



Fall 2011

To Presume or Not to Presume Prejudice - Kilgore v. Fuji Heavy Industries Changes the Way New Mexico Analyzes Juror Misconduct

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Recommended Citation

Catherine Gleeson, *To Presume or Not to Presume Prejudice - Kilgore v. Fuji Heavy Industries Changes the Way New Mexico Analyzes Juror Misconduct*, 41 N.M. L. Rev. 501 (2011).

Available at: <https://digitalrepository.unm.edu/nmlr/vol41/iss2/8>

**TO PRESUME OR NOT TO PRESUME
PREJUDICE? *KILGORE V. FUJI HEAVY
INDUSTRIES* CHANGES THE WAY NEW MEXICO
ANALYZES JUROR MISCONDUCT**

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I. INTRODUCTION

When asked if a seatbelt could inadvertently unbuckle in a car accident, the owner of a Subaru repair shop responded to a juror, “I [have] never heard of any incident where a Subaru seatbelt buckle ha[s] come open accidentally.”¹ In asking this simple question, a curious juror committed juror misconduct.² This misconduct gave new life to plaintiffs who had lost a case against the designers and manufactures of a Subaru vehicle and seatbelt system on the theory that the seatbelt in their Subaru inadvertently opened in a car accident.

In 2000, Donald Kilgore, driving a Subaru, lost control of his vehicle, causing it to roll down an embankment.³ All passengers in the car were allegedly wearing their seatbelts;⁴ however, when found, Carol Kilgore, Donald’s wife, was unrestrained by her seatbelt and lying on the roof of the car.⁵ The accident left Mrs. Kilgore a ventilator-dependent

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1. *Kilgore v. Fuji Heavy Indus. Ltd.*, 2010-NMSC-040, ¶ 6, 240 P.3d 648, 650–51.

2. *Black’s Law Dictionary* defines “juror misconduct” as:

A juror’s violation of the court’s charge or the law, committed either during trial or in deliberations after trial, such as (1) communicating about the case with outsiders, witnesses, attorneys, bailiffs, or judges, (2) bringing into the jury room information relating to the case but not in evidence, and (3) conducting experiments regarding theories of the case outside the court’s presence.

BLACK’S LAW DICTIONARY 1089 (9th ed. 2009)

3. *Kilgore*, 2010-NMSC-040 ¶ 2, 240 P.3d at 650–51.

4. *Kilgore v. Fuji Heavy Indus. Ltd.*, 2009-NMCA-078, ¶ 5, 213 P.3d 1127, 1130.

5. *Kilgore*, 2010-NMSC-040, ¶ 2, 240 P.3d at 651.

quadriplegic.⁶ After a jury trial, the Kilgores lost their case.⁷ A post-trial investigation uncovered that, likely early in the trial, a juror, with a brother who worked as a Subaru mechanic, had asked a Subaru shop owner about Subaru seatbelt buckles coming open in car accidents.⁸ The juror did this in violation of the court's instructions,⁹ and in doing so exposed herself, and potentially the rest of the jury, to extraneous information that might have prejudiced the plaintiffs' case.

This case note examines how New Mexico has dealt with allegations of extraneous information reaching the jury and how the holding in *Kilgore v. Fuji Heavy Industries* changes the way New Mexico analyzes juror misconduct. Part II reviews both federal and New Mexico caselaw involving juror misconduct. Part III examines the New Mexico Court of Appeals' and the New Mexico Supreme Court's opinions in *Kilgore*, focusing on the Supreme Court's disavowal of any further reference to the presumption of prejudice in cases involving extraneous juror information. Part IV discusses the many different approaches the U.S. Courts of Appeals employ when analyzing juror misconduct. Part V analyzes *Kilgore's* disavowal of the presumption of prejudice by demonstrating that: (1) New Mexico is now in the minority of jurisdictions that place on the movant¹⁰ the entire burden to prove that extraneous information was probably prejudicial to an objective juror; (2) a discussion of Rule of Evidence 11-301 would have been helpful to the court's analysis of presumptions; and (3) the court should reconsider how a movant can prove the probability of prejudice in light of New Mexico Rule of Evidence 11-606(B). Part V also shows how *Kilgore's* holding invokes the need for changes in questioning jurors about their ability to be impartial and the appellate standard of review for juror misconduct cases. The note concludes that *Kilgore* fundamentally changes the way New Mexico approaches juror misconduct, making it increasingly difficult for the movant to obtain a new trial on the basis of juror misconduct allegations.

6. *Id.*

7. *Id.* ¶ 3, 240 P.3d at 651.

8. *Id.* ¶¶ 4-5, 240 P.3d at 651.

9. *See* UJI 13-110 NMRA (“[D]o not attempt any research, tests, experiments, visits to any locations involved in this case, or other investigation, including the internet. It would be difficult or impossible to duplicate conditions shown by the evidence; therefore, your results would not be reliable. Such conduct also runs contrary to the rule that your verdict must be based solely upon the evidence presented to you . . .”).

10. Throughout the article I refer to the party alleging that they were prejudiced by juror misconduct or extraneous information as the “movant.”

II. BACKGROUND

The jury trial embodies the cornerstone of the American justice system and is firmly enshrined in both the U.S. Constitution and the New Mexico Constitution.¹¹ Yet how juries reach their decisions remains mostly a mystery.¹² The role of the jury dates back to thirteenth-century England.¹³ Ideally, a jury contains a cross-section of people from the community where the relevant events occur.¹⁴ The legitimacy of jury deliberations rests in part with its secrecy.¹⁵ Since the time of Lord Mansfield, courts and legislatures have fervently protected the secrecy of jury deliberations, sometimes at the cost of injustice to litigants.¹⁶ Protecting the secrecy of jury deliberations comes at a cost because juror misconduct may never surface.¹⁷ Today, the American legal system attempts to balance the secrecy of the jury deliberation process with the desire to protect litigants from jury verdicts tainted by juror misconduct.¹⁸

11. See Peter N. Thompson, *Challenge to the Decision-Making Process—Federal Rule of Evidence 606(b) and the Constitutional Right to a Fair Trial*, 38 Sw. L.J. 1187 (1985). In federal court, the right to trial by jury in a civil case is found in the Seventh Amendment. U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”). However, the Seventh Amendment has not been incorporated to apply to the states. *Scott v. Woods*, 105 N.M. 177, 182, 730 P.2d 480, 485 (Ct. App. 1986). Therefore, the right to trial by jury in a civil case in New Mexico is found in the New Mexico Constitution. N.M. CONST. art. II, § 12 (“The right to trial by jury as it has heretofore existed shall be secured to all and remain inviolate.”).

12. See Abraham S. Goldstein, *Jury Secrecy and The Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 297–98 (1993) (discussing how court rules have reinforced the “secrecy-guarding” doctrines of jury deliberations while they are ongoing but noting that “[j]urors are not routinely told . . . as they begin their deliberations, that their discussions must be kept secret after the verdict has been returned.”); see also *Skidmore v. Balt. & O.R. Co.*, 167 F.2d 54, 59 (2d Cir. 1948) (“The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi.”); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 317 (7th ed. 1956).

13. See GEORGE FISHER, EVIDENCE 6 (2nd ed. 2008).

14. CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6075(b) (2d ed. 2010); see also *Glasser v. U.S.*, 315 U.S. 60, 86–87 (1942) (stating that the proper function of democracy requires that the jury be representative of the community, “and not the organ of any special group or class”).

15. See FISHER, *supra* note 13, at 6.

16. Susan Crum, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 510 (1988).

17. See Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 262 (1920).

18. See FED. R. EVID. 606(b).

Almost a hundred years ago the New Mexico Supreme Court ruled that in order to protect the secrecy of jury verdicts, it would not “receive the affidavits of jurors to impeach their verdicts.”¹⁹ Later, when the U.S. Congress and the New Mexico Legislature enacted the Federal Rules of Evidence and the New Mexico Rules of Evidence,²⁰ they adopted specific provisions to protect the secrecy of jury verdicts by generally prohibiting jurors from testifying about the deliberation process.²¹ Federal Rule 606(b) and New Mexico Rule of Evidence 11-606(B) are identical.²² Federal Rule of Evidence 606(b) and New Mexico Rule of Evidence 11-606(B) state:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury’s attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror’s affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.²³

In enacting this rule, the U.S. Congress and the New Mexico Legislature intended to continue to encourage and facilitate open and free juror deliberation, promote stable and final verdicts, and protect jurors from annoyance and embarrassment.²⁴ Generally jurors may not testify to impeach their verdict; however, Rule 11-606(B)(1) and (2) provide limited circumstances where a juror may testify as to whether outside influences or extraneous *prejudicial* information reached the jury.²⁵ A party

19. *Goldenberg v. Law*, 17 N.M. 546, 556–57, 131 P. 499, 502 (1913) (discussing the history of whether jurors can testify about alleged juror misconduct).

20. Congress enacted the Federal Rules of Evidence in 1975. Pub. L. No. 93-595, 88 Stat. 1926 (1975). New Mexico Rule of Evidence 11-606(B) was amended in 1976 to conform to Federal Rule of Evidence 606(b). *See State v. Doe*, 101 N.M. 363, 365 (Ct. App. 1983).

21. *See Tanner v. United States*, 483 U.S. 107, 117–18 (1987).

22. *Rios v. Danuser Mach. Co., Inc.*, 110 N.M. 87, 90, 792 P.2d 419, 422 (1990).

23. FED. R. EVID. 606(b); Rule 11-606(B) NMRA.

24. *See* FED. R. EVID. 606(b) advisory committee’s note.

25. *State v. Mann*, 2002-NM-SC-001, ¶ 18, 39 P.3d 124, 129; FED. R. EVID. 606(b)(1)–(2); *see Tanner v. United States*, 483 U.S. 107, 117 (1987).

has a due process right to a fair and impartial jury,²⁶ and extraneous information that reaches the jury potentially can infringe on that party's right.²⁷ Thus, "[t]he essence of cases involving juror tampering, misconduct, or bias is whether the circumstance unfairly affected the jury's deliberative process and resulted in an unfair jury."²⁸

A. *Remmer v. United States*—*The Birth of the Presumption of Prejudice*

In *Remmer v. United States*, the U.S. Supreme Court created an automatic presumption of prejudice for any outside influence reaching the jury.²⁹ In *Remmer*, a third party allegedly contacted a juror telling him that he "could profit by bringing in a verdict favorable to the [defendant]."³⁰ The juror told the judge what had happened and the FBI undertook an investigation.³¹ The Court held:

[A]ny private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.³²

26. See *United States v. Olano*, 507 U.S. 725, 739 (1993); see also *United States v. Dutkel*, 192 F.3d 893, 899 (9th Cir. 1999).

27. *State v. Mann*, 2002-NMSC-001, ¶ 27, 39 P.3d 124, 132; see also *State v. McCarter*, 93 N.M. 708, 711 (1980) (stating that the "presumption of prejudice [was] intended to be guardian to the rights of confrontation and cross-examination").

28. *Mann*, 2002-NMSC-001, ¶ 20, 39 P.3d at 129. *Jury tampering* involves private communications between jurors and third parties. *Id.* ¶ 21, 39 P.3d at 130. *Juror misconduct* "includes activity by members of the jury which is inconsistent with the instructions of the court." *Id.* ¶ 22, 39 P.3d at 130. *Jury bias* is defined as an "inclination," "prejudice," or "predilection." See BLACK'S LAW DICTIONARY 183 (9th ed. 2009); see also Sharon Blanchard Hawk, Note, *State v. Mann: Extraneous Prejudicial Information in the Jury Room: Beautiful Minds Allowed*, 34 N.M. L. REV. 149, 155 n. 78 (2004); *State v. Dutkel*, 192 F.3d 893, 895 (9th Cir. 1999) (jury tampering is "an effort to influence the jury's verdict by threatening or offering inducements to one or more of the jurors").

