

2 of 2 DOCUMENTS

United States of America v. Ronald Pook**Criminal No. 87-274****UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA****1988 U.S. Dist. LEXIS 3398****April 18, 1988, Decided****CASE SUMMARY:**

PROCEDURAL POSTURE: Defendant was convicted of conspiring to violate § 1 of the Sherman Antitrust Act (Sherman Act), 15 U.S.C.S. § 1, by participating in "dealer pools" at antique auctions. Defendant timely filed his motion for a new trial. He claimed error in the denial of his request to charge the jury on "fair notice" and in the exclusion of his proffered evidence of the appraised value of an auctioned highboy. He also alleged juror misconduct.

OVERVIEW: The court ruled that none of the proposed grounds warranted a new trial. The court rejected defendant's contention that § 1 of the Sherman Act was unconstitutionally vague. Defendant's conduct was a per se violation of § 1 of the Sherman Act and all that was needed was to find that he knowingly entered a conspiracy to pool at auctions. Instead, the court gave defendant the benefit of a charge on specific intent, which was adequate, and defendant was not entitled to a charge on "fair notice." Defendant's proffered evidence of a non-participant's subjective, noncompetitively set valuation of a highboy was not relevant to defendant's purpose in pooling. If relevant for this purpose, its exclusion was harmless error as its probative value was diminished by the undisputed evidence that defendant paid a significantly higher price than the public auction price immediately after the public auction. There was no factual basis to conclude from a juror's post-verdict statements that the jury was exposed to any improper extraneous prejudicial information or outside influences. Moreover, the jurors were specifically charged to disregard any extraneous information.

OUTCOME: The court denied defendant's motion for a new trial following his conviction of conspiracy to violate the Sherman Act by participating in a "dealer pool"

CORE TERMS: juror, pool, public auction, auction, bid, conspiracy, antique, pooling, bidding, highboy, Sherman Antitrust Act, indictment, appraisal, knock, deliberation, extraneous, newspaper, new trial, per se, price-fixing, artificially, convicted, appraised value, outside influence, competitive, knowingly, dealer, notice, foreperson, anti-competitive

LexisNexis(R) Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > U.S. Department of Justice Actions > Criminal Actions > Sherman Act
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
 [HN1] A criminal indictment under § 1 of the Sherman Antitrust Act withstands constitutional attack.

Antitrust & Trade Law > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview
Antitrust & Trade Law > Sherman Act > General Overview

[HN2] The Sherman Act has uniformly been interpreted to make agreements that tamper with price structures illegal. It applies to buyers as well as sellers, and specifically to agreements among buyers to refrain from bidding at auctions. The same rules against agreements to restrain price competition apply to all economic areas.

Antitrust & Trade Law > Monopolization > Conspiracy to Monopolize > Sherman Act
Antitrust & Trade Law > Sherman Act > General Overview
International Trade Law > General Overview

[HN3] Section 1 of the Sherman Antitrust Act provides that every contract, combination in the form of a trust or otherwise,

or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal. 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > U.S. Department of Justice Actions > Criminal Actions > Sherman Act

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements

[HN4] The criminal offenses defined by § 1 of the Sherman Antitrust Act should be construed as including intent as an element. In a conspiracy, two different types of intent are required, the intent to agree to establish the conspiracy and the more traditional intent to effectuate the object of the conspiracy. As to this second type of intent, it is necessary to prove in addition to anti-competitive effects that the chargeable conduct was undertaken with the conscious object of producing such effects (whether or not the effects came to pass) or that the conduct is shown to have been undertaken with knowledge of its probable consequences and having the requisite anti-competitive effects.

Antitrust & Trade Law > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > U.S. Department of Justice Actions > Criminal Actions > General Overview

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements

[HN5] With certain exceptions for conduct regarded as per se illegal because of its unquestionably anticompetitive effects, the behavior proscribed by the Sherman Antitrust Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct. Thus, in price-fixing conspiracies, where the conduct is illegal per se, no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy. The act of agreeing to fix prices is itself illegal; the criminal act is the agreement. Price-fixing is an area of the law in which people either can or ought to be able to predict the legal consequences of their actions. Price fixers do not even approach the gray zone of socially acceptable or economically justifiable business conduct.

