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## Research in the Jury Room

Ariel Monroe Kiefer

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## NOTE

### Research in the Jury Room

*Smotherman v. Cass Reg'l Med. Ctr.*, 499 S.W.3d 709 (Mo.) (en banc), *reh'g denied*, (Nov. 22, 2016)

Ariel Monroe Kiefer\*

#### I. INTRODUCTION

Jury trials are fundamental to the American justice system. Yet they are not perfect. One serious problem arises when a juror performs independent research about the case. This is unfair to the parties because the information the juror finds may be inadmissible under the rules of evidence and the party does not have a chance to explain or rebut the evidence.<sup>1</sup> However, granting a new trial due to this misconduct is costly. Trials are estimated to cost between approximately \$20,000 and \$70,000, depending on the subject matter of the case.<sup>2</sup> It is difficult to determine how often juror misconduct occurs because jurors deliberate in secret and have limited contact with non-jurors.<sup>3</sup> When juror misconduct occurs, courts must determine if there should be a new trial by considering aspects like how much weight should be given to a juror's testimony stating that extraneous information did not influence the juror's decision.

Part II of this Note discusses the facts surrounding the Supreme Court of Missouri's decision not to grant a new trial due to juror misconduct in *Smotherman v. Cass Regional Medical Center*. Part III analyzes the approaches

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\*B.S., Missouri State University, 2015; J.D. Candidate, University of Missouri School of Law, 2018; Associate Editor, *Missouri Law Review*, 2017–2018. I would like to extend a special thank you to Professor Dessem and the entire *Missouri Law Review* staff for their support and guidance in writing this Note.

1. *State v. Malone*, 62 S.W.2d 909, 914 (Mo. 1933).

2. PAULA HANNAFORD-AGOR & NICOLE L. WATERS, ESTIMATING THE COST OF CIVIL LITIGATION 7 fig.2 (Jan. 2013), [http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph\\_online2.ashx](http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph_online2.ashx).

3. Thaddeus Hoffmeister, *Preventing Juror Misconduct in a Digital World*, 90 CHL-KENT L. REV. 981, 983–84 (2015). Additionally, there are few studies evaluating the frequency of juror misconduct. One study found that ninety-four percent of federal judges are taking steps to address jurors' social media use. MEGHAN DUNN, JURORS' USE OF SOCIAL MEDIA DURING TRIALS AND DELIBERATIONS 10 (Nov. 22, 2011), <https://www.fjc.gov/sites/default/files/2012/DunnJuror.pdf>. The report focuses on social media use, but many of the preventative steps, such as confiscating electronic devices and giving plain language explanations for the rules, would apply with equal force to juror research. *See id.* at 8.

the Supreme Court of Missouri and Missouri appellate courts have taken when dealing with juror misconduct. Part IV explains the Supreme Court of Missouri's rationale for denying a new trial. Finally, Part V discusses why the *Smotherman* court should have granted a new trial and the techniques courts can use in the future to reduce the frequency of juror misconduct.

## II. FACTS AND HOLDING

Kathrine Smotherman filed a lawsuit seeking damages against Cass Regional Medical Center (“the Medical Center”) after she slipped and fell in the bathroom.<sup>4</sup> Smotherman claimed that the soap dispenser was placed in such a way that it dripped on the floor, so she slipped on the soap and fell.<sup>5</sup> The Medical Center argued that Smotherman's slip was caused either by water on the bathroom floor or her preexisting knee problem.<sup>6</sup> The jury returned a verdict for the Medical Center.<sup>7</sup>

The controversy in this case arose after the initial trial. Smotherman's attorneys contacted several jurors after trial, and one of the jurors said that he researched the weather on the day of the accident.<sup>8</sup> The juror found that there was “significant snowfall” in the forecast for that day.<sup>9</sup> Therefore, Smotherman moved for a new trial on the basis of extraneous juror research.<sup>10</sup>

The Cass County Circuit Court held a hearing to determine whether it should grant Smotherman's motion for a new trial.<sup>11</sup> At the hearing, nine of the twelve jurors testified in camera.<sup>12</sup> While Missouri follows the Mansfield Rule, which prevents jurors from giving testimony for the purpose of impeaching their verdict, an exception to the rule applies in this case.<sup>13</sup> The exception allows a juror to testify about whether a juror gathered extraneous information about the case.<sup>14</sup> In this case, the jurors were allowed to testify because they were testifying about another juror's independent research about the weather on the day of the accident.<sup>15</sup> One juror testified that the offend-

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4. *Smotherman v. Cass Reg'l Med. Ctr.*, 499 S.W.3d 709, 710 (Mo.) (en banc), *reh'g denied*, (Nov. 22, 2016).

5. *Id.*

6. *Id.* at 711–12.

7. *Id.* at 712.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Smotherman v. Cass Reg'l Med. Ctr.*, No. 11CA-CV01257, 2014 WL 10120320, at \*1 (Cir. Ct. Cass Cty. Nov. 6, 2014), *rev'd*, No. WD 78111, 2015 WL 6914974 (Mo. Ct. App. Nov. 10, 2015), *rev'd en banc*, 499 S.W.3d 709 (2016), *reh'g denied*, (Nov. 22, 2016).

12. *Id.* at \*1. Three of the jurors were unavailable to attend the hearing for work related reasons or a previously scheduled vacation. *Id.* at \*1 n.1.

13. *Smotherman*, 499 S.W.3d at 712.