29. 347 U.S. 227 (1954).

30. *Id.* at 229.

31. *Id.*

32. *Id.*

Remmer stated that when extraneous information reached the jury, the proper remedy was for the trial court to determine the circumstances under which the jury came into contact with the extraneous information.³³ Moreover, the Court stated it was proper to inquire into the *impact* the information had on the juror, and whether the information had a prejudicial effect on that juror.³⁴ Ultimately, the Court remanded the case for a hearing to determine if the incident between the juror and the third party prejudiced the defendant.³⁵ If the trial court found the extraneous information prejudicial, then the movant was entitled to a new trial.³⁶

The Federal Rules of Evidence, and specifically Rule 606(b), came into being after the *Remmer* decision, which led some courts to reanalyze *Remmer's* holding.³⁷ In stating that "a juror may not testify as . . . 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 concerning the juror's mental processes,"³⁸ Federal Rule of Evidence 606(b) directly conflicts with *Remmer's* assertion that a party may inquire into the *impact* that extraneous information had on the juror. Rule 606(b) effectively cut off the avenue for the non-movant to disprove the presumption of prejudice by asking the juror whether the information impacted him or her and was prejudicial to him or her.³⁹ Accordingly, many courts felt that if *Remmer* was going to apply in "full force," it would be difficult, if not impossible, for the non-movant to overcome the presumption of prejudice.⁴⁰ This was so because Rule 606(b) would make it difficult or impossible to demonstrate the absence of prejudice without inquiring into the jury's mental processes or the effect that the extraneous

33. *Id.*

34. *Id.*

35. *Id.* at 230.

36. *Id.* at 229–30. The *Remmer* case went back to the Supreme Court in 1956. *Remmer v. United States*, 350 U.S. 377 (1956). Some courts refer to this case as "*Remmer II*." In *Remmer II*, the Court was asked to review the district court's ruling on remand that the contact between the juror and the third party was not prejudicial. *Id.* at 378–79. The Court stated that the district court read the holding from the 1954 case ("*Remmer I*") too narrowly. *See id.* at 379. In *Remmer II*, the Court held that the juror "had been subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made." *Id.* at 382. The Court granted the defendant a new trial. *Id.* The focus of this article is on the holding of the 1954 *Remmer* case where the Court created an automatic presumption of prejudice for any extraneous information reaching the jury.

37. *See* *United States v. William-Davis*, 90 F.3d 490 (D.C. Cir. 1996).

38. *Id.* at 496.

39. *Id.*

40. *Id.*

information had on the jury.⁴¹ As a result, some courts narrowed *Remmer*'s automatic presumption, doing so in a multitude of ways.

B. Smith v. Phillips and United States v. Olano Raise Questions About Remmer's Automatic Presumption of Prejudice

After the codification of Federal Rule of Evidence 606(b), and since the sweeping holding in *Remmer*, some federal courts have grappled with what exactly constitutes presumptively prejudicial extraneous information and how liberally the *Remmer* standard should apply.⁴² In *Smith v. Phillips*, the U.S. Supreme Court stated that it would be almost impossible to shield jurors from all outside influences that might impact their vote.⁴³ In *Phillips*, a member of the jury applied for a job with the District Attorney's office during the trial and the Court held that the defendant was not entitled to a new trial because of the juror's job application.⁴⁴ The Court held that the "remedy for allegations of juror partiality is a hearing in which the [movant] has the opportunity to *prove* actual bias."⁴⁵ In so holding, the Court reasoned that if due process were to require a new trial every time a juror came into contact with an outside influence, then few trials would pass constitutional muster.⁴⁶ The Court clarified that a hearing, not a new trial, was the forum for the movant to prove actual bias.⁴⁷

Eleven years later, in *United States v. Olano*, the Supreme Court may have further distanced itself from *Remmer*. In *Olano* the defendants were convicted of taking loan kickbacks.⁴⁸ The defendants appealed,

41. *Id.*; see *United States v. Greer*, 620 F.2d 1383, 1385 n.1 (10th Cir. 1980) ("[The] effect of Rule 606(b) may require the courts to narrow the definition of 'presumptively prejudicial' found in *Remmer v. United States*.").

42. See *State v. Mann*, 2002-NMSC-001, ¶ 36, 39 P.3d 124, 136.

43. 455 U.S. 209, 217 (1982).

44. *Id.* at 212.

45. *Id.* at 215 (emphasis added).

46. *Id.* at 217. The *Smith* Court further stated:

Due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case.

Id.

47. *Id.* at 215.

48. *United States v. Olano*, 507 U.S. 725, 727 (1993).

claiming that it was “plain error” under the Rules of Criminal Procedure 52(b) and 24(c) to allow the alternate jurors to be present during the jury deliberations.⁴⁹ The Court would not invoke an automatic presumption of prejudice, holding that it was not presumptively prejudicial for alternate jurors to remain present during the jury deliberations.⁵⁰ The Court reasoned that, “[t]here may be cases where an intrusion should be presumed prejudicial . . . but a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury’s deliberations and thereby its verdict?”⁵¹ The Court concluded that the defendants were not entitled to a new trial because they had not made a specific showing of prejudice, nor did they request a new hearing on the basis that the alternate jurors chilled the deliberations.⁵²

C. Early New Mexico Cases and the Automatic Presumption of Prejudice Attaching to Extraneous Juror Information

Ten years before the U.S. Supreme Court decided *Remmer*, the New Mexico Supreme Court established a presumption of prejudicial error resulting from an extraneous communication between the jury and the court reporter.⁵³ In *State v. Beal*, a court reporter went into the jury room to deliver the jury exhibits.⁵⁴ The court held that this was an error because the court reporter’s delivery of the exhibits to the jury after they had begun deliberating resulted in a communication between the court and the jury, done outside the presence of the defendant, and without the defendant’s knowledge or consent.⁵⁵ *Beal* articulated that when a jury received an improper communication, the burden was on the non-movant to overcome the presumption by demonstrating a lack of prejudice.⁵⁶ In so holding, *Beal* cited a case from the Tenth Circuit that stated that the movant did not need to explore the minds of jurors in an attempt to prove that extraneous information influenced their verdict.⁵⁷

49. *Id.* at 730.

50. *Id.* at 737.

51. *See id.* at 738–39.

52. *Id.* at 739–40.

53. *See State v. Beal*, 48 N.M. 84, 90, 146 P.2d 175, 179 (1944).

54. *Id.* at 87, 146 P.2d at 177.

55. *Id.* at 90–91, 146 P.2d at 179–80.

56. *Id.* at 94, 146 P.2d at 181–82 (“In the case at bar the record fails to disclose that no prejudice resulted from the communication of the court with the jury. The burden being upon [the non-movant] to establish this fact and it appearing that such burden has not been discharged, it was error for the trial court to deny appellant’s motion for a new trial.”).

57. *Id.* at 181 (“[W]here error occurs which, within the range of a reasonable probability, may have affected the verdict of a jury, [the movant] is not required to

Following the New Mexico Supreme Court's decision in *Beal*, as well as the U.S. Supreme Court's decision in *Remmer*, the New Mexico Court of Appeals applied the *Beal* and *Remmer* standards to decide *State v. Gutierrez*.⁵⁸ In *State v. Gutierrez*, the New Mexico Court of Appeals held that "under standards of due process, any unauthorized communication is presumptively prejudicial."⁵⁹ In *Gutierrez*, someone brushed up next to a juror during a recess and stated, "'make a wise decision.'"⁶⁰ The defendant moved for a new trial.⁶¹ However, in open court the juror assured everyone the contact did not prejudice her.⁶² Referencing *Remmer*, the court held that, "the burden is not upon the [movant] to establish the existence of prejudice."⁶³ Although so stating, the court held that "[i]t was for the trial court to determine whether the presumption of prejudice had been overcome."⁶⁴ Therefore, because the trial court believed the communication was harmless, the court denied the motion for a new trial and "in effect, ruled that the presumption of prejudice had been overcome."⁶⁵

Through 1983, New Mexico courts evaluated extraneous juror communications under the standard set forth in *Beal*. In *Budagher v. Amrep Corp.*, the court of appeals collected New Mexico cases dealing with extraneous juror communications and concluded that "in improper communications with jury cases New Mexico caselaw [sic] since *Beal* . . . has consistently applied the 'presumption of prejudice' test."⁶⁶ *Budagher* further stated that the New Mexico cases from *Beal* onwards dealing with extraneous communications "all h[e]ld that when there has been improper communication with the jury the party adversely affected benefits from a 'presumption of prejudice' which *must* be rebutted by the opposing party."⁶⁷

State v. Doe in essence followed prior precedent regarding juror misconduct cases in New Mexico. In *Doe* the court held that before a court presumes prejudice, the movant must make a "preliminary showing" that they have competent evidence that extraneous material reached the

explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. So to hold would, as a practical matter, take from a defendant his right to a fair trial." (quoting *Little v. United States*, 73 F.2d 861, 866–67 (10th Cir. 1934)).

58. 78 N.M. 529, 433 P.2d 508 (Ct. App. 1967).

59. *Id.* at 531, 433 P.2d at 510 (emphasis added).

60. *Id.* at 530, 433 P.2d at 509.

61. *Id.*

62. *Id.* at 531–32, 433 P.2d at 510–11.

63. *Id.* at 531, 433 P.2d at 510.

64. *Id.* at 531, 433 P.2d at 511.

65. *Id.*

66. 100 N.M. 167, 171, 677 P.2d 972, 976 (Ct. App. 1983).

67. *Id.* (emphasis added).

jury.⁶⁸ The court stated, “[i]f the party makes such a showing, and if there is a *reasonable possibility* the material prejudiced the defendant, the trial court should grant a new trial.”⁶⁹ *Doe* stated that if the court decides that extraneous material reached the jury, the court then “must inquire into prejudice.”⁷⁰ *Doe* listed factors that courts should consider when analyzing whether extraneous information was prejudicial.⁷¹ The factors include: (1) how the jury received the material; (2) how long the jury had the material; (3) the extent to which discussion took place among the jurors about the material; (4) at what point in the deliberations the material was received; and (5) whether the jury had reached a verdict before or after receiving the material.⁷² *Doe* reaffirmed that “the party adversely affected [by extraneous information] benefits from a ‘presumption of prejudice,’ which the opposing party must rebut.”⁷³

Just over a year and a half after *Doe*, the New Mexico Court of Appeals issued *State v. Melton*, where the court elaborated on extraneous juror information and the holdings in *Beal*, *Gutierrez*, and *Doe*.⁷⁴ In *Melton*, on the first day of deliberations, jurors requested a dictionary, which the court refused to provide.⁷⁵ That evening, one juror copied the definitions of words, and the next day at least four jurors read the copied definitions.⁷⁶ The court noted that it had to decide whether the reference to the dictionary definitions created a presumption of prejudice that the state would have to overcome, or if the defendant had the burden to prove prejudice.⁷⁷ *Melton* noted that both *Doe* and *Gutierrez* said that due process demanded that courts presume prejudice when dealing with improper juror communications.⁷⁸ Citing *State v. Beal*, the court stated that a presumption of prejudice arises once it is established that there was an improper communication made to the jury.⁷⁹ Then the non-movant has

68. 101 N.M. 363, 366, 683 P.2d 45, 48 (Ct. App. 1983) (“The party seeking a new trial on the basis that extraneous evidence reached the jury must make a preliminary showing that [the] movant has competent evidence that material extraneous to the trial actually reached the jury.”).

