id.* at 116.
5. *Id.* at 115.

affidavits to invalidate the verdict. The Court did not consider alcohol or drugs as an "outside influence . . . improperly brought to bear upon any juror" under Rule 606(b) of the Federal Rules of Evidence.[6] The Court upheld the convictions of Tanner and Conover, and they served time in prison.[7] Today, *Tanner v. United States*, remains one of the most publicized and controversial decisions ever rendered in the area of juror misconduct. The *Tanner* opinion is an extreme example of juror misconduct.[8] Yet, the Court's finding is consistent with the common law rule since the time of Lord Mansfield that jurors may not testify to invalidate their own verdict. The rule has been codified through both Federal and Alabama Rules of Evidence 606(b), which state that jurors may only testify as to "extraneous prejudicial information" brought to their attention and "whether any outside influence was improperly brought to bear upon any juror."[9] While not a frequent issue, those occasions when juror misconduct occurs are often the result of: (1) juror experiments; (2) unauthorized juror field trips; (3) other independent juror research (e.g., looking up legal terms in the dictionary, visiting the public library, etc.); (4) juror use

6. *Id.* at 120 (quoting FED. R. EVID. 606(b)).

7. *Id.* at 127–28.

8. The day before petitioners were scheduled to be sentenced, petitioners filed a motion seeking a continuance of the sentencing date, permission to interview jurors, an evidentiary hearing, and a new trial. *Id.* at 113. An affidavit filed with the motion stated that one of the jurors called Tanner's attorney and informed him that "several of the jurors consumed alcohol during the lunch breaks at various times throughout the trial, causing them to sleep through the afternoons." *Id.* The district court continued the sentencing date and heard argument on the motion to interview jurors but ultimately decided to deny the petitioners' motions. *Id.* at 113–15. Petitioners filed another motion for a new trial based on additional evidence of juror misconduct. *Id.* at 115. Petitioners then submitted an affidavit stating that Tanner's attorney received an unsolicited visit from a second juror who provided a sworn statement describing the jury's use of alcohol, marijuana, and cocaine during the trial. *Id.* at 115–16. The district court denied petitioners' second motion for new trial, and the United States Court of Appeals for the Eleventh Circuit affirmed the trial court's decision deny petitioners' motions. *Id.* at 116.

The United States Supreme Court granted certiorari "to consider whether the District Court was required to hold an evidentiary hearing, including juror testimony, on juror alcohol and drug use during the trial." *Id.* Petitioners argued that contrary to the holdings of the district court and Eleventh Circuit, an evidentiary hearing including juror testimony on drug and alcohol use was compelled by their Sixth Amendment right to trial by a competent jury. *Id.* at 116–17. The United States Supreme Court looked at the legislative history of Federal Rule of Evidence 606(b), which demonstrates that Congress specifically considered and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations, including juror intoxication, and held that "juror intoxication is not an 'outside influence' about which jurors may testify to impeach their verdict." *Id.* at 125. The United States Supreme Court also rejected petitioners' argument that the district court's failure to hold an evidentiary hearing, including juror testimony on alleged drug and alcohol use by jurors during the trial, violated petitioners' Sixth Amendment right to a fair trial before an impartial and competent jury. *Id.* at 126–27. The Court held that "Petitioners' Sixth Amendment interests in an unimpaired jury . . . are protected by several aspects of the trial process," including voir dire, the fact that the pre-verdict conduct of the jurors was "observable by the court, by counsel, . . . by court personnel," and by other jurors, and the trial court's allowance of a post-trial evidentiary hearing to impeach the verdict by non-juror evidence of juror misconduct. *Id.* at 127. Ultimately, the Court affirmed the decisions of the district court and Eleventh Circuit in holding that "an additional postverdict evidentiary hearing was unnecessary." *Id.*

9. FED. R. EVID. 606(b); ALA. R. EVID. 606(b).

of alcohol and/or drugs; (5) improper discussions among jurors during trial and deliberations; and (6) juror use of electronic media, such as e-mail and the Internet. Those situations do not just taint a verdict but may be grounds for a new trial.[10]

I. ALABAMA RULE OF EVIDENCE 606(b)

Alabama Rule of Evidence 606(b) codifies the common law presumption that jurors may not testify to invalidate their own verdict. Rule 606(b) states as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, *except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror*. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. Nothing herein precludes a juror from testifying in support of a verdict or indictment.[11]

Rule 606(b) preserves Alabama's preexisting rule that a "jury's verdict may not be impeached by the testimony of the jurors regarding matters that transpired during the deliberations."[12] The rule prohibits jurors from testifying regarding:

> (1) any matter or statement arising during the deliberations of the jury, (2) anything upon their or any juror's mind or emotions that may have been influential in assenting to or dissenting from the

10. *See, e.g.*, Jimmy Day Plumbing & Heating, Inc. v. Smith, 964 So. 2d 1, 8–9 (Ala. 2007) (improper consideration of extraneous information); *Ex parte* Thomas, 666 So. 2d 855, 857–58 (Ala. 1995) (improper juror experiment); *Ex parte* Potter, 661 So. 2d 260, 262 (Ala. 1994) (unauthorized juror field trip); Nichols v. Seaboard Coastline Ry. Co., 341 So. 2d 671, 675 (Ala. 1976) (improper independent juror research); Ala. Lumber Co. v. Cross, 44 So. 563, 564 (Ala. 1907) (juror intoxication); 1 ALA. PATTERN JURY INSTR. CIV. § 1.24 (2d ed 2009).

11. ALA. R. EVID. 606(b) (emphasis added).

12. ALA. R. EVID. 606(b) advisory committee's note (citing Carpenter v. State, 400 So. 2d 417, 426 (Ala. Crim. App. 1981); Fox v. State, 269 So. 2d 917, 919–20 (Ala. Crim. App. 1972)).