14. *Id.*

15. *See id.*

ing juror only made one comment about the weather on the date of Smotherman's accident during deliberations.<sup>16</sup> Several jurors testified that they did not remember hearing about the weather on the day of the accident, while other jurors did remember hearing about it.<sup>17</sup> All of the non-offending<sup>18</sup> jurors testified that it was immaterial to their decisions, but the trial court found that the offending juror's research did influence his decision.<sup>19</sup>

The trial court stated that even if juror testimony proves that a juror committed misconduct, a party is not necessarily entitled to a new trial.<sup>20</sup> Establishing that a juror committed misconduct only raises a "presumption of prejudice, and the burden shifts to the opposing party to rebut that presumption."<sup>21</sup> Additionally, extraneous information only raises a presumption of prejudice if the extraneous information is "material" to the "consequential facts of the case."<sup>22</sup>

The Medical Center first argued that the extraneous information the juror acquired was not material; therefore, Smotherman was not prejudiced and a new trial should not be granted.<sup>23</sup> It claimed the information was not material because it was not relevant to the central issue of whether Smotherman slipped on soap.<sup>24</sup> It also claimed that Smotherman presented so little evidence that she slipped on soap that it was unlikely she was prejudiced.<sup>25</sup> Finally, the Medical Center argued that the presumption of prejudice was rebutted because the jurors testified that the information did not impact their decisions.<sup>26</sup> Smotherman argued that the extraneous information was material because it supported the Medical Center's theory that something other than soap caused Smotherman to fall.<sup>27</sup>

The trial court agreed with the Medical Center's arguments and denied Smotherman's motion for a new trial.<sup>28</sup> The trial judge found the non-

16. *Smotherman*, 2014 WL 10120320, at \*2.

17. *Id.*

18. Non-offending jurors are jurors who did not engage in any misconduct. *See Smotherman*, 499 S.W.3d at 713. In this case, they are the jurors who did not conduct independent research. *See id.*

19. *Smotherman*, 2014 WL 10120320, at \*2; *Smotherman*, 499 S.W.3d at 717 (Teitelman, J., dissenting).

20. *Smotherman*, 2014 WL 10120320, at \*1.

21. *Smotherman*, 499 S.W.3d at 712 (citing *Travis v. Stone*, 66 S.W.3d 1, 4 (Mo. 2002) (en banc) (per curiam)).

22. *Id.* (citing *State v. Stephens*, 88 S.W.3d 876, 883–84 (Mo. Ct. App. 2002)).

23. *Smotherman v. Cass Reg'l Med. Ctr.*, No. WD 78111, 2015 WL 6914974, at \*3 (Mo. Ct. App. Nov. 10, 2015), *rev'd en banc*, 499 S.W.3d 709 (Mo.), *reh'g denied*, (Nov. 22, 2016).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Smotherman*, 499 S.W.3d at 712.

28. *Smotherman v. Cass Reg'l Med. Ctr.*, No. 11CA-CV01257, 2014 WL 10120320, at \*3 (Cir. Ct. Cass Cty. Nov. 6, 2014), *rev'd*, 2015 WL 6914974 (Mo. Ct.

offending jurors' testimony to be credible.<sup>29</sup> The trial court also found that the extraneous information the juror looked up was "immaterial."<sup>30</sup> The trial court instructed the jurors to find the Medical Center responsible only if they believed there was soap on the floor and the information about the weather "was cumulative to inferences as to other possible causes of the fall suggested during trial."<sup>31</sup> The trial court denied the motion for a new trial because the weight of the evidence presented at trial supported a finding for the Medical Center and it was unlikely Smotherman was prejudiced.<sup>32</sup>

The Missouri Court of Appeals, Western District, reversed the trial court's ruling.<sup>33</sup> The court of appeals found that the information was material because it went to the central issue of what substance, if any, caused Smotherman's fall.<sup>34</sup> The appellate court did not give any weight to the fact that the information about the weather was only mentioned once in passing because the court relied on a prior case<sup>35</sup> in which the Supreme Court of Missouri granted a motion for a new trial when one juror obtained extraneous information and did not share it with any other jurors.<sup>36</sup> Next, the court found that the "modest weight given to jurors' claims that they were not affected by extrinsic evidence" was not enough to overcome the presumption of prejudice that is present when there is juror misconduct.<sup>37</sup> Finally, the appellate court disagreed with the trial court's reasoning that because Smotherman presented little evidence, it was unlikely she was prejudiced.<sup>38</sup> The appellate court stated that because the trial court refused to grant the Medical Center's motion for a directed verdict, there was sufficient evidence for a jury to find for Smotherman.<sup>39</sup> Therefore, Smotherman may have been prejudiced by the extraneous information.<sup>40</sup> The case was then transferred to the Supreme Court of Missouri.<sup>41</sup> The Supreme Court of Missouri held that the trial court did not abuse its discretion when it found that the non-offending jurors' testimony

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App. Nov. 10, 2015), *rev'd en banc*, 499 S.W.3d 709 (Mo.), *reh'g denied*, (Nov. 22, 2016).

29. *Id.* at \*2.

30. *Id.*

31. *Id.*

32. *Id.* at \*2-3.

33. *Smotherman*, 2015 WL 6914974, at \*6.

34. *Id.* at \*4.

35. *Travis v. Stone*, 66 S.W.3d 1 (2002) (en banc) (per curiam).

36. *Smotherman*, 2015 WL 6914974, at \*5.

37. *Id.*

38. *Id.* at \*5-6.

39. *Id.* at \*5.

40. *Id.* at \*6.

41. *Smotherman v. Cass Reg'l Med. Ctr.*, 499 S.W.3d 709 (Mo.) (en banc), *reh'g denied*, (Nov. 22, 2016).

that the extraneous information did not affect their deliberations rebutted the presumption of prejudice.<sup>42</sup>

### III. LEGAL BACKGROUND

In Missouri, jurors are generally not allowed to give testimony for the purpose of impeaching their verdict.<sup>43</sup> This is called the Mansfield Rule.<sup>44</sup> The rule was originally adopted by Lord Mansfield in 1785 in the English case *Vaise v. Delaval*.<sup>45</sup> The rule reflects the idea that litigants are entitled to a fair trial but not a perfect one.<sup>46</sup> In fact, “[the Supreme] Court [of the United States] has long held that ‘[a litigant] is entitled to a fair trial but not a perfect one,’ for there are no perfect trials.”<sup>47</sup> Additionally, Federal Rule of Civil Procedure 61, regarding harmless error, prevents litigants from receiving a new trial when the court determines that the error did not affect their “substantial rights.”<sup>48</sup>

There are four main rationales for the Mansfield Rule.<sup>49</sup> The first is finality.<sup>50</sup> If verdicts could be challenged every time a juror misunderstood the law or made an error in considering the evidence, a case might never end.<sup>51</sup> Second, it is very difficult, if not impossible, to determine how a jury understood the law or thought about the evidence.<sup>52</sup> Third, frequently reviewing verdicts based on allegations of juror misconduct could erode the public’s

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42. *Id.* at 714–15. If the court had granted the motion for a new trial, the case would have reverted back to the circuit court for a new trial. *Id.* at 716.