Antitrust & Trade Law > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > Coverage > Per Se Violations

Antitrust & Trade Law > U.S. Department of Justice Actions > Criminal Actions > General Overview

[HN6] Bid-rigging is a form of concerted action similar to price-fixing, and is also considered a per se violation of the Sherman Antitrust Act. Bid-rigging is deemed to be per se illegal, in the sense that the court will not consider evidence that its effects upon commerce in a relevant market might have had a pro-competitive purpose and effect.

Evidence > Relevance > Relevant Evidence

[HN7] Fed. R. Evid. 402 provides that all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible. "Relevant" evidence is defined in Fed. R. Evid. 401 as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Antitrust & Trade Law > Price Fixing & Restraints of Trade > General Overview

Evidence > Relevance > Relevant Evidence

[HN8] The appraised value of an item to be auctioned, especially if prepared well in advance of the auction, bears no certain relationship to the fair market value or competitive price of that item. The appraisal merely purports to be an estimate of an item's fair market value at the time of the appraisal, and some appraisers are more expert than others.

Antitrust & Trade Law > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Relevance > Relevant Evidence

[HN9] Anti-competitive purpose and effect are not measured in relation to some subjective baseline value. An "artificially low price" is a price lower than that which would have been established through competition. Whether the conspirators charged under the Sherman Antitrust Act think they are paying or have paid an otherwise fair or reasonable price for the items they have purchased at a public auction is not relevant in determining whether the pooling is intended to result in lower public auction prices than might have been bid had pool members not agreed to refrain from bidding against each other.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > General Overview

Criminal Law & Procedure > Trials > Judicial Discretion

[HN10] U.S. Dist. Ct., E.D. Pa., Crim. R. 15(c) provides that after the conclusion of a trial no attorney, party or witness shall communicate with or cause another to communicate with any member of the jury without first receiving permission of the court.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > General Overview

[HN11] Courts are reluctant to allow the impeachment of jury verdicts in order to discourage juror harassment, encourage

open discussions during deliberation, reduce the incentive for jury tampering, promote the finality of verdicts, and maintain the viability of the jury as a decision maker. Those concerns must be balanced by the need for assurance the verdict was rendered by an impartial jury.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > General Overview

[HN12] To impeach a jury verdict: (1) defendant must produce evidence competent to attack the verdict; (2) defendant must establish the existence of grounds recognized as adequate to overturn the verdict; and (3) the court must find that defendant has suffered prejudice from the misconduct.

Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview

Evidence > Competency > Jurors > Deliberations

Evidence > Competency > Jurors > External Influences

[HN13] Fed. R. Evid. 606(b) provides that 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 deliberation or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or to dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Civil Procedure > Trials > Jury Trials > Jurors > Misconduct

Evidence > Competency > Jurors > Deliberations

Evidence > Competency > Jurors > External Influences

[HN14] Once competent testimony is heard, the defendant must demonstrate sufficient grounds to overturn the verdict in order to obtain a new trial on the basis of jury misconduct. The standard "overlaps extensively" with Fed. R. Evid. 606(b). There must be some kind of "extraneous influence." Bribes offered to jurors, bailiffs' comments to jurors, and newspaper articles containing prejudicial information about the case read during deliberations are examples of extraneous influences. Such influences do not include evidence of discussions among jurors, intimidation or harassment of one juror by another, and other intra-jury influences on the verdict.

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OPINION BY: SHAPIRO

OPINION

MEMORANDUM

NORMA L. SHAPIRO, J.