> verdict or indictment, or (3) their own mental processes through which they arrived at the verdict or indictment.[13]

Under Rule 606(b), there are only two situations where jurors may testify to invalidate a verdict. "A juror may testify regarding (1) any extraneous, prejudicial information that was brought improperly to the attention of the jury or (2) any outside influence brought to bear upon any juror."[14]

The text of Federal Rule of Evidence 606(b) is nearly identical to that of Alabama Rule of Evidence 606(b).[15] However, many federal courts have prohibited jurors from testifying about whether or not the extraneous information affected the verdict.[16] Rather, these federal courts have held that "the judge must decide, based only on the objective facts, whether probable prejudice occurred."[17] However, under Alabama law, "jurors are not limited to testifying merely that extraneous information was brought before them but also may testify as to whether they were influenced by the extraneous information."[18]

II. ALABAMA CASE LAW

A. Juror Experiments

The Alabama Supreme Court has ruled that improper experiments conducted by jurors may constitute grounds for a new trial.[19] In *Ex parte Thomas*, the defendant was charged with disorderly conduct and possession of cocaine.[20] The cocaine possession charge arose when two small bags of cocaine were found under the back seat of the police car used to transport the defendant.[21] The defendant denied possession of the cocaine and further claimed he was handcuffed and could not have hidden the drugs.[22] During deliberations, the jurors asked the judge for a pair of handcuffs to determine if the handcuffs could affect a person's mobility.[23] The judge denied the request and told the jury that such experiments were improper.[24] Despite the judge's instructions, a member of the jury put on

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13. ALA. R. EVID. 606(b) advisory committee's note.
14. *Id.*
15. *Compare* FED. R. EVID. 606(b), *with* ALA. R. EVID. 606(b).
16. *See, e.g.*, United States v. Howard, 506 F.2d 865 (5th Cir. 1975).
17. ALA. R. EVID. 606(b) advisory committee's note (citing *Howard*, 506 F.2d at 869).
18. ALA. R. EVID. 606(b) advisory committee's note (citing Whitten v. Allstate Ins. Co., 447 So. 2d 655, 657–59 (Ala. 1984)).
19. *See Ex parte* Thomas, 666 So. 2d 855, 857–58 (Ala. 1995); *Ex parte* Lasley, 505 So. 2d 1263, 1264 (Ala. 1987).
20. *Thomas*, 666 So. 2d at 856.
21. *Id.* at 857.
22. *See id.*
23. *Id.*
24. *Id.*

the pants that the defendant had been wearing at the time of his arrest, had another juror bind his hands behind him with a cord, and thereafter was able to reach into his pockets.[25] The jury convicted the defendant.[26] The experiment was exposed when "[o]ne juror executed an affidavit saying that she had based her decision in part on the experiment."[27] The court held the experiment constituted reversible error because it introduced new evidence "crucial in resolving a key material issue"[28] into the case (i.e., whether the defendant was physically capable of removing the cocaine from his pocket) and the experiment clearly affected the verdict.[29]

In *Ex parte Lasley*, the defendant was charged with two counts of first degree assault for allegedly holding two young children in scalding water until they were severely burned.[30] The defendant claimed that he was giving the children a bath, left them in the water while answering a knock at the door, and returned to find them in scalding hot water.[31] During the trial, three jurors conducted separate home experiments to test the defendant's theory by running hot water in the bath tub and checking the water temperature at different levels and time intervals.[32] One of the jurors also consulted a law book to better understand certain legal terms and concepts.[33] The jury convicted the defendant, and the defendant appealed on the grounds that the experiments were improper.[34] The court set forth the following standard to determine whether juror misconduct requires a new trial: "The test of vitiating influence is not that it did influence a member of the jury to act without the evidence, but that it *might* have unlawfully influenced that juror and others with whom he deliberated, and *might* have unlawfully influenced its verdict rendered."[35] The court held the combination of home experiments conducted by three jurors and the consultation of law books by one juror might have influenced the jury, and therefore, the court granted the defendant a new trial.[36]

There have been situations, however, where a juror's experiment was not necessarily cause for a new trial. Alabama courts have ruled that juror

25. *Id.* at 858.
26. *Id.* at 856.
27. *Id.* at 858.
28. *Id.* (The court stated that juror misconduct constituting reversible error includes those instances where the extraneous facts did not necessarily change the decision of the jurors but where the jury's considering them was "crucial in resolving a key material issue." (citing Hallmark v. Allison, 451 So. 2d 270, 271 (Ala. 1984))).
29. *Id.* (Under Alabama law, "[j]uror misconduct will justify a new trial when . . . the misconduct affected the verdict, or when from the extraneous facts prejudice may be presumed as a matter of law." (citing Whitten v. Allstate Ins. Co., 447 So. 2d 655, 658 (Ala. 1984))).
30. *Ex parte* Lasley, 505 So. 2d 1263, 1264 (Ala. 1987).
31. *Id.*
32. *Id.*
33. *Id.*
34. *See id.* at 1263–64.
35. *Id.* at 1264 (citing Roan v. State, 143 So. 454, 460 (Ala. 1932) (emphasis added)).
36. *Id.*

experiments do not constitute reversible grounds when there is insufficient evidence of prejudice.[37] In *Ex parte Reed*, the defendant was charged with the sale of cocaine to an undercover police officer.[38] At trial, a second police officer testified that he witnessed the transaction from inside a nearby van with tinted windows.[39] During an overnight recess, one juror looked out the tinted windows of her own van to test the credibility of the police officer's testimony.[40] The results of the experiment were consistent with the police officer's testimony.[41] The defendant was convicted, and thereafter, filed a motion for a new trial based on an affidavit from the juror who conducted the experiment.[42] The court observed that juror experiments "constitute[] juror misconduct because [they] inherently result[] in the introduction of facts, whether consistent or inconsistent with the evidence already before the jury, that have not been subject to the rules of evidence or to cross-examination by either party."[43] However, the court went on to say that "not every instance of juror misconduct warrants a new trial"[44] and that the conduct only requires a reversal "when found to be prejudicial."[45] In affirming the conviction, the court noted the juror did not tell any other jurors about her experiment until after the verdict had been reached, and the juror testified the experiment did not affect her vote.[46] Therefore, the court ruled that the defendant failed to make the requisite showing of prejudice and denied the motion for new trial.[47] In its opinion, the court distinguished the case from *Ex parte Lasley* because the facts of the experiment were *not* communicated to other jurors before the verdict was rendered, whereas they were communicated before the rendering of the verdict in *Lasley*.[48]

There are no hard guidelines in Alabama with regard to juror experiments. However, case law suggests that the court is much more likely to invalidate a verdict based on a juror experiment if the juror shared the results of the experiment with other jurors before the verdict was rendered.