43. *Id.* at 712. The Supreme Court of the United States has interpreted this rule several times. In March 2017, the Court held that where a juror makes a statement during deliberations indicating that he or she relied on racial animus to convict a defendant, the Sixth Amendment requires Federal Rule of Evidence 606(b) to give way to permit the trial court to consider evidence of the juror’s statement. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017); *See also* *Warger v. Shauers*, 135 S. Ct. 521 (2014) (holding Rule 606(b) applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during voir dire).

44. *Smotherman*, 499 S.W.3d at 712.

45. Jason R. Mudd, Note, *Liberalizing the Mansfield Rule in Missouri: Making Sense of the Extraneous Evidence Exception After Travis v. Stone*, 69 MO. L. REV. 779, 782 (2004); *Vaise v. Delaval* (1785) 99 Eng. Rep. 944 (K.B.).

46. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984).

47. *Id.* (third alteration in original) (quoting *Brown v. United States*, 411 U.S. 223, 231–32 (1973)).

48. FED. R. CIV. P. 61.

49. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 87 (Mo. 2010) (en banc).

50. *Id.*

51. *Id.*

52. *Id.* at 87–88.

confidence in the jury system.<sup>53</sup> Last, impeaching jury verdicts might lead to harassment and threats against jurors by lawyers, the parties, or the public.<sup>54</sup>

Initially, there was an exception to the Mansfield Rule in cases where life or liberty was at stake.<sup>55</sup> However, that exception did not last long.<sup>56</sup> *State v. Branstetter* eliminated that exception when the court held that jurors could not testify about whether they had reached a quotient verdict in regard to the number of years the defendant should serve.<sup>57</sup> Currently, there are two recognized situations where courts allow a juror to testify about juror misconduct for the purpose of impeaching the verdict. One exception is when there is an allegation that a juror showed severe racial bias during deliberations.<sup>58</sup> The other exception, the subject of this Note, arises when a juror gathers information outside the evidence presented at trial.<sup>59</sup> While the second exception is well established, it is still unclear what weight, if any, the court should give to juror testimony that the extraneous information did not influence their decisions.

Many Missouri cases have considered what weight should be given to juror testimony about the effect of the extraneous information on their deliberations. The weight of the juror's testimony is important because it is an easy and common way for a party to rebut the presumption of prejudice that arises after juror misconduct. The courts have not articulated a standard of proof for rebutting the presumption of prejudice and instead rely on precedent and fact-specific analysis. Additionally, there is no bright-line rule regarding what weight the court must give juror testimony. Generally, the court will decide whether to grant a new trial based on the type of extraneous information,<sup>60</sup> whether non-offending jurors testified that the information influenced their decisions,<sup>61</sup> the form of the juror's testimony,<sup>62</sup> the verdict the

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53. James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 ST. JOHN'S L. REV. 389, 438 (1991).

54. *Id.*

55. *Pratte v. Coffman*, 33 Mo. 71, 78 (Mo. 1862) (stating in dicta that such an exception may apply but that it does not fit the case at hand).

56. *State v. Branstetter*, 65 Mo. 149, 156–57 (Mo. 1877).

57. *Id.* at 152, 156–57.

58. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 88, 90 (Mo. 2010) (en banc) (holding that an evidentiary hearing should have been held when a juror expressed ethnic and religious bias against a Jewish party).

59. *See id.* at 88; *Travis v. Stone*, 66 S.W.3d 1, 4 (Mo. 2002) (en banc) (per curiam). Extraneous information is another term for information a juror obtains outside of trial. *See Smotherman v. Cass Reg'l Med. Ctr.*, 499 S.W.3d 709, 711 (Mo.) (en banc), *reh'g denied*, (Nov. 22, 2016).

60. *See State v. Suschank*, 595 S.W.2d 295, 298 (Mo. Ct. App. 1979) (affirming judgment in case in which jurors looked up the word “reasonable” in a dictionary but stating that “not every case of misconduct by a jury requires a reversal”).

61. *Smotherman*, 499 S.W.3d at 716.

62. *See Middleton v. Kan. City Pub. Serv. Co.*, 152 S.W.2d 154, 160 (Mo. 1941).

jurors reached,<sup>63</sup> and any other factors the court finds relevant.<sup>64</sup> Some Missouri cases have granted a new trial based on juror testimony, while others have not.

#### A. Cases Granting a New Trial Based on Juror Testimony

In *Middleton v. Kansas City Public Service Co.*, a car and a streetcar were involved in an accident.<sup>65</sup> A juror gathered extraneous information about the way the car and the streetcar were built.<sup>66</sup> The plaintiff submitted similar affidavits from nine jurors saying that the extraneous information did not influence their decisions.<sup>67</sup> The court granted a new trial because the trial court erred in placing the burden on the moving party to show that there was prejudice<sup>68</sup> and because the court found that there was “little probative value [in the affidavit] because of the common tendency of jurors to minimize the effect of misconduct.”<sup>69</sup>

Later, in *Travis v. Stone*, the Supreme Court of Missouri again held that a juror’s testimony stating that extraneous information did not influence her decision was not sufficient to rebut the presumption of prejudice.<sup>70</sup> In that case, a juror improperly visited the accident site.<sup>71</sup> The juror who committed the misconduct testified that the information did not affect her decision and that she did not share the information with other jurors.<sup>72</sup> Other jurors did not testify.<sup>73</sup> The court stated that “it must be assumed” that the juror’s extraneous information impacted her decision, which may have influenced her participation in the deliberations.<sup>74</sup> The court granted a new trial because the extraneous information may have “subtly affected the outcome.”<sup>75</sup>

#### B. Cases Refusing to Grant a New Trial

Several Missouri courts of appeals cases both before and after *Travis* and *Middleton* have reached a different conclusion. In *State v. Herndon*, sev-

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63. *State v. Herndon*, 224 S.W.3d 97, 103 (Mo. Ct. App. 2007).