69. *Id.* (emphasis added).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 367, 683 P.2d at 49. Finally, *Doe* stated that “if the court finds an improper communication occurred, the [non-movant] must rebut the presumption.” *Id.*

74. 102 N.M. 120, 692 P.2d 45 (Ct. App. 1984).

75. *Id.* at 122, 692 P.2d at 47.

76. *Id.*

77. *Id.* at 123, 692 P.2d at 48.

78. *Id.*

79. *Id.*

the burden to show the communication did not affect the verdict, which the non-movant can do by showing the communication was harmless.⁸⁰ However, the court stated that if the non-movant “fails to meet this burden, then the presumption of prejudice must prevail.”⁸¹ In so stating, the court noted that the presumption of prejudice met the requirements of due process even though Rule 606(b) in effect precludes the non-movant from ever *proving* that the improper communication affected the verdict.⁸² Finally, the court stated that overcoming the presumption of prejudice is not impossible.⁸³

D. Refining the Presumption of Prejudice: The Emergence of the “Typical Juror” and “Threshold Question”/“Preliminary Showing” in New Mexico

Three years after the decision in *Doe*, the New Mexico Court of Appeals decided *Prudencio v. Gonzales*, which in essence articulated a two-part test that the movant must first satisfy before the court invokes the presumption of prejudice.⁸⁴ Expounding on *Doe* and *Melton*, *Prudencio* stated that in order to satisfy the “threshold question” of whether extraneous information created a presumption of prejudice, the trial court needed first “to receive evidence as to 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.”⁸⁵ Second, if the court finds that the jury was exposed to extraneous information or an improper outside influence, then the issue becomes whether there is a “reasonable probability” or “likelihood” that the extraneous information would have an effect upon the verdict or upon a “typical juror.”⁸⁶ If the movant satisfies these steps, and the court establishes the presumption of prejudice, “the burden then shifts to the [non-movant] to demonstrate that the improper conduct did not have an influen-

80. *Id.* (“In *State v. Beal*, the supreme court held that when it has once been established that there was a communication made to the jury, a presumption of prejudice arises. The burden is then upon the party resisting a new trial [the non-movant] to demonstrate that the communication did not affect the verdict.”).

81. *Id.*

82. *Id.* In stating that the presumption of prejudice test met due process requirements, the court cited *Remmer. Id.*

83. *Id.* (“This presumption, however is not irrebuttable.”) (citing *State v. Ho’o*, 99 N.M. 140, 654, P.2d 1040 (Ct. App. 1982)).

84. 104 N.M. 788, 727 P.2d 553 (Ct. App. 1986).

85. *Id.* at 789–90, 727 P.2d at 554–55 (internal citation and quotation marks omitted).

86. *Id.* at 790, 727 P.2d at 555 (emphasis added) (internal quotation marks omitted).

tial effect upon the jurors.”⁸⁷ Finally, *Prudencio* noted that the trial court is in the best position to decide whether the non-movant has demonstrated that the extraneous information did not impact the jury.⁸⁸

E. Conflicting Holdings: Hurst v. Citadel, Ltd. and Goodloe v. Bookout

The two most recent civil cases preceding *Kilgore* that deal with juror misconduct demonstrate that the New Mexico Court of Appeals analyzed juror misconduct in two ways. In *Hurst v. Citadel, Ltd.*, the court of appeals seemingly retreated from the language in *Prudencio*.⁸⁹ In *Goodloe v. Bookout*, the court of appeals continued to follow the guidelines set out in *Prudencio*.⁹⁰

In *Hurst*, the court stated that once it determines that extraneous information reached the jury, the court must determine if the extraneous information was prejudicial.⁹¹ Citing *Beal*, *Prudencio*, and *Doe*, *Hurst* held “[w]e have previously held that the injection of extraneous information creates a presumption of prejudice.”⁹² *Hurst* noted that this presumption was rebuttable and “the burden is upon the party resisting a new trial [the non-movant] to demonstrate that the improper communication did not have any prejudicial influential effect upon the jurors.”⁹³ Finally, *Hurst* noted that although the non-movant can rebut the presumption of prejudice, to do so could be difficult.⁹⁴

In *Goodloe v. Bookout*, the second civil case preceding *Kilgore*, the court began by giving credence to the *Remmer* standard of prejudice, stating, “in keeping with the United States Supreme Court decision in *Remmer v. United States*, New Mexico courts have treated unauthorized communications as ‘presumptively prejudicial,’ although the presumption

87. *Id.*

88. *Id.*

89. 111 N.M. 566, 807 P.2d 750 (Ct. App. 1991).

90. 1999-NMCA-061, 980 P.2d 652.

91. *Hurst*, 111 N.M. at 571, 807 P.2d at 755 (Ct. App. 1991). There is nowhere in *Hurst* where the court discusses meeting the “preliminary” or “threshold question” of determining whether there is a reasonable probability that extraneous information had an effect on the typical juror. Instead, *Hurst* directly states that the presumption of prejudice arises just upon a showing of extraneous information reaching the jury. *Id.* This seems like a retreat back to the holding of *Gutierrez* and *Doe*.

92. *Id.* It is interesting that *Hurst* cites *Prudencio*, but as stated *supra*, note 91, *Hurst* does not require the movant to satisfy the “threshold question” or determine if there was a reasonable probability that extraneous information impacted a typical juror.

93. *Id.*

94. *Id.*

is not conclusive and can be rebutted.”⁹⁵ However, the court stated that the non-movant faces a difficult task, considering that under Rule 11-606(B) jurors cannot testify as to whether the improper communication influenced them.⁹⁶ Nevertheless, the court noted that courts apply “common sense” when evaluating the “likelihood” of the communication’s prejudice on the jury.⁹⁷ Then, without dismissing *Remmer* and citing *Prudencio v. Gonzales*, the court held that “rather than stating that courts always presume prejudice, it may be more accurate to state that the threshold question for the trial court is whether the unauthorized conduct creates a presumption of prejudice.”⁹⁸ Just as stated in *Prudencio*, to satisfy the threshold question that there is a presumption of prejudice, the court has to determine the issue of “whether there is a reasonable probability or likelihood that the extrinsic communications or conduct would have an effect upon the verdict or upon a typical juror.”⁹⁹

F. New Mexico Supreme Court’s Most Recent Juror Misconduct Case Before Kilgore

In 2002 the New Mexico Supreme Court decided *State v. Mann*, holding that jurors can rely on their background, education, and professional experience to inform their decisions as long as they are using such knowledge in connection with the evidence presented at trial.¹⁰⁰ *Mann* also indicated that the U.S. Supreme Court has “distanced” itself from the *Remmer* presumption of prejudice, yet it stated that it was unnecessary to resolve the issue.¹⁰¹ Nevertheless, *Mann* held that “[t]he party requesting a new trial on the basis that the jury was exposed to extraneous information must make a *preliminary showing* that [he or she] has competent evidence that material extraneous to the trial actually reached the jury.”¹⁰² Moreover, the movant must “make an affirmative showing that some extraneous influence came to bear on the jury’s deliberations.”¹⁰³ However, *Mann* did not expressly state that the movant must demon-

95. *Goodloe*, 1999-NMCA-061, ¶ 20, 980 P.2d at 657. *Goodloe* cited *United States v. Sylvester*, 143 F.2d 923, 933–34 (5th Cir. 1998) for the suggestion that the U.S. Supreme Court may have abandoned *Remmer*. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* (internal citation and quotation marks omitted).

99. *Id.* (internal citation and quotation marks omitted).

100. 2002-NMSC-001, ¶ 38, 39 P.3d 124, 136.

101. *Id.* ¶ 36, 39 P.3d at 135.

102. *Id.* ¶ 19, 39 P.3d at 129 (emphasis added) (internal quotation marks omitted) (citing *State v. Sena*, 105 N.M. 686, 688, 736 P.2d 491, 493 (1987)).

103. *Id.* (quoting *State v. Mann*, 2000-NMCA-088, ¶ 85, 11 P.3d 564, 584) (internal quotation marks omitted).

strate that extraneous information had an effect upon a “typical juror” as did *Prudencio* and *Goodloe*.¹⁰⁴

Overall, up through *Mann*, two lines of juror misconduct of cases emerged in New Mexico. Under *Beal*, *Gutierrez*, *Doe*, *Melton*, and *Hurst* (“*Beal* line of cases”), the court would presume prejudice merely after showing that extraneous information reached the jury.¹⁰⁵ Under *Prudencio* and *Goodloe* (“*Prudencio* line of cases”) the movant had the burden to show that extraneous information reached the jury and that the material would likely impact a verdict or a typical juror before the court invoked the presumption of prejudice.¹⁰⁶ Once the court invoked the presumption of prejudice, the non-movant was required to demonstrate that the extraneous information did not have an influential effect on the jurors or was harmless to the jury and its verdict.¹⁰⁷

III. STATEMENT OF THE CASE

A. Facts

On May 19, 2000, Donald and Carole Kilgore, and their seven-year-old granddaughter Emily Walters, were involved in a single-vehicle rollover accident on Highway 84 near Tierra Amarilla, New Mexico.¹⁰⁸ Mr. Kilgore was driving a 1998 Subaru Legacy Outback with his granddaughter seated next to him in the front passenger seat and his wife directly behind him in the back seat.¹⁰⁹ Mr. Kilgore lost control of the vehicle, causing it to rollover down an embankment and land upside down.¹¹⁰ All vehicle occupants were wearing their seatbelts.¹¹¹ When found, Mr. Kilgore and Emily were hanging upside down, restrained and belted by their seatbelts.¹¹² However, Mrs. Kilgore was found lying facing up on the roof of the car, unrestrained by her seatbelt.¹¹³ Although Mr. Kilgore and Emily did not suffer serious injuries, the accident left Mrs. Kilgore a ventilator-dependent quadriplegic.¹¹⁴

104. See *id.* Nor does paragraph nineteen of *Mann* refer to the extraneous information’s influence on a “typical juror.”

105. See *State v. Doe*, 101 N.M. 363, 366, 683 P.2d 45, 48 (Ct. App. 1983).

106. See *Prudencio v. Gonzalez*, 104 N.M. 788, 789–90, 727 P.2d 553, 554–55 (Ct. App. 1986).

107. *Id.* 104 N.M. at 790, 727 P.2d at 555.

108. *Kilgore v. Fuji Heavy Indus. Ltd.*, 2010-NMSC-040, ¶ 2, 240 P.3d 648, 650–51.

109. *Id.* ¶ 2, 240 P.3d at 651.

110. *Id.*

111. *Kilgore v. Fuji Heavy Indus. Ltd.*, 2009-NMCA-078, ¶ 5, 213 P.3d 1127, 1130.

112. *Id.* ¶ 5, 213 P.3d at 1130.

113. *Id.*

114. *Id.*; *Kilgore*, 2010-NMSC-040, ¶ 2, 240 P.3d at 651.

B. Procedural History

The Kilgores sued the designer and manufacturer of the vehicle, Fuji Heavy Industries, as well as the designer and manufacturer of the car's seatbelt buckle system, Takata Seat Belts, Inc.¹¹⁵ The Kilgores alleged that the Takata AB seatbelt buckle in the Subaru seatbelt buckle system "had been designed, tested, and manufactured improperly, resulting in the risk of accidental, inadvertent, or unintentional unbuckling during a crash or rollover."¹¹⁶ The plaintiffs' theory of the case centered on the idea that the seatbelt buckle could inadvertently or accidentally release because the buckle was "dangerously exposed and demonstrably susceptible to unintended contact, opening the buckle and releasing the [seatbelt]."¹¹⁷ Moreover, the plaintiffs attempted to show that the seatbelt release button was prone to contact from unintended sources like a hand, elbow, or a loose object in the passenger side of the car, which could cause it to unintentionally unbuckle.¹¹⁸

The District Court in Santa Fe County instructed the jury that in order to find the defendants guilty of negligence, the plaintiffs had to prove that both Fuji and Takata did not exercise ordinary care in designing and testing the seatbelt system, and additionally, that Fuji did not exercise ordinary care in selecting the seatbelt system for the Subaru vehicle.¹¹⁹ Finally, the court instructed the jury that the plaintiffs bore the burden of proving that the seatbelt system created an "unreasonable risk of injury" to Mrs. Kilgore and that the seatbelt system was defective upon reaching the user or consumer.¹²⁰ The jury returned a special verdict¹²¹ in favor of the defendants on September 29, 2006, and the trial court rendered the final judgment on December 11, 2006.¹²²

115. *Kilgore*, 2010-NMSC-040, ¶ 3, 240 P.3d at 651.