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37. *See Ex parte* Reed, 547 So. 2d 596, 597 (Ala. 1989); Allen v. State, 494 So. 2d 777, 785 (Ala. Crim. App. 1985).
38. *Reed*, 547 So. 2d at 597.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* (citing *Ex parte* Lasley, 505 So. 2d 1263, 1264 (Ala. 1987)).
44. *Id.* (citing *Lasley*, 505 So. 2d at 1264).
45. *Id.* (citing Bell v. State, 149 So. 687, 689 (Ala. 1933)).
46. *Id.* at 598.
47. *Id.*
48. *Id.* at 598 n.2.

B. Unauthorized Juror Field Trips

Alabama courts have ruled that unauthorized juror field trips may constitute grounds for a new trial.[49] In *Ex parte Potter*, the defendant was charged with criminally negligent homicide based on his striking and killing a pedestrian while driving his vehicle under the influence of alcohol.[50] The defendant testified the accident was unavoidable because a second car pulled out in front of him, causing him to veer off the side of the road and hit the victim.[51] During a recess, several different jurors visited the accident scene to determine the width of the road.[52] The jurors reported their findings to the other jurors once deliberations resumed.[53] The defendant was convicted, and he filed a motion for new trial based on the juror misconduct.[54] The Alabama Court of Criminal Appeals upheld the conviction, holding that the field trip did not affect the verdict since (1) the jurors testified that it did not affect their verdict and (2) the width of the road was not a disputed, material issue in the case.[55] However, the Alabama Supreme Court disagreed and granted the defendant a new trial.[56] The court reiterated that juror misconduct requires granting a new trial if the misconduct "might have" unlawfully influenced a juror or the verdict rendered.[57] The court held that, despite the jurors' testimony that the information they learned about the width of the street did not affect their verdict, it was apparent that "the jurors viewed the street at most to help them resolve questions of fact or at least to help them understand better the evidence adduced at trial."[58] Therefore, the court, in granting a new trial, held that the field trip "might have" affected the verdict.[59]

In *Crowell v. City of Montgomery*, the defendant was charged with driving under the influence of alcohol.[60] The condition of the road surface

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49. *See Ex parte* Potter, 661 So. 2d 260, 262 (Ala. 1994); Whitten v. Allstate Ins. Co., 447 So. 2d 655, 661 (Ala. 1984); Williams v. State, 570 So. 2d 884, 887 (Ala. Crim. App. 1990); Crowell v. City of Montgomery, 581 So. 2d 1130, 1133 (Ala. Crim. App. 1990).
50. *Potter*, 661 So. 2d at 260.
51. *Id.* at 261.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 262.
57. *Id.* at 261.
58. *Id.* at 262.
59. *Id. See also* Whitten v. Allstate Ins. Co., 447 So. 2d 655, 661 (Ala. 1984) (holding an unauthorized visit to the accident scene by at least two jurors in an uninsured motorist trial constituted grounds for a new trial when the evidence was undisputed that two jurors changed their decisions about the case based on the visit and the discussions about it); Williams v. State, 570 So. 2d 884, 887 (Ala. Crim. App. 1990) (holding an unauthorized visit to the crime scene by a juror in an attempted murder trial constituted grounds for a new trial when the juror discussed what she observed with other jurors and admitted her viewing the crime scene influenced her decision about the case).
60. Crowell v. City of Montgomery, 581 So. 2d 1130, 1131 (Ala. Crim. App. 1990).

was a contested fact at the trial.[61] During trial, one juror drove down the road because she "kind of wanted to see what the road was like. [She] knew at one time it had been torn up."[62] After learning of the juror's unauthorized field trip, the trial court allowed her to remain on the jury, and the defendant was convicted.[63] On appeal, the Alabama Court of Criminal Appeals set forth the following standard to determine whether a juror's unauthorized field trip is grounds for a new trial:

> A new trial should ordinarily be granted when jurors, without the authority of the court or consent of the parties, have examined or inspected a place or thing which is the subject of conflicting evidence. That the juror was actually influenced by the examination or inspection need not be shown. It is sufficient that he may have been so influenced.[64]

The juror admitted that she drove down the road to "resolv[e] the material conflict between the arresting officer's testimony and appellant's testimony on the condition of [the road] and its effect on a driver."[65] The juror testified that she did not discuss her unauthorized visit with any other jurors and that it would not have impacted her decision.[66] However, the court reversed the conviction and granted a new trial.[67] Specifically, the court disregarded the juror's testimony that the information she learned during the unauthorized visit would not affect her decision, holding that "[t]he jurors cannot in every case determine the question of whether they were, or might have been, improperly influenced."[68]

Alabama courts have held that unauthorized juror field trips do not constitute grounds for a new trial when there is insufficient evidence of prejudice.[69] In *Dawson v. State*, the defendant was convicted of distributing a controlled substance.[70] The charges were based upon the defendant allegedly selling drugs to an undercover police officer at an apartment