64. *See Smotherman*, 499 S.W.3d at 711 (The trial court “is in the best position to determine what effect, if any, juror misconduct may have had on a jury’s verdict.”).

65. *Middleton*, 152 S.W.2d at 155.

66. *Id.* at 156–57.

67. *Id.* at 157. Twelve jurors tried the case, but only nine submitted affidavits. *Id.* at 160.

68. *Id.* at 159.

69. *Id.* at 160.

70. *Travis v. Stone*, 66 S.W.3d 1, 2 (Mo. 2002) (en banc) (per curiam).

71. *Id.* at 3.

72. *Id.*

73. *Id.*

74. *Id.* at 5.

75. *Id.*



eral jurors used their cell phones during deliberations.<sup>76</sup> One juror talked to the alternate juror, and the alternate said that she thought the victim was lying and the verdict should be not guilty.<sup>77</sup> All of the other jurors testified that they did not hear the conversation, and the juror who had the conversation said it did not influence her decision.<sup>78</sup> The court did not grant a new trial.<sup>79</sup> The court recognized that while the offending juror's testimony should not be given much weight as to the effect of the misconduct, the verdict of guilty showed that the alternate's suggestion that the jury should find the defendant not guilty did not persuade the jury.<sup>80</sup> The court held that the presumption of prejudice was effectively refuted.<sup>81</sup>

In other cases, Missouri courts have held that a new trial was not warranted when juror misconduct did not lead to any new information. In *State v. Suschank*, jurors looked up the definition of "reasonable" in a dictionary, but they testified that it did not influence their verdict.<sup>82</sup> The court refused to grant a new trial because the definitions the jurors found were not different from their knowledge of the ordinary usage of the word.<sup>83</sup> Additionally, in *Consolidated School District No. 3 of Grain Valley v. West Missouri Power Co.*, a juror talked with another person about a technical aspect of the case.<sup>84</sup> The court did not grant a new trial because the juror did not share the information with other jurors and the information was not contrary to the information presented at trial.<sup>85</sup> Ultimately, Missouri courts decide whether to grant a new trial when there is juror misconduct based on the specific facts of each case. The court in *Smotherman* performs the same type of analysis but represents a new reluctance to grant new trials.

#### IV. INSTANT DECISION

The majority opinion, written by Judge Mary R. Russell, held that Smotherman was not entitled to a new trial.<sup>86</sup> Judge Richard B. Teitelman's dissent disagreed with the majority.<sup>87</sup>

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76. *State v. Herndon*, 224 S.W.3d 97, 100–02 (Mo. Ct. App. 2007).

77. *Id.* at 101.

78. *Id.* at 102.

79. *Id.* at 103.

80. *Id.*

81. *Id.* ("The unanimous guilty verdict refutes any contention that [an alternate juror's] conversation with [a juror] influenced the jurors during deliberations.")

82. *State v. Suschank*, 595 S.W.2d 295, 297–98 (Mo. Ct. App. 1979).

83. *Id.* at 298.

84. *Consol. Sch. Dist. No. 3 v. W. Mo. Power Co.*, 46 S.W.2d 174, 180 (Mo. 1931).

85. *Id.*

86. *Smotherman v. Cass Reg'l Med. Ctr.*, 499 S.W.3d 709, 710 (Mo.) (en banc) *reh'g denied*, (Nov. 22, 2016).

87. *Id.* at 716 (Teitelman, J., dissenting).

*A. The Majority*

The Supreme Court of Missouri held that the trial court did not abuse its discretion in finding that the non-offending jurors' testimony, which suggested that the improper research did not influence their deliberations, successfully rebutted the presumption of prejudice.<sup>88</sup> Therefore, Smotherman was not entitled to a new trial.<sup>89</sup> The Supreme Court of Missouri first considered whether prior cases dictated the outcome of this case.<sup>90</sup> The court found that neither *Travis* nor *Middleton* prevented the trial court from relying in part on the non-offending jurors' testimony.<sup>91</sup> The court found that this case was distinguishable from *Travis*.<sup>92</sup> This case was different because eight non-offending jurors credibly testified that they either did not know about the research or that it did not affect their decisions, whereas in *Travis*, only the offending juror testified.<sup>93</sup> Whether an offending or non-offending juror testifies is important because courts have found non-offending juror testimony more credible.<sup>94</sup> According to the court, this case was also distinguishable because the trial court in *Travis* did not explain its reasoning, whereas the trial court in this case wrote a thorough and well-reasoned opinion that showed that the trial court carefully considered the evidence and came to a logical and reasonable conclusion.<sup>95</sup> The court also found that the *Middleton* precedent did not make it improper for the trial court to give weight to the non-offending jurors' testimony.<sup>96</sup> Here, the trial court heard live testimony from the jurors, whereas in *Middleton* the court merely received "form" affidavits.<sup>97</sup> The court reasoned that since both *Middleton* and *Travis* were distinguishable from the case at hand, they did not control the outcome.<sup>98</sup>

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88. *Id.* at 711 (majority opinion).

89. *Id.* A trial court does not abuse its discretion unless "its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* at 712 (citing *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 87 (Mo. 2010) (en banc)).