116. *Id.* ¶ 3, 240 P.3d at 651.

117. *Kilgore*, 2009-NMCA-078, ¶ 1, 213 P.3d at 1130.

118. *Id.* ¶ 7, 213 P.3d at 1131.

119. *Id.* ¶ 1, 213 P.3d at 1130.

120. *Id.* ¶ 7, 213 P.3d at 1131.

121. According to *Black's Law Dictionary*, a "special verdict" is "[a] verdict in which the jury makes findings only on factual issues submitted to them by the judge, who then decides the legal effect of the verdict," 1697 (9th ed. 2009); see FED. R. CIV. P. 49. In *Kilgore*, the jury specifically found that: (1) "Fuji was not negligent in designing, testing, or selecting the seatbelt system and that Takata was not negligent in designing or testing the seatbelt system;" (2) "no negligence of Fuji or Takata was a cause of Mrs. Kilgore's spinal cord injury and related damages;" and (3) "[t]he seatbelt system in Plaintiff's car that was supplied by Defendants was not defective." *Kilgore*, 2009-NMCA-078, ¶¶ 7–8, 213 P.3d at 1131.

122. *Kilgore*, 2009-NMCA-078, ¶ 8, 213 P.3d at 1131.

C. Discovery of Juror Misconduct

Following the verdict, Gregory Scott (Scott), a paralegal for the plaintiffs' counsel, undertook an investigation into the jury's verdict.¹²³ Based on his investigation, Scott submitted an affidavit stating he contacted Juror Marie Millie Valdivia (Juror Valdivia) to learn about the rationale behind her verdict.¹²⁴ All Juror Valdivia would say is that she believed that the plaintiffs "had definitely proved" that the seatbelt buckle could easily open if various body parts contacted the buckle; however, she thought that in real car accidents, there was not enough evidence that a buckle could release.¹²⁵ Therefore, Juror Valdivia did not feel that the seatbelt was defective.¹²⁶ Subsequently, Scott obtained information that Juror Valdivia's brother worked as a Subaru mechanic, and Juror Valdivia had spoken with the owner of the Subaru shop, Michael Griego (Griego), about Subaru seatbelt buckles likely sometime early in the trial.¹²⁷

Based on the information Scott obtained about Juror Valdivia, the plaintiffs filed a motion for a new trial on the grounds that Juror Valdivia had received extraneous information during the course of the trial.¹²⁸ Along with the motion for the new trial, the plaintiffs submitted an affidavit from Griego describing his conversation with Juror Valdivia.¹²⁹ The

123. *Id.* ¶ 9, 213 P.3d at 1131.

124. *Kilgore v. Fuji Heavy Indus. Ltd.*, 2010-NMSC-040, ¶ 4, 240 P.3d 648, 651.

125. *Id.*

126. *Id.*

127. *Id.* ¶ 5, 240 P.3d at 651; *Kilgore*, 2009-NMCA-078, ¶ 10, 213 P.3d at 1131.

128. *Kilgore*, 2010-NMSC-040, ¶ 5, 240 P.3d at 651. It is interesting that the plaintiffs filed a motion for a new trial not based on an affidavit from Juror Valdivia, but based on an affidavit from Griego. Rule 11-606(B) deals with the competency of jurors as witnesses, not other people. Rule 11-606(B) states that "[a] juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying." Juror Valdivia or other members of the *Kilgore* jury would presumably be allowed to testify "whether extraneous prejudicial information was improperly brought to the jury's attention," per 11-606(B)(1).

129. *Kilgore*, 2010-NMSC-040, ¶ 6, 240 P.3d at 651–52. Griego's affidavit stated the following:

1. My name is Michael Griego. I am an adult and I am competent to make this affidavit. The facts stated in this affidavit are true and are based upon my own personal knowledge.
2. I read an article in the newspaper about the trial in Santa Fe in which a woman was suing Subaru because she was paralyzed in a rollover accident because her seatbelt came off. I believe the article was in September of this year.
3. I am the owner of Mike's Garage at 1501 5th St., Santa Fe, New Mexico. My shop only works on Subaru vehicles. Michael Lucero is an employee of my business.

plaintiffs based their motion for a new trial on the notion that Scott's and Griego's affidavit "establish[ed] that Juror Valdivia received extraneous information and that, under New Mexico law, the Court must therefore presume prejudice and grant the plaintiffs' motion for a new trial."¹³⁰ The trial court denied the motion for a new trial and the plaintiffs appealed.¹³¹

D. New Mexico Court of Appeals Affirms the Trial Court and Elaborates on the Presumption of Prejudice Asserted in New Mexico Caselaw

The New Mexico Court of Appeals held that the conversation between Juror Valdivia and Griego did not constitute extraneous prejudicial information that reached the jury.¹³² In evaluating Juror Valdivia's receipt of the information about the seatbelt buckle, the court looked at whether the information Juror Valdivia received gave rise to a presumption of prejudice.¹³³ In so doing, the court went through a history of New Mexico caselaw regarding extraneous juror communications and *Remmer's* presumption of prejudice.¹³⁴ Beginning with *Beal, Doe*, and the U.S. Supreme Court's decision in *Remmer*, the court recounted how the presumption of prejudice expressed in *Beal* and *Doe* has continued in both civil and criminal cases in New Mexico.¹³⁵ In its discussion of *Mann*, the court recognized that the Supreme Court has distanced itself from *Remmer's* presumption of prejudice.¹³⁶ However, the court concluded that it would not reconcile New Mexico precedent with the potential changes in federal and other state law regarding the presumption of prejudice.¹³⁷ After so stating, the court asserted that in New Mexico jurisprudence, "the pre-

4. Marie Millie Valdivia is Michael Lucero's sister.

5. Prior to my seeing the newspaper article about the Subaru trial, Ms. Valdivia and I had a conversation. She told me that she was a juror on the Subaru trial. I told her that I had never heard of any incident where a Subaru seatbelt buckle had come open accidentally. I told her that I had never heard of that happening.

6. During the conversation, she said to me, at least twice, that she was not supposed to be talking to me about the case.

Id.

130. *Id.* ¶ 6, 240 P.3d at 652 (internal citation, brackets, and quotation marks omitted).

131. *Kilgore*, 2009-NMCA-078, ¶ 31, 213 P.3d at 1137.

132. *Id.*

133. *Id.* ¶ 14, 213 P.3d at 1132.

134. *See id.* ¶¶ 14–17, 213 P.3d at 1132–33.

135. *Id.* ¶ 17, 213 P.3d at 1133.

136. *Id.* ¶ 18, 213 P.3d at 1134.

137. *Id.*

sumption of prejudice does not arise unless a sufficient preliminary or threshold showing is made to invoke it.”¹³⁸

Citing *Doe*, *Goodloe*, and *Mann*, the court of appeals held that “the preliminary-showing requirement in *Doe* and *Mann*, and *Goodloe*’s threshold-question requirement” demonstrate that once the district court is satisfied that the jury received extraneous information, “the district court is to make an assessment whether evidence exists that requires invocation of the presumption-of-prejudice error.”¹³⁹ In assessing whether the court should invoke a presumption of prejudice due to the extraneous information, the court of appeals, citing *Mann*, noted that the court’s utmost focus should be in assessing whether extraneous information “unfairly affected the jury’s deliberative process and resulted in an unfair jury.”¹⁴⁰ If a court believes that the extraneous information satisfied the factors to invoke the presumption of prejudice, the court of appeals recognized that the non-movant would then have to rebut the presumption or the district court would at least have to hold an evidentiary hearing to question jurors.¹⁴¹ Finally, the court of appeals held that it saw no difference between a “preliminary showing” and a “threshold question” and would refer to the inquiry as “preliminary.”¹⁴²

With regard to the case, the court held that the plaintiffs did not satisfy the “preliminary showing” of whether there was “a reasonable probability or likelihood that extrinsic communications or conduct would have an effect upon the verdict or a typical juror.”¹⁴³ Had the plaintiffs satisfied this “preliminary showing” the court would have invoked a presumption of prejudice making it so the defendants would bear the burden of rebutting the presumption.¹⁴⁴

The court reasoned that Griego’s affidavit about his conversation with Juror Valdivia did not meet the “preliminary requirement” of showing that extraneous information actually reached the jury because the affidavit did not state who initiated the conversation, nor did it state that Juror Valdivia requested specific information about the seatbelt buckle in

138. *Id.* ¶ 19, 213 P.3d at 1134.

139. *Id.* ¶ 20, 213 P.3d at 1134.

140. *Id.* (internal quotation marks omitted) (quoting *State v. Mann*, 2002-NMSC-001, ¶ 20, 39 P.3d 124, 129).

141. *Id.* ¶ 14, 213 P.3d at 1132.

142. *Id.* ¶ 20, 213 P.3d at 1134.

143. *Id.* ¶¶ 23, 24, 213 P.3d at 1136 (quoting *Goodloe v. Bookout*, 1999-NMCA-061, ¶ 20, 980 P.2d 652, 657).

144. *See id.* ¶¶ 14, 31, 213 P.3d at 1137. The court also mentioned that once a presumption of prejudice was shown, perhaps that court would have to hold an evidentiary hearing. *Id.* ¶ 14, 213 P.3d at 1133.

question.¹⁴⁵ Moreover, the court stated that it presumed the jurors followed the court's instructions not to talk with anyone about the case or seek outside information.¹⁴⁶ In support of this rationale, the court noted that Juror Valdivia stated to Griego at least twice that she was not supposed to be discussing the case with him.¹⁴⁷ In addition, the court reasoned that it was unlikely that Griego's statement would have impacted her verdict in light of the mass of testimony at trial about seatbelt buckle designs and whether such a buckle could have inadvertently come open.¹⁴⁸ Finally, the court stated that it was unlikely that Juror Valdivia's information reached other members of the jury or that Juror Valdivia felt so strongly about the information that she would have shared it with other jurors.¹⁴⁹ The court of appeals affirmed the trial court's decision to deny the plaintiffs' motion for a new trial.¹⁵⁰

E. New Mexico Supreme Court Disavows the Presumption of Prejudice and Non-Movant's Burden to Rebut Presumption

After the New Mexico Court of Appeals decision in *Kilgore*, the New Mexico Supreme Court granted certiorari to hear the case.¹⁵¹ In an opinion written by Justice Petra Jimenez Maes, the New Mexico Supreme Court held that, among other things, the presumption of prejudice which attaches to extraneous juror communications no longer exists under New Mexico law.¹⁵² The New Mexico Supreme Court analyzed U.S. Supreme Court cases, federal cases, and New Mexico cases to come to the conclusion that the presumption of prejudice had narrowed over time and was no longer automatic.¹⁵³

In disavowing the presumption of prejudice, the New Mexico Supreme Court clarified what it believed the *Doe*, *Goodloe*, *Prudencio*, and *Mann* courts held with respect to whether extraneous information reaching the jury was presumptively prejudicial.¹⁵⁴ According to *Kilgore*, a party requesting a new trial on the basis of extraneous information had to, with competent evidence, either make a "preliminary showing" or sat-

145. *Id.* ¶ 24, 213 P.3d at 1135.