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61. *Id.* at 1132.
62. *Id.*
63. *Id.*
64. *Id.* at 1133 (quoting Arrington v. State, 123 So. 99, 101 (Ala. 1929)).
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* (quoting *Ex parte* Lasley, 505 So. 2d 1263, 1264 (Ala. 1987)). Unlike the Alabama Court of Criminal Appeals in *Crowell*, the Alabama Supreme Court in *Ex parte Reed*, in denying the defendant's motion for a new trial, did give consideration to the fact that a juror who conducted an unauthorized experiment did not tell any other jurors about her experiment until after the verdict had been reached and testified that the experiment did not affect her vote. *See Ex parte* Reed, 547 So. 2d 596, 598 (Ala. 1989).
69. *See* Dawson v. State, 710 So. 2d 472, 476 (Ala. 1997); Reynolds v. City of Birmingham, 723 So. 2d 822, 826 (Ala. Crim. App. 1998).
70. *Dawson*, 710 So. 2d at 473.

complex.[71] A second officer testified that from his stake-out position, he was able to see the defendant leave an apartment in the complex and drive off.[72] During the trial, a juror went to the apartment complex, parked his vehicle in the same place where the officer's stake-out vehicle was parked, and attempted to discern whether the officer would have been able to identify the defendant leaving the apartment.[73] As a result of this unauthorized visit by a juror to the crime scene, the defendant moved for a new trial.[74] The juror testified that his visit to the crime scene did not affect his decision in the case.[75] According to members of the jury, the juror who visited the crime scene reported the officer's stake-out location would not have permitted him to see the defendant leave the apartment.[76] The Alabama Court of Criminal Appeals reversed the defendant's conviction, holding the juror's unauthorized trip to the crime scene "might have affected" the verdict.[77] However, the Alabama Supreme Court reversed the Court of Criminal Appeals and reinstated the conviction.[78] The court opined that "presumption of prejudice as a matter of law has generally been restricted to cases in which the jury's consideration of the extraneous facts was 'crucial in resolving a key material issue in the case.'"[79] The court held the field trip was not essential to resolving a key issue in the case for two reasons: (1) regardless of whether the officer was able to see the defendant leave the apartment from his stake-out position, the undercover officer who bought the drugs from the defendant was able to positively identify him; and (2) the knowledge gleaned from the experiment (that the officer could not have identified the defendant from his stake-out position) actually benefitted the defendant rather than prejudicing him.[80] Therefore, the court affirmed the conviction, holding that the unauthorized trip could not have caused the defendant any prejudice.[81]

Under Alabama law, a verdict should be invalidated based on an unauthorized juror field trip if the juror visits a place which is the subject of conflicting evidence or if the field trip is crucial in resolving a key issue in the case. Furthermore, as long as the appealing party can show that it was

71. *Id.*
72. *Id.*
73. *Id.* at 473–74.
74. *Id.* at 473.
75. *Id.* at 474.
76. *Id.*
77. *Id.* at 475.
78. *Id.* at 474–75.
79. *Id.* at 475 (quoting Hallmark v. Allison, 451 So. 2d 270, 271 (Ala. 1984)).
80. *Id.* at 475–76.
81. *Id.* at 476. *See also* Reynolds v. City of Birmingham, 723 So. 2d 822, 826 (Ala. Crim. App. 1998) (holding that a juror's unauthorized visit to the crime scene did not warrant reversal of the defendant's conviction for public intoxication and disorderly conduct when all the jurors stated that they based their decision on the testimony of the witnesses presented at trial rather than any statements made by the investigating juror).

prejudiced by an unauthorized field trip, the trip may constitute grounds for a new trial even when the offending juror does not discuss the trip with other jurors and testifies that the trip did not impact his decision.

C. Reliance Upon Outside Written Materials

The Alabama Supreme Court has ruled that jurors' reference to resources such as a dictionary, encyclopedia, or law book constitutes grounds for a new trial.[82] In *Nichols v. Seaboard Coastline Railway Company*, a wrongful death case, the trial court gave lengthy jury instructions at the close of the evidence and defined legal terms, including negligence, contributory negligence, subsequent negligence, subsequent contributory negligence, and wantonness.[83] During deliberation, the jurors asked the trial judge for clarification on the definition of negligence.[84] The trial judge declined, stating that "it would be improper to rehash what has already been given."[85] The next day, one of the jurors revealed definitions to the terms "negligence, contributory negligence, subsequent negligence, and subsequent contributory negligence" that he had looked up in an encyclopedia.[86] The juror also told the other members of the panel that "if both parties contributed to the fault of the accident, the jury could not find against the defendants."[87] The jury found for the defendant, and the plaintiff appealed on the grounds of juror misconduct.[88] The Alabama Supreme Court recognized that "[d]efinitions of legal terms and concepts . . . from general reference books . . . are *extraneous* matters and fall within the exception to the general rule" forbidding jurors from impeaching their own verdict.[89] In granting a new trial, the court expressly condemned "the use of *any* source, beyond the court itself, for instructions on the law of the case."[90]

In *Nowogorski v. Ford Motor Company*, a wrongful death case arising out of a tractor accident, the plaintiff was required to prove five elements to recover under the Alabama Extended Manufacturer's Liability Doctrine (AEMLD), including that the tractor was "defective."[91] During deliberations, one juror brought a dictionary into the jury room and read the defi-

82. *See* Nowogorski v. Ford Motor Co., 579 So. 2d 586, 590 (Ala. 1990); *Ex parte* Lasley, 505 So. 2d 1263, 1264 (Ala. 1987); Nichols v. Seaboard Coastline Ry. Co., 341 So. 2d 671, 675 (Ala. 1976); McCray v. State, 565 So. 2d 673, 675 (Ala. Crim. App. 1990).
83. *Nichols*, 341 So. 2d at 672.
84. *Id.*
85. *Id.*
86. *Id.* at 673.
87. *Id.*
88. *Id.*
89. *Id.* (citing Weekley v. Horn, 82 So. 2d 341 (Ala. 1955)).
90. *Id.* at 676.
91. Nowogorski v. Ford Motor Co., 579 So. 2d 586, 588 (Ala. 1990).