90. *Id.* at 713–14.

91. *Id.*

92. *Id.* at 713.

93. *Id.*

94. *Id.* at 713, 715 (finding that "there is no logical reason to treat non-offending jurors as categorically less credible than all other witnesses," and finding that it was proper for the trial court not to give any weight to the offending juror's testimony); *Travis v. Stone*, 66 S.W.3d 1, 6 (Mo. 2002) (en banc) (per curiam) (holding that the lone testimony of the offending juror was not sufficient to rebut the presumption of prejudice).

95. *Smotherman*, 499 S.W.3d at 713–14.

96. *Id.* at 714.

97. *Id.*

98. *Id.*

Last, the court considered whether the non-offending jurors' testimony should be given any weight in this case.<sup>99</sup> The court decided not to create a new rule requiring that no weight be given to non-offending jurors' testimony for three main reasons.<sup>100</sup> First, the court recognized that, generally, the trial court is in the best position to determine the credibility of a witness and decide how much weight to give his or her testimony.<sup>101</sup> The court reasoned that requiring a trial court to give jurors' testimony little or no weight unnecessarily takes the power to determine credibility away from the trial court.<sup>102</sup> Second, the court found that leaving the trial court with broad discretion to decide a motion for a new trial when there was juror misconduct was supported by prior precedent.<sup>103</sup> Third, the court stated that a rule mandating that no weight can be given to non-offending jurors' testimony would effectively make the presumption of prejudice irrefutable.<sup>104</sup> It would make it impossible for the trial court to believe jurors' testimony that the extraneous information did not affect their deliberations.<sup>105</sup> Therefore, the presumption of prejudice would always stand, and the trial court would have to grant a new trial every time there was juror misconduct.<sup>106</sup> Additionally, the court upheld the trial court's decision that the information was immaterial because the verdict director only asked the jurors to find the Medical Center liable if they believed there was soap on the floor.<sup>107</sup> The majority held that it was not an abuse of discretion to hold that the non-offending jurors' testimony rebutted the presumption of prejudice.<sup>108</sup>

### B. *The Dissent*

The dissent believed that the Medical Center did not successfully rebut the presumption of prejudice created by the juror misconduct; therefore, a new trial should have been granted.<sup>109</sup> According to the dissent, the trial court erred when it decided that the information the juror improperly re-

99. *Id.* at 714–16.

100. *Id.* at 715–16.

101. *Id.* at 715.

102. *Id.* The majority was also concerned that doing this would send the message that the court believed that jurors who acted properly and fulfilled their civic duty are not trustworthy. *Id.*

103. *Id.* at 715–16 (citing *Consol. Sch. Dist. No. 3 v. W. Mo. Power Co.*, 46 S.W.2d 174, 180 (Mo. 1931); *State v. Herndon*, 224 S.W.3d 97, 100–03 (Mo. Ct. App. 2007); *State v. Hayes*, 637 S.W.2d 33, 38–39 (Mo. Ct. App. 1982); *State v. Suschank*, 595 S.W.2d 295, 297–98 (Mo. Ct. App. 1979); *Hoffman v. Dunham*, 202 S.W. 429, 431 (Mo. Ct. App. 1918)).

104. *Smotherman*, 499 S.W.3d at 716.

105. *Id.*

106. *Id.*

107. *See id.* at 712–13.

108. *Id.* at 714–15.

109. *Id.* at 718 (Teitelman, J., dissenting).

searched was not material to the case.<sup>110</sup> Information is material if “it has some logical connection with the consequential facts.”<sup>111</sup> The dissent believed the information was material because “the possible existence of water on the floor has an obvious logical connection to the central disputed issue of what caused Plaintiff to slip and fall.”<sup>112</sup>

The dissent next found error with the trial court’s evaluation of the jurors’ testimony.<sup>113</sup> Because jury deliberations are a collective process, the fact that the offending juror stated that his research influenced his decision compromised the deliberations even though eight other jurors said that it did not influence their decisions.<sup>114</sup> The dissent also stated that the majority’s decision was inconsistent with *Travis* because *Travis* condemned independent factual research by jurors, stating it can “subtly affect[] the outcome of the case.”<sup>115</sup> Additionally, in *Travis*, a new trial was granted when the offending juror did not share the information with other jurors, but here the information was shared.<sup>116</sup> Therefore, the dissent found that it followed that the prejudicial effect would be greater in this case.<sup>117</sup> The dissent stated that the focused research in this case should be deemed prejudicial since the general research in *Travis* was deemed prejudicial.<sup>118</sup> The dissent concluded that the prejudice was very high in this case and that the weight of the non-offending jurors’ testimony was not enough to overcome it; therefore, a new trial should have been granted.<sup>119</sup>

## V. COMMENT

This case represents a change in the way the Supreme Court of Missouri views juror testimony involving misconduct. This Part discusses why the majority should have followed the dissent’s legal analysis, the competing policy considerations, and future approaches to guard against juror misconduct.

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110. *Id.* at 717.

111. *Id.* (internal quotation marks omitted) (quoting *State v. Stephens*, 88 S.W.3d 876, 883–84 (Mo. Ct. App. 2002)).

112. *Id.* The dissent further argued that the trial court’s finding that the extraneous information was immaterial should have ended its analysis because immaterial evidence is not prejudicial. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* (quoting *Travis v. Stone*, 66 S.W.3d 1, 5 (Mo. 2002) (en banc) (per curiam)).

116. *Id.*

117. *Id.* at 718.