146. *Id.*

147. *Id.* ¶ 26, 213 P.3d at 1136.

148. *Id.* ¶¶ 28, 30, 213 P.3d at 1136.

149. *Id.* ¶ 30, 213 P.3d at 1136–37.

150. *Id.* ¶ 30, 213 P.3d at 1137.

151. *Kilgore v. Fuji Heavy Indus. Ltd.*, 2010-NMSC-040, ¶ 10, 240 P.3d 648, 652.

152. *Id.* ¶ 29, 240 P.3d 648, 658.

153. *See id.* ¶¶ 14–19, 240 P.3d at 654–55. For greater discussion of these cases see *supra* Part II.

154. *See id.* ¶ 19, 240 P.3d at 654–55.

isfy the “threshold question” to invoke the presumption of prejudice.¹⁵⁵ To establish a presumption of prejudice, in the eyes of the New Mexico Supreme Court, the *movant* had to establish that (1) extraneous information reached the jury, (2) the information was relevant to the case being tried, and (3) that there was a reasonable probability that the extraneous information affected the jury’s verdict or a typical juror.¹⁵⁶ The court then stated that although previous New Mexico precedents had referred to these requirements as a “preliminary showing” or “threshold question,” there was nothing that was actually preliminary or threshold about the inquiries “because the ultimate issue in all jury tampering, misconduct, or bias cases is ‘how the impropriety in question would have affected a hypothetical average jury.’”¹⁵⁷

The court reasoned that the question about how the extraneous information affected the hypothetical average juror was the proper inquiry because Rule 11-606(B) “prohibits a juror from testifying as to any matter or statement made during the course of deliberations or to the juror’s mental processes,” making actual prejudice impossible to prove or disprove.¹⁵⁸ Instead of the *movant* meeting the threshold requirements necessary to invoke a presumption of prejudice, which the non-*movant* would then have to rebut, the court said, “the *trial court* must employ an objective test, which inquires into the *probability of prejudice*, to ascertain the impact that the extraneous material had upon the jury.”¹⁵⁹ Then, the court announced that although New Mexico cases have classified the presumption of prejudice as a burden-shifting mechanism,

it is clear that, in reality, no presumption actually exists, because the burden remains on the moving party throughout the proceedings to prove the ultimate fact in issue, i.e., that there is a reasonable probability that extraneous material affected the verdict or a typical juror. Accordingly, we hereby disavow any further reference to a “presumption of prejudice” in our caselaw because, in practice, the burden does not shift to the opposing party to disprove prejudice.¹⁶⁰

155. *Id.* ¶ 21, 240 P.3d at 655.

156. *Id.*

157. *Id.* (quoting 3 JACK B. WEINSTEIN & MARGARET A. BERGER § 606.05[2][b] (2d. ed. 2010)).

158. *Id.* ¶ 12, 240 P.3d at 655–56 (quoting *State v. Mann*, 2002-NMSC-001, ¶ 18, 39 P.3d 124, 129 and citing *Goodloe v. Bookout*, 1999-NMCA-061, ¶ 20, 980 P.3d 652, 657) (internal quotation marks omitted).

159. *Id.* ¶ 21, 240 P.3d at 656 (emphasis added).

160. *Id.* ¶ 22, 240 P.3d at 656.

Because the moving party will have a difficult, if not impossible, task of demonstrating proof that the extraneous information impacted the jury, the New Mexico Supreme Court stated that the movant could prove and the trial courts could assess the “*probability of prejudice*” by employing an objective test consisting of at least five relevant factors.¹⁶¹ The factors include:

- (1) The manner in which the extraneous material was received;
- (2) How long the extraneous material was available to the jury;
- (3) Whether the jury received the extraneous material before or after the verdict;
- (4) If received before the verdict, at what point in the deliberations was the material received; and,
- (5) Whether it is probable that the extraneous material affected the jury’s verdict, given the overall strength of the opposing party’s case.¹⁶²

In applying the court’s new statement of the rule for extraneous juror information, the court found that by Juror Valdivia speaking with Griego, extraneous material actually reached the jury and the material was relevant to the case.¹⁶³ Moreover, the court found that because of his unique position as the owner of a Subaru auto-repair shop, his knowledge of Subaru vehicles made it less probable that the seatbelt system in the plaintiffs’ vehicle was defective.¹⁶⁴ The court ultimately held that Griego’s affidavit was sufficient to show that a juror had received extraneous information that was relevant to the case at hand and remanded the case for an evidentiary hearing.¹⁶⁵ At the evidentiary hearing, the plaintiffs, the moving party, will have the opportunity to prove that “there [was] a reasonable probability that the extraneous material affected the verdict or a typical juror.”¹⁶⁶

Overall, the New Mexico Supreme Court concluded that in New Mexico law, the presumption of prejudice that had previously attached to extraneous juror communications no longer exists.¹⁶⁷ Thus, if and when a movant wants a new trial on the basis of extraneous information, at an

161. *Id.* ¶ 23, 240 P.3d at 656.

162. *Id.* In crafting this objective test, the court used the factors similar to the factors *Doe* had articulated twenty-seven years earlier to determine if extraneous information had reached the jury.

163. *Id.* ¶¶ 24–25, 240 P.3d at 656–57.

164. *Id.*

165. *Id.* ¶¶ 25–28, 240 P.3d at 657–58.

166. *Id.* ¶ 28, 240 P.3d at 658. At the time of publication, there is no conclusive ruling from the district court’s evidentiary hearing.

167. *Id.* ¶ 29, 240 P.3d at 658.

evidentiary hearing the movant bears the burden of proving that extraneous material reached the jury and the information relates to the case being tried.¹⁶⁸ Then the movant will have to prove to the court that the extraneous information created a probability of prejudice.¹⁶⁹

IV. U.S. CIRCUIT COURTS OF APPEALS' APPROACHES TO THE PRESUMPTION OF PREJUDICE

The U.S. Courts of Appeals take many different approaches in assessing juror misconduct and choosing whether to apply *Remmer's* presumption of prejudice. Below is a brief survey of the various approaches taken by the circuit courts demonstrating that there is not a clear or consistent approach to analyzing juror misconduct. Finally, I pay special attention to the Tenth Circuit's position as New Mexico is in the Tenth Circuit.

A. First Through Ninth Circuits, Eleventh Circuit, and D.C. Circuit

The First Circuit applies the *Remmer* presumption of prejudice only when there was an egregious circumstance of jury tampering or third party communication.¹⁷⁰ In the Second Circuit, "it is well-settled that any extra-record information of which a juror becomes aware is presumed prejudicial."¹⁷¹ However, in the Second Circuit, the non-movant can rebut this presumption by showing that extraneous information was harmless to a hypothetical average juror.¹⁷² The Third Circuit only grants the movant a new trial if the movant demonstrates that they suffered "substantial prejudice" from extraneous information.¹⁷³ In the Third Circuit, it is the

168. *Id.* ¶ 23, 240 P.3d at 656.

169. *See id.*

170. *United States v. Boylan*, 898 F.2d 230, 261 (1st Cir. 1990). Casting doubt on *Remmer*, the First Circuit held, "the presumption is applicable only where there is an egregious tampering or third party communication which directly injects itself into the jury process." *Id.* *Bradshaw* reasserted this standard stating that "[p]ut another way, the *Remmer* standard should be limited to cases of significant ex parte contacts with sitting jurors or those involving aggravated circumstances . . ." *United States v. Bradshaw*, 281 F.3d 278, 288 (1st Cir. 2002) (quoting *Boylan*, 898 F.2d at 261).

171. *United States v. Greer*, 285 F.3d 158, 173 (2d Cir. 2002).

172. *Id.*

173. *United States v. Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001) (citing *United States v. Gilseman*, 949 F.2d 90, 95 (3d Cir. 1991)); *see also* *United State v. Elgende*, 384 F. App'x 47, 51 (3d Cir. 2010) (holding that in order for the movant to get a new trial, the movant "must show not only that there was misconduct by a juror but also that the misconduct resulted in substantial prejudice to the defendant so that the right to a fair trial was impeded . . . [and] [p]rejudice is not a precisely defined concept but depends on the particular circumstances in the case.").

movant “who bears the burden of demonstrating the likelihood of prejudice.”¹⁷⁴ The Third Circuit does not automatically presume prejudice; instead, in the Third Circuit, the movant must demonstrate that extraneous information likely created prejudice, and if the movant does so, the court will objectively evaluate whether the extraneous information would affect the hypothetical average juror.¹⁷⁵

In the Fourth Circuit, *Remmer*'s presumption of prejudice applies in all cases, except those in which the extraneous communication was nothing more than an *innocuous* intervention.¹⁷⁶ The Fifth and D.C. Circuits grant the district court discretion to apply *Remmer*'s presumption of prejudice.¹⁷⁷ The Sixth Circuit is the only U.S. Court of Appeals to have expressly abandoned *Remmer*'s presumption of prejudice.¹⁷⁸ Like the Fourth Circuit, the Seventh Circuit does not apply *Remmer*'s presumption

174. *United States v. Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001)

175. *Id.*; see also *Waldorf v. Shuta*, 3 F.3d 705, 709–10 (3d Cir. 1993) (personal injury case stating that “[i]t is fundamental that every litigant who is entitled to trial by jury is entitled to an impartial jury, free to the furthest extent practicable from extraneous influences that may subvert the fact-finding process”). *Waldorf* also stated that the moving party has to demonstrate the likelihood of actual prejudice and the court will determine, through an objective analysis, whether the alleged prejudicial information impacted a hypothetical average juror. *Id.*

176. *United States v. Basham*, 561 F.3d 302, 319 (4th Cir. 2009).

177. In *United States v. William-Davis*, the D.C. Circuit stated that the Supreme Court in *Smith and Olano* “narrowed” and “seemed to reconfigure” *Remmer*. 90 F.3d 490, 497 (D.C. Cir. 1996). The D.C. Circuit held that instead of *automatically* presuming prejudice, the district court should “inquire” into whether the extraneous information “showed enough of a likelihood of prejudice” to then assign the non-movant the burden of proving the communication was harmless. See also *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998) (“[T]he trial court must first assess the severity of the suspected intrusion; only when the court determines that prejudice is likely should the [non-movant] be required to prove its absence.”). In *Sylvester*, the court agreed with *William-Davis* and stated that *Remmer*'s automatic presumption cannot survive. *Id.* The court stated that the district court should examine the severity of the extraneous information, and “only when the court determines that prejudice is likely should the [non-movant] be required to prove its absence.” *Id.*

178. See *United States v. Wheaton*, 517 F.3d 350, 362 (6th Cir. 2008) (holding that defendant must do more than raise “‘serious suspicion’” to demonstrate he should be granted a new trial. The movant “bears the burden of *proving* the jury was biased.” (emphasis added)); *United States v. Pennell*, 737 F.2d 521, 532–33 (6th Cir. 1984); see also Eva Kerr, Note, *Prejudice, Procedure, and a Proper Presumption: Restoring the Remmer Presumption of Prejudice in Order to Protect Criminal Defendants' Sixth Amendment Rights*, 93 IOWA L. REV. 1451, 1477 (2008) (“The Sixth Circuit remains the lone circuit that refuses to presume prejudice in all cases involving extraneous communications with the jury.”).

of prejudice in cases involving innocuous communications.¹⁷⁹ Additionally, the Seventh Circuit recognizes that *Remmer* might only apply in cases that involve private outside contacts with jurors.¹⁸⁰ Therefore, in the Seventh Circuit, *Remmer*'s presumption of prejudice still applies as long as the extraneous communication was not harmless or innocuous.¹⁸¹

The Eighth Circuit applies *Remmer*'s presumption of prejudice if extraneous information relates to a factual issue not presented at trial.¹⁸² However, the Eighth Circuit does not apply *Remmer*'s presumption of prejudice in habeas corpus cases.¹⁸³ The Ninth Circuit does not have a clear approach to dealing with juror misconduct.¹⁸⁴ In the Ninth Circuit, if the communication is merely innocuous and does not rise to the level of jury tampering, the movant bears the burden of proving prejudice.¹⁸⁵

179. *Whitehead v. Cowan*, 263 F.3d 708, 724–25 (7th Cir. 2001); *see also* *Moore v. Knight*, 368 F.3d 936, 943 (7th Cir. 2004) (finding that an *ex parte* communication between the bailiff and the jury “remains under the purview of *Remmer*”); *United States v. Thibodeaux*, 758 F.2d 199, 202–203 (7th Cir. 1985) (stating extraneous communication overheard by juror was ambiguous and innocuous).