nition of at least one word to the other jurors.[92] The jury found in favor of the defendant, and the plaintiff filed a motion for a new trial based on juror misconduct.[93] In support of plaintiff's motion for new trial, one juror signed an affidavit stating that hearing the definition of the word "defective" swayed him in favor of the defendant.[94] However, the trial court denied plaintiff's motion for new trial, and plaintiff appealed to the Alabama Supreme Court.[95] The court stated that "[i]n each of the cases in which we have held that the trial court erred in failing to grant a new trial, there has been a common factor—*the existence of juror misconduct that could have affected the verdict*."[96] Since "at least one juror testified that his decision about the case was influenced by the extraneous dictionary definitions to be 'more in favor' of Ford than in favor of the plaintiff," the court reversed and granted the plaintiff a new trial.[97] The court held that the use of any source beyond the court for instructions on the law "clearly falls within the category of one of those bells which the law recognizes cannot be unrung."[98]

The Alabama Supreme Court has held that unauthorized juror research in the form of a juror reviewing a medical textbook during deliberations constitutes grounds for a new trial.[99] In *Ex parte Arthur*, the driver and passenger of a van filed suit following an automobile accident.[100] The defendant admitted liability, and the parties tried the case on the matter of damages.[101] One of the plaintiffs alleged that her migraine headaches had become more frequent since the accident.[102] During jury deliberations, a juror consulted a medical textbook for the causes of migraine headaches "so that he could compare this information with the evidence presented at trial."[103] The juror told the rest of the panel that "his medical research had revealed that migraine headaches are caused not only by accident impacts,

92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 589 (citing Hallmark v. Allison, 451 So. 2d 270 (Ala. 1984); Nichols v. Seaboard Coastline Ry. Co., 341 So. 2d 671 (Ala. 1976)).
97. *Id.* at 590.
98. *Id.* (quoting *Nichols*, 341 So. 2d at 676). *See also Ex parte* Lasley, 505 So. 2d 1263, 1264 (Ala. 1987) (holding that the combination of home experiments conducted by three jurors and the consultation of law books by one juror might have influenced the jury and therefore, the Court granted the defendant a new trial); McCray v. State, 565 So. 2d 673, 674 (Ala. Crim. App. 1990) (granting a new trial to the defendant who had been charged with kidnapping and assault when the jury's verdict might have been affected by the fact that some jurors read portions of the Alabama pattern jury instructions during deliberations).
99. *Ex parte* Arthur, 835 So. 2d 981, 985–86 (Ala. 2002).
100. *Id.* at 982.
101. *Id.*
102. *Id.*
103. *Id.* at 984.

but also by other means and through other causes."[104] After the jury returned a verdict awarding the plaintiffs substantially less than the amount of their medical expenses, plaintiffs sought a new trial on the grounds of juror misconduct.[105] In support of their motion, plaintiffs presented an affidavit signed by one juror stating that the juror who conducted the medical research told the rest of the jury that he "'was agreeable to paying all the medical bills' before he did the research, but that afterward, 'he agreed with the position that the medical bills should not be paid.'"[106] The trial court denied the plaintiffs' motion for a new trial, and plaintiffs appealed.[107] The Alabama Supreme Court granted one of the plaintiffs (the plaintiff with the migraine headaches) a new trial, holding the medical research was prejudicial as a matter of law since it was "'not the type of common knowledge we expect jurors to bring to deliberations,' and it 'was crucial in resolving a key material issue in the case'" (i.e., plaintiffs' damages).[108]

Alabama courts have held that independent juror research during deliberations does not constitute grounds for a new trial when there is insufficient evidence of prejudice.[109] In *Ex parte Apicella*, a juror spoke with an attorney friend about the law of complicity as it related to a charge of capital murder.[110] The defendant was convicted and filed a motion for new trial based in part on the juror misconduct issue.[111] The juror testified the conversation lasted about two and a half minutes, was very general in nature, and did not enter his thoughts during deliberations.[112] The Alabama Supreme Court observed that:

> Generally, under Alabama law, juror misconduct involving the introduction of extraneous materials warrants a new trial when one of two requirements is met: 1) the jury verdict is shown to have been actually prejudiced by the extraneous material; or 2) the extraneous material is of such a nature as to constitute prejudice as a matter of law.[113]

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104. *Id.* at 984–85.
105. *Id.* at 983.
106. *Id.*
107. *Id.*
108. *Id.* at 985 (citations omitted).
109. *See Ex parte* Apicella, 809 So. 2d 865, 870–72 (Ala. 2001); Knight v. State, 710 So. 2d 511, 516–17 (Ala. Crim. App. 1997).
110. *Apicella*, 809 So. 2d at 870.
111. *Id.* at 868.
112. *Id.* at 870.
113. *Id.* (citation omitted).

However, the court stated that "mere exposure to [a] definition does not require a new trial as a matter of law."[114] The court affirmed the trial court's denial of the motion for new trial since there was no evidence that the juror's conversation with an attorney regarding the law of complicity influenced the juror's vote or was ever made known to any other members of the jury.[115]

Under Alabama law, the main two factors that the court looks to in determining whether to invalidate a verdict based upon a juror's reliance on outside written materials are: (1) whether the content of the written materials was made known to other members of the jury before a verdict was reached and (2) whether the content of the juror research prejudiced the appealing party. The court is much more likely to invalidate a verdict based upon a juror's reliance on outside written materials if the content of the written materials is made known to other members of the jury before a verdict is reached and causes the appealing party to be prejudiced.