118. *Id.*

119. *See id.*

A. *The Majority's Misapplication of the Legal Standard*

The majority should have adopted the dissent's approach because the dissent made a logical and persuasive argument that the extraneous information was material to the case and that the juror's testimony should not have been given significant weight. First, the majority should have followed the dissent's approach in determining that the extraneous information was material. The dissent argued that the extraneous information was material because it supported the Medical Center's theory of the case.<sup>120</sup> Smotherman's theory was that she slipped and fell on soap, and the Medical Center said she slipped for some other reason.<sup>121</sup> The majority found that it was not material because the central issue was "whether there was soap on the bathroom floor."<sup>122</sup> However, if the jurors thought it was likely that water was on the floor, they would be less likely to find for Smotherman by finding that soap was on the floor.<sup>123</sup> In this case, that may have been what happened. The juror found that there was significant snowfall on the day in question,<sup>124</sup> so the jurors with whom the offending juror shared the weather information may have thought that it was likely that there was water on the bathroom floor from people tracking snow into the building.<sup>125</sup> Therefore, the majority should have found that the extraneous information in this case supported the Medical Center's theory and, consequently, was material.

Second, the majority failed to recognize *Smotherman's* similarities to past cases. The dissent argued that the majority departed from past precedent when it upheld the trial court's decision to give the jurors' testimony substantial weight and allow the testimony to rebut the presumption of prejudice.<sup>126</sup> The majority stated that *Travis* and *Middleton* did not dictate the result in this case.<sup>127</sup> This case represents a break from the general direction of past cases. In both *Travis* and *Middleton*, the court granted a new trial because the jurors' testimony was not sufficient to rebut the presumption of prejudice.<sup>128</sup> In *Travis* and *Middleton*, the jurors stated that the extraneous information did not influence their decisions.<sup>129</sup> In *Smotherman*, at least one juror's testimony was compromised because the offending juror stated that his research did

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120. *Id.* at 717.

121. *Id.* at 711 (majority opinion).

122. *See id.* at 712–14.

123. *See id.* at 717 (Teitelman, J., dissenting).

124. *See id.* at 712 (majority opinion).

125. *See id.* at 717 (Teitelman, J., dissenting).

126. *Id.* at 717–18.

127. *Id.* at 713–14 (majority opinion). Both courts found that the juror's testimony was not enough to rebut the presumption of prejudice and granted a new trial. *Travis v. Stone*, 66 S.W.3d 1, 2 (Mo. 2002) (en banc) (per curiam); *Middleton v. Kan. City Pub. Serv. Co.*, 152 S.W.2d 154, 159 (Mo. 1941).

128. *Travis*, 66 S.W.3d at 2; *Middleton*, 152 S.W.2d at 159–60.

129. *Travis*, 66 S.W.3d at 3; *Middleton*, 152 S.W.2d at 160.

influence his decision, and he did share the information with the jury.<sup>130</sup> Additionally, in both *Travis* and *Middleton*, the offending jurors did not share the information with the other jurors, yet the court still found that their testimony was insufficient to rebut the presumption of prejudice.<sup>131</sup> Here, the other jurors' testimony should have been even less reliable because the offending juror *did* share the information with the jury.<sup>132</sup> The fact that the majority found that the testimony of the non-offending jurors was sufficient to rebut the presumption of prejudice makes it more difficult for movants to obtain a new trial in cases of misconduct, which raises serious concerns about fairness.

### B. Policy Considerations

There are many competing policy considerations the court must consider when deciding whether to grant a new trial based on juror misconduct, including protecting jurors from harassment, maintaining the stability of verdicts, establishing finality for the parties, and protecting the public's trust in the jury system. However, this Note focuses on two prominent considerations: efficiency and the right to a fair trial. Courts are not required to analyze these public policy arguments, yet they often do.<sup>133</sup> This Part argues that fairness considerations outweigh efficiency concerns. This Part also argues that fairness considerations dictate that juror testimony regarding whether extraneous information influenced his or her verdict be given little weight because this testimony has been proven unreliable in several studies.

#### 1. Efficiency

Courts generally favor upholding jury verdicts. As one Missouri court said, "Courts should not overturn a jury verdict lightly. Trials are costly – for the litigants, the jurors and taxpayers."<sup>134</sup> In cases of juror misconduct, giving little weight to non-offending jurors' testimony that the outside information did not influence their verdict would increase the number of new trials and intensify the burden on everyone involved. This is an important consideration because the costs are very high. The usual cost of a civil case, such as a premises liability case, is \$54,000, with most of the cost coming from the

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130. *Smotherman*, 499 S.W.3d at 717 (Teitelman, J., dissenting).

131. *Travis*, 66 S.W.3d at 3; *Middleton*, 152 S.W.2d at 160.

132. *Smotherman*, 499 S.W.3d at 712 (majority opinion); *id.* at 717 (Teitelman, J., dissenting).

133. *See, e.g.*, *Matlock v. St. John's Clinic, Inc.*, 368 S.W.3d 269, 277 (Mo. Ct. App. 2012); *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 87–88 (Mo. 2010) (en banc) (expressing the public policy consideration that trials should come to an end eventually and also pointing out that there is no "legitimate way to corroborate or refute the mental process of a particular juror").

134. *Matlock*, 368 S.W.3d at 277 (quoting *Keltner v. K-Mart Corp.*, 42 S.W.3d 716, 722 (Mo. Ct. App. 2001)).

trial itself.<sup>135</sup> The cost to a juror of serving on a jury is high as well and ranges from \$800 to \$1000 per juror per day.<sup>136</sup> The cost to the court is only about thirty dollars per juror per day, but the juror incurs lost wages, his or her employer loses productivity, and the juror's day-to-day activities, such as childcare, are affected.<sup>137</sup> All of these costs create a compelling policy reason to limit new trials. However, limiting new trials could potentially deny citizens the right to a fair trial.