180. *Whitehead*, 263 F.3d at 725 (citing cases from other circuits which “confine *Remmer* to private contacts with jurors that actually pose a danger of prejudicing the jury”).

181. *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005) (discussing that there are situations in which a private communication between a juror and a third person “would not create a rational presumption of prejudice,” and finding extraneous information “must be of a character that creates a reasonable suspicion that further inquiry is necessary to determine whether the defendant was deprived of his right to an impartial jury”).

182. *United States v. Hall*, 85 F.3d 367, 371 (8th Cir. 1998). The Eighth Circuit does not apply the presumption of prejudice if the extraneous information relates to a purely legal issue. *Id.* Once the presumption is in place, the non-movant bears a heavy burden to prove that the extraneous information was “harmless beyond a reasonable doubt.” *Id.*

183. *See Helmig v. Kemna*, 461 F.3d 960, 963 (8th Cir. 2006) (“[T]he district court erred in applying the presumption of prejudice without taking into account that this is a habeas case.”).

184. In *U.S. v. Dutkel*, the Ninth Circuit asserted that the *Remmer* presumption applies only in cases that involve jury tampering. 192 F.3d 893, 894–95 (9th Cir. 1999). *Dutkel* stated that jury tampering is much more serious than jury misconduct and that the Supreme Court in *Remmer* “announced a special rule dealing with jury tampering.” *Id.* at 895. *Dutkel* stated in its interpretation of *Remmer* “a presumption of prejudice arises if a juror was subjected to coercion or bribery, and if this intrusion may have affected the juror in the exercise of his judgment.” *Id.* at 897. If there is jury tampering in the Ninth Circuit, the non-movant bears a heavy burden to prove that the tampering was not prejudicial. *Id.* at 894–95, 899.

185. *See U.S. v. Brande*, 329 F.3d 1173, 1176 (9th Cir. 2003). In *Brande*, the Ninth Circuit stated that “not every improper contact is either tampering, on the one hand, or innocuous, on the other” so the court at an evidentiary hearing “‘must consider the

The Eleventh Circuit applies the *Remmer* presumption of prejudice, but it has expressly recognized that its sister circuits may have in part abandoned *Remmer*; however, it declines to resolve the issue.¹⁸⁶ In the Eleventh Circuit, the court stated that a new trial is required only when the extraneous information “posed a reasonable possibility of prejudice to the defendant.”¹⁸⁷

B. Tenth Circuit—Remmer’s Presumption Applies in All Cases Except in Habeas Corpus Cases

The Tenth Circuit continues to apply *Remmer*’s presumption of prejudice in all cases except habeas corpus petitions.¹⁸⁸ However, the Tenth Circuit has not always had a clear approach to juror misconduct.¹⁸⁹ In *Smith v. Ingersoll-Rand Co.*, the Tenth Circuit described the two different standards it had applied in juror misconduct cases.¹⁹⁰ First, it said that in some cases in the Tenth Circuit when a juror comes into contact with extraneous information, a new trial is necessary if the movant demonstrates that there is the “slightest possibility” that the extraneous information impacted the verdict.¹⁹¹ Second, *Ingersoll-Rand* described other cases within the Tenth Circuit where *Remmer*’s presumption of prejudice applied and could only be rebutted by showing the information was harmless.¹⁹² Despite the differing approaches, *Ingersoll-Rand* declined to resolve the issue, stating that the court needed to resolve the issue when sitting en banc.¹⁹³

Three years later, in *United States v. Scull*, the Tenth Circuit strictly adhered to *Remmer*’s presumption of prejudice.¹⁹⁴ In *Scull*, the court cited

content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source.” *Id.* (quoting *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 2003)); see also *U.S. v. Dutkel*, 192 F.3d 893, 895 n.1 (9th Cir. 1999).

186. See *Boyd v. Allen*, 592 F.3d 1274, 1305 n.9 (11th Cir. 2010).

187. *Id.* at 1305 (citation and internal quotation marks omitted).

188. *Cannon v. Mullin*, 383 F.3d 1152, 1170 (10th Cir. 2004) (noting that this court does not apply *Remmer* in § 2254, habeas corpus proceedings); see also *Kerr*, *supra* note 178, at 1468.

189. *But see Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919, 922 (10th Cir. 1992) (“The law in the Tenth Circuit is clear. A rebuttable presumption of prejudice arises whenever a jury is exposed to external information in contravention of a district court’s instructions.”).

190. 214 F.3d 1235, 1241 (10th Cir. 2000).

191. *Id.* (citing cases that applied the “slightest possibility” standard).

192. *Id.* (citing cases that apply the *Remmer* presumption of prejudice).

193. *Id.* at 1242 (“[The] precise resolution requires adopting one standard to the foreclosure of the other, an act which may only be undertaken by this court sitting *en banc*.”).

194. 321 F.3d 1270 (10th Cir. 2003).

Remmer for the proposition that “[w]hen members of a jury are exposed to extraneous information about a matter pending before the jury, a presumption of prejudice arises.”¹⁹⁵ The court noted the circuit split on whether the presumption had been narrowed or reconfigured, but expressly stated that “[i]n the absence of Supreme Court authority to the contrary . . . we review [the movant’s] claim under *Remmer*’s rubric.”¹⁹⁶ The Tenth Circuit seemed to qualify its position in 2007 when it stated that “[t]he defendant must also demonstrate that an unauthorized contact created actual juror bias; courts should not presume that a contact was prejudicial.”¹⁹⁷ However, in a 2011 opinion, the Tenth Circuit recognized the narrowing or abandonment of *Remmer* in the other Circuits (namely the Sixth) and expressly stated, “[w]e, however, have deemed ourselves obligated to follow *Remmer I*’s presumption [i]n the absence of Supreme Court authority to the contrary.”¹⁹⁸ Overall, the Tenth Circuit applies the *Remmer* presumption of prejudice in all cases except habeas cases and will not stop until the Supreme Court rules on the issue.

V. ANALYSIS

A. Overview

The New Mexico Supreme Court’s holding in *Kilgore v. Fuji Heavy Industries* is more than a reconciliation of New Mexico caselaw with U.S. Supreme Court precedent.¹⁹⁹ Instead, *Kilgore* does away with the two lines of New Mexico juror misconduct jurisprudence and follows a minority approach to evaluating juror misconduct. Thus, *Kilgore*’s holding fundamentally changes the way New Mexico approaches juror misconduct.

195. *Id.* at 1280.

196. *Id.* at 1280 n.5.

197. *United States v. Robertson*, 473 F.3d 1289, 1294 (10th Cir. 2007) (quoting *United States v. Frost*, 125 F.3d 346, 377 (6th Cir. 1997)) (internal quotation marks omitted).

198. *Teniente v. Wyo. Attorney Gen.*, 2011 WL 14467, No. 10-8033 (10th Cir. Jan. 5, 2011) (internal citation and quotation marks omitted) (deciding if the Wyoming Supreme Court had applied Wyoming state law standards for extraneous juror communications correctly in light of conflicting federal law and stating, “[j]ust because we have felt obliged to adhere to the presumption of *Remmer I* does not mean that a contrary view of the dictates of Supreme Court caselaw is unreasonable”).

199. *Kilgore v. Fuji Heavy Indus. Ltd.*, 2010-NMSC-040, ¶ 18, 240 P.3d 648, 654 (“We take this opportunity ‘to reconcile existing New Mexico precedent with this more recent articulation by the Supreme Court.’” (citing *State v. Mann*, 2002-NMSC-001, ¶ 36, 39 P.3d 124, 135) (emphasis added)).

B. New Mexico Rule 11-301: Presumptions in Civil Cases and the Presumption Eliminated in Kilgore

In *Kilgore*, the New Mexico Supreme Court never mentions New Mexico Rule of Evidence 11-301 or Federal Rule of Evidence 301 that deal with presumptions in civil cases or what it means for a party to have a presumption in their favor.²⁰⁰ Rule 11-301 states:

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed [the non-movant] the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.²⁰¹

Before *Kilgore*, it was not absolutely clear from New Mexico's juror misconduct cases whether once the court invoked the presumption of prejudice, the non-movant had the *burden of proof*,²⁰² or just the *burden of production*,²⁰³ to show that the extraneous information was harmless or non-prejudicial to the jury.²⁰⁴ In *Prudencio*, the language, "the burden

200. See *Chapman v. Varela*, 2009-NMSC-041, ¶¶ 12–14, 213 P.2d 1109, 1116–17 (discussing the effects of presumptions in civil cases as well as explaining, "if a party successfully raises a presumption that could be used by the fact finder to justify a finding of the ultimate fact . . . the risk of nonpersuasion never shifts from the party on whom it was originally placed, [the non-movant]").

201. Rule 11-301 NMRA; see also FED R. EVID. 301.

202. "'Burden of Proof' has two distinct meanings. In its strict sense, the term denotes the duty of establishing the truth of a given proposition or issue by as much evidence as the law demands in the case in which the issue arises, whether civil or criminal. In a secondary sense, the term 'burden of proof' is used to designate the obligation resting upon a party to meet with evidence a prima facie case created against that party." J. DUKE THORNTON, TRIAL HANDBOOK FOR NEW MEXICO LAWYERS, § 9.1 "Burden of Proof and Burden of Going Forward." (2011) "The burden of proof in this secondary sense means, in short, the necessity of going forward with the evidence and is sometimes expressed by the term 'burden of evidence.'" *Id.* The "burden of proof" is also known as the "burden of persuasion." See *id.* The burden of proof includes both the burden of persuasion and the burden of production. BLACK'S LAW DICTIONARY 223 (9th ed. 2009).

203. Burden of Production: "A party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict." BLACK'S LAW DICTIONARY 223 (9th ed. 2009).

204. See *Prudencio v. Gonzales*, 104 N.M. 788, 790, 727 P.2d 553, 555 (Ct. App. 1986) ("Once the presumption of prejudice is established, the burden then shifts to the opposing party to demonstrate that the improper conduct did not have an influential effect upon the jurors."); *State v. Melton*, 102 N.M. 120, 123, 692 P.2d 45, 48 (Ct.

then shifts to the opposing party to demonstrate that the improper conduct did not have an influential effect upon jurors,”²⁰⁵ suggests that the non-movant had the burden to prove—not just the burden to produce evidence—that the extraneous information was harmless.²⁰⁶

However, under Rule 11-301, the non-movant never bears the burden to prove non-prejudice; instead, the non-movant only bears the “burden of going forward with evidence to rebut or meet the presumption.”²⁰⁷ If one were to factor Rule 11-301 into the mix, then under the *Beal* line of cases, perhaps this was the law: (1) upon a showing of extraneous information reaching the jury this automatically created a presumption of prejudice; (2) under Rule 11-301, once the presumption arose, the non-movant *had to* come forward with counter-evidence that the extraneous information was not prejudicial or was harmless; (3) although 11-301 imposed on the non-movant the burden to produce counter-evidence of prejudice, the burden of proof (persuasion) was still on the movant to prove prejudice rather than on the non-movant to prove harmlessness. Nevertheless, because there was never a mention of Rule 11-301 in any of New Mexico’s civil juror misconduct cases, the non-movant may very well have had the burden to prove that the extraneous information was non-prejudicial or harmless, even though Rule 11-301 states the contrary.