D. Juror Use of Alcohol and Drugs

The Alabama Supreme Court, much like the United States Supreme Court in *Tanner*, has upheld jury verdicts despite the fact that jurors were suspected to be under the influence of alcohol or drugs.[116] In *Alabama Power Co. v. Henderson*, a personal injury action, one juror was suspected of having alcohol on his breath on the morning that the jury was set to begin deliberations.[117] The trial court held a hearing in chambers during which the defendant attempted to strike the juror.[118] The trial court allowed the juror to continue when he stated that he had not consumed any alcoholic beverages since 11:30 the previous night, and that he could continue with the deliberations.[119] The jury awarded plaintiff a verdict in the amount of $500,000.[120] On appeal, the court held that a juror drinking alcohol during a trial or deliberations "is not grounds for a new trial unless the beverages were consumed in such quantities or at such time to incapacitate the juror from performing his duties, or unless it would be reasonable to conclude that the drinking may have influenced the ver-

114. *Id.* at 871 (quoting Pearson v. Fomby, 688 So. 2d 239, 245 (Ala. 1997)).

115. *Id.* at 872. In *Knight v. State*, 710 So. 2d 511 (Ala. Crim. App. 1997), a child abuse case, the Alabama Court of Criminal Appeals held that juror misconduct consisting of independent research into whether a child victim could have contracted a sexually transmitted disease by contact with a contaminated towel rather than by sexual contact with the defendant did not require a new trial because the defendant was not prejudiced. The juror's independent research "strengthened, rather than prejudiced, the [defendant's] theory of defense." *Id.* at 518.

116. *See* Ala. Power Co. v. Henderson, 342 So. 2d 323, 326–27 (Ala. 1976); Ala. Lumber Co. v. Cross, 44 So. 563, 564 (Ala. 1907).

117. *Henderson*, 342 So. 2d at 326.

118. *Id.* at 326–27.

119. *Id.* at 327.

120. *Id.* at 325.

dict."[121] The court affirmed the lower court's denial of grant of a new trial, holding that it would defer to "the ruling of the trial judge who investigated the matter and had an opportunity to observe the juror."[122]

In *Alabama Lumber Co. v. Cross*, the Alabama Supreme Court also affirmed a trial court's decision to deny a motion for new trial that was based on a juror's misconduct of drinking alcohol during trial.[123] Specifically, the court held that:

> [T]he fact that a member of a jury did, during the trial of a cause or while deliberating on their verdict, drink intoxicating liquors, will not be ground for a new trial, unless there is some reason to suppose that such liquors were drunk at such time or in such quantities as to unfit the juror for the performance of his duties, or unless they were furnished by the party in whose favor the verdict was afterwards rendered, or at least unless the circumstances were such as to create a reasonable belief that the drinking may have improperly influenced the verdict.[124]

No Alabama appellate court has ever reversed a verdict based upon juror use of drugs or alcohol during trial. However, the case law suggests a verdict could theoretically be reversed based on a juror's use of drugs or alcohol if: (1) the drugs or alcohol were used at such time or in such quantities as to make the juror unfit to perform his duties, or (2) the drugs or alcohol were provided by the party in whose favor the verdict was afterwards rendered.

E. Improper Discussions Among Jurors

The Alabama Supreme Court has held that improper discussions among jurors during deliberations may not constitute grounds for a new trial as long as jurors have not obtained the information discussed from "some process outside the scope of the trial."[125]

In *Jimmy Day Plumbing & Heating, Inc. v. Smith*, a motorcyclist brought a personal injury action against the employer of a truck driver following an automobile accident.[126] The jury awarded the plaintiff $1.5 million, and the defendant filed a motion for new trial based in part upon

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121. *Id.* at 327 (citing *Cross*, 44 So. at 564).
122. *Id.* (citation omitted).
123. *Cross*, 44 So. at 564.
124. *Id.* (citation omitted).
125. Jimmy Day Plumbing & Heating, Inc. v. Smith, 964 So. 2d 1, 9 (Ala. 2007) (quoting Sharrief v. Gerlach, 798 So. 2d 646, 652–53 (Ala. 2001)). *See also* Thompson Properties 119 AA 370, Ltd. v. Birmingham Hide and Tallow Co., Inc., 897 So. 2d 248, 264–65 (Ala. 2004); Bethea v. Springhill Mem'l Hosp., 833 So. 2d 1, 7–9 (Ala. 2002); *Sharrief*, 798 So. 2d at 652–53.
126. *Jimmy Day Plumbing & Heating, Inc.*, 964 So. 2d at 3.

juror misconduct.[127] The defendant submitted affidavits of three jurors stating that they decided to award the plaintiff money for attorney fees and income taxes they assumed that he would have to pay even though there was no evidence presented on the issue at trial.[128] The jurors admitted that they did not know the amount that the plaintiff would have to pay for fees and that they essentially guessed an amount.[129] The trial court denied the defendant's motion for new trial.[130] On appeal, the Alabama Supreme Court stated that under Alabama Rule of Evidence 606(b), there is an "important 'distinction . . . between "extraneous facts," the consideration of which by a juror or jurors may be sufficient to impeach a verdict, and the "debates and discussions of the jury," which are protected from inquiry.'"[131] The court explained that jurors' actions in looking up legal terms in a dictionary or encyclopedia or taking unauthorized field trips to the scene of a car accident fall within the former category.[132] However, the court went on to explain:

> The problem characteristic in each of these cases is the extraneous nature of the fact introduced to or considered by the jury. The improper matter someone argues the jury considered must have been obtained by the jury or introduced to it by some process outside the scope of the trial. Otherwise, matters that the jurors bring up in their deliberations are simply not improper under Alabama law, because the law protects debates and discussions of jurors and statements they make while deliberating their decision.[133]

The court stated that affidavits which merely reflect some of the jurors' discussions without regard to their propriety or lack thereof "are not extraneous facts that would provide an exception to the general rule of exclusion of juror affidavits to impeach the verdict."[134] The court affirmed the trial court's decision to deny the defendant a new trial, specifically holding that the juror affidavits "provide[d] no evidence indicating that the jury consulted any outside source of information or that any juror was influenced by any outside information."[135]

In *Bethea v. Springhill Memorial Hospital*, the plaintiff brought a medical malpractice action against the defendant hospital arising out of the