## 2. A Fair Trial

The right to a fair trial is fundamental. Both the U.S. Constitution and the Missouri Constitution protect it by saying that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”<sup>138</sup> In addition to being a fundamental right, fair trials are also important to society. Holding a fair trial has cathartic value for the parties and lets them air their grievances in front of a body that has the power to redress the wrong.<sup>139</sup> More importantly, fair trials are fundamental to maintaining order in society and holding the proper party accountable for its actions.<sup>140</sup> The Missouri Constitution also gives parties the right to a jury trial in civil cases.<sup>141</sup> The right to a jury trial includes the right to a fair and impartial jury.<sup>142</sup> If anything prevents the “fair and due consideration of the case” or if “the jury [receives] any evidence . . . not authorized by the court,” the court is authorized to grant a new trial.<sup>143</sup>

In *Smotherman*, the trial was not fair because a member of the jury conducted independent fact research.<sup>144</sup> The court emphasized that parties are entitled to a fair trial but not a perfect trial.<sup>145</sup> A juror conducting independent research and further sharing the information with other jurors is a serious

135. HANNAFORD-AGOR & WATERS, *supra* note 2, at 7 fig.2.

136. Am. Judicature Soc’y, Editorial, *The Costs of Juries*, 93 JUDICATURE 92, 128 (2009).

137. *Id.*

138. U.S. CONST. amend. V; accord MO. CONST. art. I, § 10.

139. See Susan Crump, *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, 534–35 (1988). Federal Rule of Evidence 606(b) is substantially similar to the Mansfield rule. See FED. R. EVID. 606(b).

140. *The Right to a Fair Trial*, DEFENDING HUM. RIGHT TO FAIR TRIAL, <https://www.fairtrials.org/about-us/the-right-to-a-fair-trial/> (last visited Jan. 19, 2018).

141. MO. CONST. art. I, § 22(a). The Seventh Amendment does the same in most federal court actions. U.S. CONST. amend. VII.

142. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 87 (Mo. 2010) (en banc).

143. MO. REV. STAT. § 547.020(1), (2) (2016).

144. See *Smotherman v. Cass Reg’l Med. Ctr.*, 499 S.W.3d 709, 710 (Mo.) (en banc), *reh’g denied*, (Nov. 22, 2016).

145. *Id.*

threat to the fairness of the trial. These acts are unfair because the jury is able to consider facts that the defendant does not have a chance to rebut or explain.<sup>146</sup>

When the jury is exposed to extraneous information, the trial is no longer fair and the verdict is compromised even if the jurors testify that the information did not influence their decisions. This is partially because jurors may minimize the effect of their misconduct when testifying in front of the judge.<sup>147</sup> First, jury deliberations are collaborative.<sup>148</sup> In *Smotherman*, some jurors said that the information did not influence their decisions.<sup>149</sup> However, one juror admitted that it did influence his decision and that would have influenced the way he participated in the deliberations.<sup>150</sup> The juror's altered participation may have "subtly affected the outcome of the case."<sup>151</sup> Therefore, it must be assumed that the deliberations were compromised because it is impossible to show the degree to which the deliberations were altered or how they were altered.<sup>152</sup>

Second, even though the non-offending jurors testified that the information did not influence their decisions, it is impossible to know whether some extraneous fact may have unconsciously influenced the jurors' decisions.<sup>153</sup> Studies show that information may influence a jury's decision without the jurors realizing it.<sup>154</sup> For example, in a study where mock jurors were asked whether they thought the defendant was guilty after reading about different pieces of evidence, the mock jurors were likely to find subsequent information more incriminating after they heard a credible piece of information they found very incriminating.<sup>155</sup> This shows that jurors are generally not able to discern which pieces of information impacted their decision.<sup>156</sup> Other studies show that "[p]eople often cannot report accurately on the effects of particular stimuli on higher order, inference-based responses."<sup>157</sup> In several studies, the participants were not able to discern whether a certain stimulus

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146. See *State v. Malone*, 62 S.W.2d 909, 914 (Mo. 1933).

147. *Middleton v. Kan. City Pub. Serv. Co.*, 152 S.W.2d 154, 160 (Mo. 1941).

148. *Smotherman*, 499 S.W.3d at 717 (Teitelman, J., dissenting).

149. *Id.*

150. *Id.*

151. *Id.* (quoting *Travis v. Stone*, 66 S.W.3d 1, 5 (Mo. 2002) (en banc) (per curiam)).

152. *Id.* (citing *Travis*, 66 S.W.3d at 5).

153. See *State v. Malone*, 62 S.W.2d 909, 914 (Mo. 1933).

154. Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046, 1051 (1997).

155. *Id.*

156. *Id.*

157. Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 233 (1977).



had an effect on their behavior.<sup>158</sup> Even when the participants were asked if they believed a certain stimulus affected their behavior, they stated that they did not believe it had affected their behavior even though the statistical data in a controlled experiment showed that it had caused their behavior.<sup>159</sup> A juror's testimony that extraneous information did not influence his or her decision should not receive substantial weight based on this data.<sup>160</sup>

### C. Preventing Juror Misconduct

Preventing juror misconduct would prevent costly appeals, decrease the frequency of new trials, and increase trial fairness. Currently, Missouri attempts to prevent juror misconduct through jury instructions.<sup>161</sup> The Missouri Approved Instructions tell jurors that they may not “conduct any independent research . . . [by] the use of the Internet.”<sup>162</sup> The instructions also explain why it is important for jurors to follow these rules.<sup>163</sup> The rules state that “[i]t would be unfair to the parties to have any juror influenced by information that has not been allowed into evidence in accordance with those rules of evidence and procedure.”<sup>164</sup> Additionally, the rules tell the jurors that a new trial may be necessary if the jurors break the rules.<sup>165</sup> These instructions sufficiently explain the legal reasons a juror should not conduct independent research, but they might be confusing to a juror who is not familiar with legal procedures. In *Smotherman*, they failed to prevent juror misconduct.<sup>166</sup> Therefore, courts might benefit from trying new techniques of preventing juror misconduct.

Enacting penalties may help prevent juror misconduct. Some judges have enacted fines.<sup>167</sup> Some fines are \$250, while others can be the entire

158. *Id.* at 237–38. In one of the studies, participants took a placebo pill before bed. *Id.* at 237. Half of the participants were told that the pill would relax them, the other half were told it would excite them. *Id.* at 237–38. There was a significant difference in the time it took each group to fall asleep as compared to their base line, yet none of the participants believed the change in how long it took them to fall asleep was due to the placebo pill. *Id.* at 238.