Kilgore does not mention Rule 11-301 when it “disavows” any presumption of prejudice in juror misconduct cases.²⁰⁸ Yet, it is interesting to consider *Kilgore*’s holding in light of Rule 11-301. What *Kilgore*’s holding

App. 1984) (“In *State v. Beal*, the Supreme Court held that when it has once been established that there was a communication made to the jury, a presumption of prejudice arises. The burden is then upon the party resisting a new trial [the non-movant] to demonstrate that the communication did not affect the verdict.” (citation omitted)); *State v. Ho’o*, 99 N.M. 140, 146–47 (Ct. App. 1982) (“Although any unauthorized contact between the prosecution and the jury is presumptively prejudicial to the defendant, this presumption is not irrebuttable . . . In each instance, the burden is upon the [non-movant] to affirmatively demonstrate the absence of any actual prejudice to the defendant.”); *State v. Beal*, 48 N.M. 84, 93, 146 P.2d 175, 180–81 (1944) (stating the non-movant has the burden to establish that prejudice did not result from the extraneous information).

205. *Prudencio*, 104 N.M. at 790, 727 P.2d at 555.

206. *See State v. Doe*, 101 N.M. 363, 367, 683 P.2d 45, 49 (Ct. App. 1984) (concluding that in New Mexico when there has been an extraneous communication, the movant “benefits from a ‘presumption of prejudice’ which the opposing party must rebut”).

207. Rule 11-301 NMRA.

208. *Kilgore v. Fuji Heavy Indus. Ltd.*, 2010-NMSC-040, ¶ 22, 240 P.3d 648, 656 (“[T]he burden remains on the moving party throughout the proceedings to prove the ultimate fact in issue, i.e., that there is a reasonable probability that the extraneous material affected the verdict or a typical juror.”).

likely did is establish that: (1) the burden of proof is on the movant to show extraneous information prejudiced the jury; (2) this initial burden is met by showing a reasonable probability that an objective juror would be influenced by the extraneous information; (3) this showing is sufficient to compel an evidentiary hearing at the trial level; (4) and at the evidentiary hearing, the non-movant has *no obligation* to come forward with counter-evidence that the extraneous information was harmless; (5) the non-movant can, if they desire, present evidence that the information was harmless, but it is not clear whether the non-movant must do so.

The fourth and fifth factors articulated in the last scenario above are critical to the interplay between Rule 11-301 and *Kilgore's* holding. Under factor four, the non-movant is not required to produce any counter-evidence to show the extraneous information was non-prejudicial or harmless. This is different than Rule 11-301 because since *Kilgore* eliminated any *presumption* of prejudice, Rule 11-301's demands do not apply. However, it is unclear whether the non-movant might still want to bring fourth counter-evidence showing that the extraneous information was non-prejudicial (i.e., harmless). The *Prudencio* and *Beal* line of cases seemingly used to demand that the non-movant demonstrate the information was non-prejudicial or harmless. Now, however, all *Kilgore* says is that at an "evidentiary hearing in which all interested parties are permitted to participate," the "[p]lantiffs will have an opportunity to prove there is a reasonable probability that the extraneous material affected the verdict or a typical juror."²⁰⁹

Overall, it appears by eliminating a presumption of prejudice in *Kilgore*, the court also eliminated any requirement that the non-movant show the extraneous information was harmless. It is unclear whether the non-movant would be wise to show the extraneous information was harmless, but only time will tell how this plays out in New Mexico courts.

C. Why Disavow Over Thirty Years of New Mexico Precedent?

New Mexico precedent, from *Prudencio* through *Mann*, "narrowed" and "refined" the presumption of prejudice, as *Kilgore* aptly notes.²¹⁰ However, the cases up until *Kilgore* narrowed and refined the presumption of prejudice in a way more consistent with most of the circuit courts—by requiring the movant to make a preliminary showing that extraneous information reached the jury and may have impacted them before the non-movant had to demonstrate that the information was non-prejudicial or harmless.

209. *Id.* ¶¶ 23, 28, 240 P.3d 648, 656, 658.

210. *Id.* ¶ 19, 240 P.3d 648, 655–56.

Now, with *Kilgore*, where New Mexico deviates from both the *Beal* and *Prudencio* line of cases, and from most of the other circuits, is in requiring that the movant bear the entire burden of proving prejudice. In shifting the burden of proof to the movant throughout the proceedings, the *Kilgore* court simply asserted, “in practice, the burden does not shift to the opposing party to disprove prejudice.”²¹¹ However, this statement seems fairly conclusory and overly broad. It is unclear why the New Mexico Supreme Court had to deviate from a long line of New Mexico and circuit court cases that at some point shifted the burden to the non-movant to demonstrate the extraneous information was not prejudicial or harmless. Perhaps “in practice” this is what occurs, but New Mexico’s deviation is such a far cry from almost all other court’s approaches, it seems unfair to the moving party and its right to a fair and impartial jury. Finally, the fact that the New Mexico Supreme Court undertook a substantive change in the way courts should evaluate extraneous juror information in a civil case might have greater ramifications in criminal cases.

D. Cases Cited in *Kilgore*—No Discussion of the Tenth Circuit

Although *Kilgore* cites circuit court cases to support its position that the presumption of prejudice no longer exists in cases involving extraneous juror information, it fails to realize that in all but one of those cases, the non-movant still bears the burden of proving the alleged prejudice was harmless. The New Mexico Supreme Court cites *United States v. Williams-Davis* for rejecting *Remmer*’s automatic presumption of prejudice,²¹² which is a true assessment of *Williams-Davis*. However, in *Williams-Davis*, the non-movant still bears a burden to prove that the extraneous information was harmless to the movant.²¹³ Moreover, the *Kilgore* court cites *United States v. Hall* as a court employing the objective five-factor test, but fails to mention that the Eighth Circuit presumes prejudice if the extraneous material relates to a factual issue not developed at trial, which the non-movant must rebut by showing the extraneous communication was harmless *beyond a reasonable doubt*.²¹⁴

The Sixth Circuit is the only Circuit that has totally abandoned presuming prejudice in any circumstance of juror misconduct, bias, or tampering.²¹⁵ The New Mexico Supreme Court seems to suggest that the

211. *Id.* ¶¶ 21, 23, 240 P.3d 648, 655–56.

212. *Id.* ¶ 18, 240 P.3d 648, 654.

213. *United States v. Williams-Davis*, 90 F.3d 490, 497 (D.C. Cir. 1996).

214. *United States v. Hall*, 85 F.3d 367, 371 (8th Cir. 1996).

215. *See United States v. Wheaton*, 517 F.3d 350, 362 (6th Cir. 2008) (holding that defendant must do more than raise “serious suspicion” to demonstrate he should be granted a new trial. The movant bears the burden of *proving* the jury was biased.); *see*

Sixth Circuit's approach is the best solution to dealing with juror misconduct. This is not necessarily wrong, just curious, especially in light of the fact that the Tenth Circuit has expressly stated that *Remmer's* presumption of prejudice applies in all extraneous juror information cases, except habeas corpus cases.²¹⁶ Furthermore, the Tenth Circuit has expressly avoided disavowing *Remmer's* presumption until the U.S. Supreme Court rules on the issue.²¹⁷ Overall, there is really no clear reason why New Mexico abandoned both the *Beal* and the *Prudencio* line of cases to establish the new rule that the movant bears the entire burden of proof that it is reasonably probable that extraneous information prejudiced an objective juror.

E. Proving the Probability of Prejudice and the Use of the Term "Prejudicial"

No matter who bears the burden of proving that an extraneous communication probably prejudiced the jury, the fact remains that parties have an arduous task of proving anything in light of Rule 606(b)'s prohibition against jurors testifying as to the effect that extraneous information had on their mental processes or deliberations.²¹⁸ Impeaching jury verdicts has been a contentious issue for over two centuries.²¹⁹ However, there are two competing views of impeaching jury verdicts.²²⁰ The first view finds that jury verdicts should be impeached if extraneous information impacted the party's right to a fair and impartial jury.²²¹ The second view is that in light of policy considerations favoring the finality and secrecy of jury verdicts, jury verdicts should rarely be impeached.²²² The second view finds support in the notion that if jurors were always asked about their verdicts, they would be less likely to render an unfavorable

also Kerr, *supra* note 178, at 1476–77 (noting that “[t]he Sixth Circuit is the only circuit that continues to follow *Smith* and *Olano*, instead of applying *Remmer's* presumption of prejudice”).

216. See *United States v. Scull*, 321 F.3d 1270, 1280 (10th Cir. 2003).

217. See *id.*

218. See *Williams-Davis*, 90 F.3d at 496.

219. See James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 ST. JOHN'S L. REV. 389, 437 (1991).

220. *Id.*

221. *Id.* at 437–38 (“Proponents of the first viewpoint, which most scholars have adopted, argue that the interests of fairness and accuracy of result mandate the adoption of a liberal approach with regard to inquiries into jury verdicts and the impeachment of those verdicts. They focus on whether the verdict in a particular case was rendered by a fair and impartial jury, based solely on the evidence, a position that finds its roots in the Constitution.”).

222. *Id.* at 438.

verdict, and may be more prone to harassment—perhaps diminishing public confidence in the jury system.²²³

The majority view in the circuit courts is to adhere to Rule 606(b)'s language that a juror cannot testify to “the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith.”²²⁴ The Second, Seventh, Eighth, and Tenth Circuits adhere to this view.²²⁵ However, not all circuit courts agree.²²⁶ The Sixth and the Ninth Circuits believe that a party should be able to ask a juror whether an exposure to an outside influence influenced a juror’s ability to be impartial.²²⁷ Moreover, the Sixth Circuit held that a party should be able to inquire into the jurors’ states of mind after the jury was exposed to extraneous information.²²⁸

In three different cases, the Sixth and Ninth Circuits expressed their opinions about jurors testifying about extraneous influences impacting them and the verdict. In *United States v. Herndon*, during deliberations, a

223. *Id.* (“[P]roponents of the second view, which Congress and most courts have adopted, advocate restriction of post-trial scrutiny of jury verdicts. They focus primarily on protecting individual jurors and the jury system as a whole.”).

224. FED. R. EVID. 606(b). *See also* *United States v. Honken*, 541 F.3d 1146, 1168 (8th Cir. 2008) (stating that “circuits disagree whether Rule 606(b) prohibits a juror from testifying as to whether extraneous information or an outside influence affected the juror’s ability to be impartial”).

225. *United States v. Greer*, 285 F.3d 158, 173–74 (2d. Cir. 2002) (holding that it was improper for the district court to ask juror whether the extraneous information impacted their ability to be fair and impartial); *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (7th Cir. 1991) (“The proper procedure [to determine the existence of any unauthorized communication made to a juror] is for the judge to limit the questions asked the jurors to whether the communication was made and what it contained, and then, having determined that the communication took place and what exactly it said, to determine—without asking the jurors anything further and empathetically without asking them what role the communication played in their thoughts or discussion—whether there [was] a reasonable possibility the communication altered the verdict.”); *Honken*, 541 F.3d at 1168 (holding that “606(b) prohibits a juror from testifying at a post-verdict hearing as to whether extraneous information or an outside influence affected the juror’s ability to be impartial”); *United States v. Simpson*, 950 F.2d 1519, 1521 (10th Cir. 1991) (“The language of Rule 606(b) allows a juror to testify as to whether any extraneous prejudicial information was improperly brought to bear upon a juror. However, the language of the rule is equally clear that a juror may not testify as to the effect the outside information had upon the juror.”) (emphasis added).