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127. *Id.* at 3, 8.
128. *Id.* at 8.
129. *See id.*
130. *Id.* at 3.
131. *Id.* at 8 (quoting Sharrief v. Gerlach, 798 So. 2d 646, 652 (Ala. 2001)).
132. *See id.*
133. *Id.* at 8–9 (citation omitted).
134. *Id.* at 9 (citation omitted).
135. *Id.*

use of the drug Pitocin.[136] After the verdict was rendered in favor of the hospital, the plaintiff filed a motion for new trial based in part upon juror misconduct.[137] The plaintiff presented the affidavit of a juror who stated that during deliberations some of the female jurors related their own personal experiences with Pitocin during pregnancy.[138] According to the affidavit, the women "were using their own encounters rather than the evidence presented . . . in the courtroom as the basis for the[ir] conclusions," and "[the] discussion clearly affected the jurors and the verdict."[139] The trial court denied the plaintiff's motion for new trial.[140] The Alabama Supreme Court affirmed, holding that "the alleged prejudicial information—personal experiences with the use of Pitocin in induced labor—is not extraneous information under the exception to Rule 606(b)."[141] Specifically, the court held that jurors relating their personal experiences to other jurors fell "within the 'debates and discussions' of the jurors during the process of deliberating," which is protected from inquiry under Alabama law.[142]

Under Alabama law, debates and discussions among jurors during deliberations, such as jurors relating their personal experiences to other jurors and reading from their notes, may not constitute grounds for a new trial as long as jurors have not obtained the information discussed from some process outside the scope of trial.

F. Juror Use of E-Mail and the Internet

The fastest developing area in the realm of juror misconduct involves juror use of e-mail, social networking sites such as Facebook, and microblogging sites such as Twitter during trial. Former Alabama Governor Don Siegelman and HealthSouth executive Richard Scrushy appealed their convictions on federal bribery charges based in part upon purported e-mails exchanged between jurors during trial and deliberations.[143] The de-

136. Bethea v. Springhill Mem'l Hosp., 833 So. 2d 1, 2 (Ala. 2002).
137. *Id.* at 4.
138. *Id.*
139. *Id.*
140. *Id.* at 9.
141. *Id.* at 8.
142. *Id.* at 9. In *Thompson Properties 119 AA 370, Ltd. v. Birmingham Hide and Tallow Co., Inc.*, 897 So. 2d 248 (Ala. 2004), the Alabama Supreme Court held that a juror's conduct in reading her notes to the other jurors during deliberations, despite the trial court's instructions to the contrary, did not constitute grounds for a new trial. The court held that the juror's notes did not constitute extraneous facts since they were "a reflection of her recollection of the trial court's charge, [and] were made within the scope of the trial." *Id.* at 265. Rather, the court held that the juror's conduct in reading her notes "was part of the 'debates and discussions' of the jury." *Id.* (citation omitted). *See also* Sharrief v. Gerlach, 798 So. 2d 646, 651–53 (Ala. 2001) (holding that jurors' affidavits regarding their discussions in deliberations did not support a post-trial motion to issue subpoenas to jurors when there was no evidence presented that the jury consulted any outside sources of information during deliberations).
143. *See* United States v. Siegelman, 561 F.3d 1215, 1240 (11th Cir. 2009), *vacated by* 130 S. Ct.

fendants argued that the e-mails between jurors during the trial constituted "premature jury deliberation and deliberation by fewer than all the jurors in [the] case" and "denied the defendants of their Sixth Amendment right to an impartial jury."[144] In affirming the defendants' conviction, the Eleventh Circuit cited the public policy concerns associated with allowing juror testimony to impeach a verdict:

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussions in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.
>
> Permission to attack jury verdicts by postverdict interrogations of jurors would allow defendants to launch inquiries into jury conduct in the hope of discovering something that might invalidate the verdicts against them. "Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." Such events would result in "the destruction of all frankness and freedom of discussion" in the jury room. And, as early as 1892, the Supreme Court expressed concern that such postverdict investigation would "induce tampering with individual jurors subsequent to the verdict." In a justice system that depends upon public confidence in the jury's verdict, such events are unacceptable.[145]

Even considering the district court's factual finding that "some of the emails might relate to discussion of the case prior to the submission of the case to the jury" and "others might indicate limited deliberation by fewer than all the members of the jury," the Eleventh Circuit concluded the district court did not abuse its discretion in deciding that the purported e-mails did not entitle defendants to a new trial.[146] The Eleventh Circuit

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3542 (2010).

144. *Id.*

145. *Id.* at 1240–41 (citations omitted).

146. *Id.* at 1242.

agreed with the district court holding that although "it is unquestionably clear that such discussions constitute misconduct, it is not the sort of conduct that this Court can or should directly inquire into by interrogating jurors, nor is it in this Court's view grounds for granting a new trial."[147] The ruling in *Siegelman* is consistent with the general rule under Alabama law that improper discussions among jurors during deliberations may not constitute grounds for a new trial as long as jurors have not obtained the information discussed from some process outside the scope of trial.[148]

Courts around the country are beginning to face increased problems associated with juror access to the Internet during trial. For example, convicted Pennsylvania State Senator Vincent Fumo filed a postverdict motion for new trial arguing that the trial court abused its discretion in refusing to remove a juror who made public postings about the trial on Twitter and Facebook during the trial.[149] With regards to the Twitter post at issue—"This is it . . . no looking back now!"—the United States District Court for the Eastern District of Pennsylvania held:

> [S]uch a comment could not serve as a source of outside influence because, even if another user had responded to [the juror's] Twitter postings (of which there was no evidence), his sole message suggested that the jury's decision had been made and that it was too late to influence him.[150]

The court also reviewed the juror's Facebook postings, including a status update on the Friday after the completion of deliberations stating, "Stay tuned for the big announcement on Monday everyone!"[151] The court held that the juror's Facebook postings "were nothing more than harmless ramblings having no prejudicial effect" and "were so vague as to be virtually meaningless."[152] Ultimately, the court denied the motion for new trial, holding that "[t]here was no evidence presented by either party showing that [the juror's] extra-jury misconduct had a prejudicial impact on the Defendants."[153] Likewise, an Arkansas building materials company appealed a $12.6 million judgment, claiming that a juror posted Twitter updates during the trial, including one stating "I just gave away TWELVE