159. *Id.*

160. *Contra Smotherman v. Cass Reg'l Med. Ctr.*, 499 S.W.3d 709, 715 (Mo.) (en banc), *reh'g denied*, (Nov. 22, 2016). However, giving juror testimony less weight due to the research regarding the unconscious effect evidence may have on a juror's mind and the difficulty people have with determining which stimuli led them to a certain decision would likely lessen the insulting effect.

161. *See* MO. APPROVED JURY INSTR. (CIVIL) 2.01(8) (7th ed.).

162. *Id.*

163. *See id.*

164. *Id.*

165. *Id.*

166. *See Smotherman v. Cass Reg'l Med. Ctr.*, 499 S.W.3d 709, 712 (Mo.) (en banc), *reh'g denied*, (Nov. 22, 2016).

167. *See* David P. Goldstein, Current Development, *The Appearance of Impropriety and Jurors on Social Networking Sites: Rebooting the Way Courts Deal with Juror Misconduct*, 24 GEO. J. LEGAL ETHICS 589, 600 (2011).

cost of the retrial.<sup>168</sup> The harsh fine may be justified if the misconduct is so severe that it warrants a mistrial.<sup>169</sup> Some people even believe criminal charges are warranted for juror misconduct.<sup>170</sup> Some countries, such as Australia, have taken this approach.<sup>171</sup>

However, there are downsides to enacting penalties. Self-reporting is one of the primary ways courts discover juror misconduct.<sup>172</sup> If there are severe penalties, jurors will be far less likely to report misconduct by other jurors if they know that the other juror will be in serious trouble.<sup>173</sup> Additionally, citizens generally do not want to serve on a jury, and severe penalties will discourage citizens even further from performing this civic duty.<sup>174</sup>

Another alternative is that judges could confiscate jurors' electronic devices during the trial and deliberations.<sup>175</sup> Jurors would be unable to access the Internet during the day, and it might reduce a juror's urge to look up information because the juror might forget about it when the juror leaves court for the day.<sup>176</sup> However, since jurors are not in court all of the time, judges cannot confiscate all devices they might encounter, and further, judges cannot control jurors' access to information outside the courtroom.<sup>177</sup>

A better option requires educating the jurors. Simply telling jurors not to research information about the case one time during the trial, as was done in *Smotherman*, is likely not enough.<sup>178</sup> A judge could explain in plain language why the rule against independent research is in place. This is the most popular option among federal judges who are trying to prevent jurors from using social media.<sup>179</sup> If the jurors have a better understanding of why they are not allowed to do research and the consequences for the parties if they violate the rules, they will be more likely to follow the rules.<sup>180</sup> Additionally, judges can restate the instruction before voir dire, after voir dire, and before

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168. *Id.*

169. *Id.*

170. *Id.*

171. Hoffmeister, *supra* note 3, at 982.

172. Goldstein, *supra* note 167, at 600.

173. *Id.*

174. *Id.* at 601.

175. *Id.* at 599.

176. *See id.* at 599–600.

177. *See id.*

178. The jury was told not to conduct Internet research, yet a juror did so anyway. *Smotherman v. Cass Reg'l Med. Ctr.*, 499 S.W.3d 709, 712 (Mo.) (en banc), *reh'g denied*, (Nov. 22, 2016).

179. DUNN, *supra* note 3, at 8 tbl.8. 62.4% of the judges used this technique. *Id.* This study focused on jurors' social media use, but the same concepts can be applied to jurors' Internet research. *See id.* at 1.

180. Ralph Artigliere et. al., *Reining in Juror Misconduct*, 84 FLA. B.J. 8, 14 (2010).

the jury begins deliberating.<sup>181</sup> A judge could also post a sign with the instruction in the jury room. Since many jurors have not served on a jury before and many of the instructions can seem confusing, repeating the instruction banning independent research will help jurors remember the rule. However, there are still problems with this strategy. For example, the jurors may wonder what is being kept from their knowledge. To ensure that jurors do follow the rules, the judge can encourage jurors to notify the judge if they see another juror conducting research, and court personnel can keep an eye on the jurors to make sure they are not using their phones during the trial. While there is no perfect way to prevent juror misconduct, courts can take these preventative measures to reduce its frequency.

## VI. CONCLUSION

Juror misconduct is a serious problem. When it happens, it costs everyone involved money and undermines the fairness of the trial. In *Smotherman*, the court dealt with the aftermath of juror misconduct and had to decide whether to grant a new trial.<sup>182</sup> The court did not consider that the jury might use the information to determine what substance was on the bathroom floor; therefore, it erroneously found that the information was not material.<sup>183</sup> Additionally, the court gave significant weight to non-offending jurors' testimony that extraneous information did not impact their decisions,<sup>184</sup> and in doing so, this case broke from the past precedent of *Travis* and *Middleton*.<sup>185</sup>

The court did not adequately consider the public policy repercussions of denying *Smotherman* a new trial. Two relevant policy considerations are efficiency of the court system and fairness to the parties. Fairness to the parties is the weightier consideration here because parties have a fundamental right to a fair trial. However, deciding whether to further the policy goal of fairness or efficiency is difficult. In the future, courts should take more preventative measures to reduce the instances of juror misconduct. One effective preventative measure is educating the jury about why they should not conduct independent research and reminding them of that rule often. Preventing juror misconduct is vital in limiting costly new trials and stopping instances where citizens are denied the right to a fair trial.

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181. DUNN, *supra* note 3, at 8 tbl.8. 53.3% of federal judges chose this option. *Id.*

182. *See Smotherman*, 499 S.W.3d at 710.

183. *See id.* at 717 (Teitelman, J., dissenting).

184. *See id.* at 715 (majority opinion).

185. *See id.* at 717–18 (Teitelman, J., dissenting).