226. MATTHEW BENDER, WEINSTEIN’S EVIDENCE MANUAL, § 606.05[1][c] (2010).

227. *United States v. Herndon*, 156 F.3d 629, 637 (6th Cir. 1998); *United States v. Walker*, 1 F.3d 423, 431 (6th Cir. 1993); *United States v. Rutherford*, 371 F.3d 634, 644 (9th Cir. 2004); *see also Honken*, 541 F.3d at 1168.

228. *Herndon*, 156 F.3d at 637; *Walker*, 1 F.3d at 431.

juror recalled that he might have had prior business dealings with the defendant.²²⁹ The Sixth Circuit held that the district court abused its discretion by denying the defendant a hearing where he could “have an opportunity to prove actual bias” because the district court “not only failed to adequately investigate the allegation of juror partiality, but the juror never personally assured the court of his impartiality.”²³⁰ Similarly, in *United States v. Walker*, an earlier case in the Sixth Circuit, the court reaffirmed its belief that *Smith* “reinterpreted *Remmer*” by shifting the burden to the movant to show the extraneous communication was prejudicial to the movant, and expressly reaffirming that “[p]rejudice is not to be presumed.”²³¹ In *Walker* the jury was exposed to un-redacted deposition transcripts.²³² The Sixth Circuit held that the movants were deprived of a fair trial because the district court denied the movant’s “reasonable request to inquire into the jurors’ states of mind” in order to have the opportunity to prove actual juror bias.²³³

The Ninth Circuit seems to agree with the Sixth. In *United States v. Rutherford*, the defendants moved for a new trial on the belief that the IRS agents sitting on the plaintiff’s side of the courtroom intimidated the jury and “prejudiced its deliberations.”²³⁴ The court held that under Rule 606(b) a court may not consider testimony “regarding the affected juror’s mental processes in *reaching the verdict*.”²³⁵ In explaining what this meant, the court stated:

[F]or example, a juror cannot testify to whether an outside influence *caused* him to change his vote from innocent to guilty. However, a court can and should consider the effect of extraneous information or improper contacts on a juror’s state of mind.²³⁶

Overall, the Ninth Circuit held that a court could gather evidence relating to jury influences or contacts and how those influences or contacts impacted the jurors’ ability to be fair and impartial in receiving evidence and listening to testimony.²³⁷

229. 156 F.3d at 631.

230. *Id.* at 637 (“[T]he risk of prejudice is so great when a jury is tainted with extraneous information, we believe that [Defendant] should have the opportunity to establish whether prejudice existed.”).

231. *Walker*, 1 F.3d at 431 (quoting *United States v. Zelinka*, 862 F.2d 92, 95–96 (6th Cir. 1988)).

232. *Id.* at 430.

233. *Id.* at 431.

234. 371 F.3d 634, 638 (9th Cir. 2004).

235. *Id.* at 644 (quoting *United States v. Elias*, 269 F.3d 1003, 1020 (9th Cir. 2001)).

236. *Id.* (quoting *Elias*, 269 F.3d at 1020).

237. *Id.*

If New Mexico is going to adopt the hard-lined approach that the movant bears the entire burden of proving the “probability of prejudice” when extraneous information reaches the jury, New Mexico should adopt the approaches taken by the Sixth and Ninth Circuit and allow jurors to testify as to the impact that the extraneous information had on them. Although *Kilgore* expressly stated that Rule 11-606(B) prohibits jurors testifying about the effect that the extraneous information had on their deliberations and mental processes,²³⁸ movants are still going to face an uphill battle in attempting to satisfy the court that the extraneous information would probably prejudice a typical juror.

Seeing as New Mexico adheres to the Sixth Circuit’s holding that *Smith* abandoned *Remmer* and placed the burden on the movant to prove prejudice, New Mexico should follow the Sixth Circuit in its entirety. Thus, New Mexico should allow the movant to inquire into the jurors’ states of minds to see if the extraneous material impacted their ability to be impartial in order to prove the probability of prejudice. Because the movant still has a constitutionally guaranteed right to a fair and impartial jury, the movant should have the ability to get the most direct evidence of prejudice instead of having to go down a path of uncertainty and ambiguity.²³⁹ This is the only way to strike a balance between the finality and secrecy of verdicts and the movant’s right to a fair and impartial jury.

Allowing the movant to examine the state of mind of the jurors as to their ability to remain impartial in deliberating and rendering a verdict also eliminates the need for the trial court to employ the nebulous factors listed in the five-factor test articulated in *Kilgore*. Directly in the language of Rule 606(b) is the word “prejudicial.” The rule states, “a juror may testify as to whether extraneous *prejudicial* information was brought to the jury’s attention.”²⁴⁰ According to *Merriam-Webster’s Collegiate Dictionary*, “prejudicial” means “tending to injure or impair” or “[d]etrimental.”²⁴¹ The fact that the drafters of Federal Rule 606(b)(1) and New Mexico Rule 11-606(B)(1), decided to include the word “prejudicial” within the rule would suggest that a juror should be able to testify whether extraneous information came to their attention that was “detrimental” or injurious to the movant’s case. When the Sixth and Ninth Circuits held that a juror can testify about their ability to remain impartial and their state of mind regarding any extraneous material that reached

238. *Kilgore v. Fuji Heavy Indus. Ltd.*, 2010-NMSC-040, ¶¶ 21, 23, 240 P.3d 648, 655–56.

239. *Compare* *Sassounian v. Roe*, 230 F.3d 1097, 1109 (9th Cir. 2000) *with* *United States v. Walker*, 1 F.3d 423, 431 (6th Cir. 1993).

240. FED. R. EVID 606(b) (emphasis added); *accord* Rule 11-606(B) NMRA.

241. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 979 (11th ed. 2007).

them, perhaps what the courts were seeing is the inherent conflict that arises with the use of the word “prejudicial” in Rule 606(b)(1) and the prohibition on jurors testifying about the effect of anything upon their minds or emotions and what influenced their verdict.

Therefore, New Mexico needs to adopt the approach of the Sixth and Ninth Circuits or the New Mexico Supreme Court needs to amend 11-606(B) and eliminate, or else explain, what it means to have the word “prejudicial” in the rule. It would seem that the use of the term “prejudicial” in the rule authorizes a juror to state whether extraneous information was detrimental or injurious to his or her perception of the case. Would not the question “did extraneous *and* prejudicial information reach your ears?” be permissible under a literal reading of 11-606(B)(1)? From a literal reading, it seems so.

F. Standard of Appellate Review

If New Mexico refuses to adopt the position taken in the Sixth and the Ninth Circuits that allows for a hearing where the movant can ask the juror to assure the court that he or she is impartial and to allow the movant to inquire into the jurors’ states of mind, then New Mexico should adopt a modified appellate standard of review for cases dealing with juror misconduct.²⁴² *People v. Waddle*, a Colorado state case cited favorably in *Kilgore*, stated that appellate courts normally review trial courts’ determinations on whether to grant a new trial under an abuse of discretion. However, *Waddle* held that the “question about whether there exists a reasonable possibility that extraneous communications with a jury influenced its verdict is a matter of law, to be resolved independently by a reviewing court.”²⁴³ Some federal appellate courts also review juror misconduct cases under a mixed question of law and fact.²⁴⁴ In *United States v. Cheek*, the court stated that:

Because the ultimate factual determination regarding the impartiality of the jury necessarily depends on legal conclusions, it is reviewed in light of all the evidence under a *somewhat narrowed*, modified abuse of discretion standard giving the appellate court

242. See *Kilgore v. Fuji Heavy Indus. Ltd.*, 2010-NMSC-040, ¶ 20, 240 P.3d 648, 655 (“Both the trial court’s factual findings and its ruling on the movant’s motion for a new trial are reviewed for an abuse of discretion.”).

243. *People v. Waddle*, 97 P.3d 932, 983 (Colo. 2004).

244. *Sassounian v. Roe*, 230 F.3d 1097 (9th Cir. 2000) (“Juror misconduct is a mixed question of law and fact, reviewed de novo.”).

more latitude to review the trial court's conclusion in this context than in other situations.²⁴⁵

Requiring that the movant bear the entire burden of proving that there is a reasonable probability a hypothetical juror may have been impacted by extraneous information is a difficult task to accomplish. Allowing the New Mexico appellate courts to review de novo the trial court's determination of whether the movant met this burden might add a much needed protective measure before a movant is potentially denied his right to a fair and impartial jury. Therefore, New Mexico should adopt this modified appellate review standard in cases dealing with juror misconduct.

VI. CONCLUSION

By disavowing any reference to the presumption of prejudice in New Mexico cases involving juror misconduct, the New Mexico Supreme Court has established that it wants to make it difficult for the movant to obtain an evidentiary hearing or possibly a new trial on the grounds that the jury received extraneous information. New Mexico seems to follow the Sixth Circuit in its approach to making the movant bear the entire burden of proof that extraneous information was probably prejudicial. If this is so, New Mexico should follow the lead of the Sixth and Ninth Circuits and allow the movant to question jurors' ability to be impartial or else expand on what it means to have the word "prejudicial" in Rule 11-606(B)(1).

In a world with almost instant access to the Internet, juror misconduct will be much easier to commit. Parties impacted by a juror "Googling" information about a case or updating their Facebook, Twitter, or blog page with information about a trial will have a difficult time obtaining a new trial in New Mexico state courts.²⁴⁶ Even though there is great confusion in other jurisdictions as to how, when, or if *Remmer's* presumption of prejudice applies, New Mexico believes it has solved the problem in this state. Yet, *Kilgore's* holding fundamentally changes the way New Mexico approaches juror misconduct and only time will tell how

245. *United States v. Cheek*, 94 F.3d 136, 140 (4th Cir. 1996) (emphasis added) (internal citation and quotation marks omitted); *see also* *United States v. Basham*, 561 F.3d 302, 319 (4th Cir. 2009) (applying the narrowed modified abuse of discretion to juror misconduct analysis).

246. *See* Caren Myers Morrison, *Can the Jury Trial Survive Google?*, ABA SECTION OF CRIMINAL JUSTICE, Winter 2011 (describing incidents of jurors conducting internet research, blogging or tweeting from the jury box, and possible solutions).

exactly *Kilgore*'s holding will impact both civil and criminal juror misconduct cases in the state.²⁴⁷

247. The U.S. Supreme Court could grant certiorari to resolve once and for all whether/how/or if courts should apply *Remmer*'s presumption of prejudice. See Bradley Tennyson Smith, Note, *Remmer's Presumption of Prejudice: The Tenth Circuit's Position*, 81 DENV. U. L. REV. 687, 702 (2004) ("Even if the fundamental principles of . . . *Remmer* have been in some form limited by Supreme Court's decisions in *Phillips* and *Olano*, until overruled, the federal circuit courts must continue to apply them where they are directly applicable. Because only some federal courts continue to adhere to those cases, the Supreme Court should exercise its *certiorari* jurisdiction and decide this matter once and for all."). Even if the U.S. Supreme Court were to decide a case clearly articulating its position on *Remmer*, New Mexico can still of course make its own rules for cases involving juror misconduct. Nevertheless, precedent from the U.S. Supreme Court stating that *Remmer*'s holding is still good law or that neither *Smith* nor *Olano* overruled or narrowed *Remmer* could be persuasive in New Mexico.