147. *Id.*
148. *See* Jimmy Day Plumbing & Heating, Inc. v. Smith, 964 So. 2d 1, 8–9 (Ala. 2007); Thompson Properties 119 AA 370, Ltd. v. Birmingham Hide and Tallow Co., Inc., 897 So. 2d 248, 264–65 (Ala. 2004); Bethea v. Springhill Mem'l Hosp., 833 So. 2d 1, 7–9 (Ala. 2002); Sharrief v. Gerlach, 798 So. 2d 646, 652–53 (Ala. 2001).
149. *See* U.S. v. Fumo, No. 06-319, 2009 WL 1688482, at *58 (E.D. Pa. June 17, 2009).
150. *Id.* at *61.
151. *Id.*
152. *Id.* at *64.
153. *Id.* at *67.

MILLION DOLLARS of somebody else's money."[154] However, the Washington County, Arkansas, Circuit Court affirmed the verdict, ruling that while the "tweets" may have been in bad taste, they were not so improper as to necessitate a mistrial.[155]

In an effort to combat the dangers of sites such as Facebook and Twitter, the Alabama Pattern Jury Instructions Committee recently approved Model Jury Instructions forbidding jurors from using electronic media to research or communicate about a case during trial.[156] With regards to independent juror research, the Instructions, in pertinent part, provide as follows:

> You must not investigate the facts, the law or any party or witness, on the Internet or otherwise [visit the scene of the accident] [attempt to inspect or examine any object or property unless that object or property has been received in evidence and the inspection is made in the court room or in the jury room].
>
> We have learned that some jurors in other cases have tried to research the law or the facts of a case so they can learn more about the case they are hearing. A juror cannot consider facts that are not in evidence.
>
> If there is anything about this case or similar cases in the news media or on the Internet, you must not read, listen to, or watch the report. Do not use the Internet or any other method to investigate any aspect of the case. This is because your verdict must be based only on the legal evidence that is presented in the Courtroom.[157]

The Instructions also provide that jurors may not use any electronic media to communicate with others about the case, stating, in pertinent part, as follows: "You must not discuss the case with anyone until the case is over. This means that you must not discuss the case in person, in writing, or on the Internet. You must not 'tweet' or 'blog' about the case during the trial and deliberations."[158]

Likewise, the United States Judicial Conference recently issued Model Jury Instructions forbidding jurors from using electronic media to research

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154. John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1.

155. Martha Neil, *Juror Tweets in $12.6M Case Teach Lawyer a Lesson: Ask About Web Use*, A.B.A. J., Apr. 8, 2009, http:// www.abajournal.com/ news/ article/ sweet_ news_ for_ plaintiff_ in_ 12.6m_ case_ jurors_ tweets_ wont_ change_ verdict.

156. Diane Babb Maughan, *12 Jurors and the Internet*, BIRMINGHAM BAR ASSOCIATION BULLETIN, Summer 2010, at 9.

157. 1 ALA. PATTERN JURY INSTR. CIV. § 1.25 (2d ed 2009).

158. 1 ALA. PATTERN JURY INSTR. CIV. § 1.24 (2d ed 2009).

or communicate about a case during trial, and numerous other state courts have adopted or proposed rules to limit the use of electronic media by jurors during trial.[159] With regards to independent juror research, the Federal Instructions, in pertinent part, provide as follows: "[Y]ou should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom."[160] The Federal Instructions also provide that jurors may not use any electronic media to communicate with others about the case, stating as follows:

> I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.[161]

Alabama's appellate courts have yet to release an opinion addressing juror use of electronic media to research or communicate about a case during trial. However, the Alabama Supreme Court has been hesitant to reverse a verdict based upon jurors' improper discussions during deliberations, as long as the information considered by the jurors was not obtained through some process outside the scope of trial.[162] Therefore, it seems unlikely that under current Alabama law, jurors' mere posting of trial updates on Twitter or Facebook would constitute extraneous, prejudicial information or an improper outside influence sufficient to invalidate a verdict. However, the proliferation of juror use of e-mail, social networking websites, and microblogging websites will continue to challenge courts throughout the country in the years ahead.

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159. Stephanie Goldberg, *An End to the Twittering Juror?*, ABA LITIGATION NEWS, Spring 2010, at 12.

160. Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, Dec. 2009, *available at* http:// www.uscourts.gov/ newsroom/ 2010/ DIR10-018.pdf.

161. *Id.*

162. *See* Jimmy Day Plumbing & Heating, Inc. v. Smith, 964 So. 2d 1, 8–9 (Ala. 2007); Thompson Properties 119 AA 370, Ltd. v. Birmingham Hide and Tallow Co., Inc., 897 So. 2d 248, 264–65 (Ala. 2004); Bethea v. Springhill Mem'l Hosp., 833 So. 2d 1, 7–9 (Ala. 2002); Sharrief v. Gerlach, 798 So. 2d 646, 652–53 (Ala. 2001).

CONCLUSION

The general law in Alabama is well-settled that jurors may not testify to invalidate their own verdict unless extraneous prejudicial information is brought to their attention or an improper outside influence is brought to bear upon them. The analysis of whether juror misconduct rises to the level of requiring a new trial focuses on two main factors: (1) whether the misconduct prejudiced one of the parties and (2) whether the misconduct may have affected the verdict. Alabama appellate courts have been split on whether juror experiments, field trips, and other unauthorized research constitute grounds for a new trial, depending on the facts and circumstances of each individual case. In sum, Lord Mansfield's presumption that jurors may not testify to invalidate their own verdict is still alive in Alabama, but there are certain situations where a juror's conduct is so prejudicial to one of the parties that it mandates a new trial. Each case must be decided based on its individual facts and circumstances.