Defendant Ronald Pook was charged with conspiracy to violate Section One of the Sherman Antitrust At, 15 U.S.C. § 1, by participating in "dealer pools" at antique auctions in Pennsylvania, Delaware, and New Jersey. In connection with the conspiracy, the government indicted, in addition to defendant, four companies and eleven individuals all of whom pled guilty as charged. *See* E.D. Pa. Criminal Nos. 87-2; 87-4; 87-5; 87-6; 87-23; and 87-262-1 through 10. Following a six-day trial, a jury convicted defendant Pook of the charged offense.

Defendant timely moved for a new trial, the government responded, and oral argument was held on the motion. The court denied defendant's motion without opinion prior to sentencing on January 27, 1987. Defendant took a timely appeal, though no stay of execution of the sentence was requested or granted, and this opinion is filed to explain the court's denial of defendant's motion.

When a dealer pool was in operation at a public auction of consigned antiques, those dealers who wished to participate in the pool would agree not to bid against the other [*2] members of the pool. If a pool member succeeded in purchasing an item at the public auction, pool members interested in that item could bid on it by secret ballot at a subsequent private auction ("knock out"); to participate in the knock out the members' bids had to be at least 15% higher than the successful bid at the public auction. The pool member bidding the highest at the private auction claimed the item by paying each pool member bidding a share of the difference between the public auction price and the successful private bid. The amount paid to each

pool member ("pool split") was calculated according to the amount the pool member bid in the knock out. The consignors and auctioneers received a percentage of the public auction price but did not receive any portion of the knock out price.

Defendant raised three grounds for a new trial: (1) failure to grant defendant's request to charge the jury on "fair notice"; (2) exclusion of defendant's proffered evidence of the appraised value of a particular auctioned item; and (3) alleged juror misconduct. None of these grounds warranted a new trial.

1. "Fair Notice"

Defendant objected to the court's refusal to charge the following:

[*3] If you find that Ronald Pook did not have fair notice that the Sherman Antitrust Act could be applied to dealer pooling at auctions between 1980 and September, 1985, then you must acquit the defendant. ¹

¹ Counsel submitted the instruction as a "supplemental requested instruction" on the day of the charging conference.

It was defendant's contention that the Constitution prohibits his conviction for violation of the Sherman Antitrust Act unless he had prior notice or warning that auction pools violated the law. In support of this contention, defendant cited Supreme Court authority on whether other statutes were "void for vagueness," that is, so vague that their enforcement against individuals violated the due process clause of the Constitution. *See Lambert v. California*, 355 U.S. 225 (1957); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); and *Marks v. United States*, 430 U.S. 188 (1977). This argument challenges the constitutionality of the indictment, but such constitutionality is not a jury question. There is no question that [HN1] a criminal indictment under Section One of the Sherman Antitrust Act withstands constitutional attack.

This case does not involve passive [*4] conduct, it does not involve a statute whose language is open to potentially discriminatory application in individual cases, and it does not involve a statute whose interpretation is constantly and dramatically changing. Defendant was charged not only with knowledge of the statute, but also with knowledge of its judicial gloss. *LaFave & Scott, Criminal Law* (1972) at 64. [HN2] The Sherman Act has uniformly been interpreted to make agreements that tamper with price structures illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-22 (1940). It applies to buyers as well as sellers, *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948), and specifically to agreements among buyers to refrain from bidding at auctions. *See Swift & Co. v. United States*, 196 U.S. 375, 391 (1905) (in auctions of livestock, it was held illegal for competing buyers "to refrain from bidding against each other, 'except perfunctorily and without good faith,' and by this means compelling the owners of such stock to sell at less prices than they would receive if the bidding really was competitive"); *United States v. Champion International Corp.*, 557 F.2d 1270 [*5] (9th Cir.), *cert. denied*, 434 U.S. 938 (1977) (held illegal to eliminate competitive bidding for forest timber). *American Tobacco Co. v. United States*, 147 F.2d 93, 107 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Though the government points to no prior case where the Sherman Antitrust Act has been applied to anticompetitive conduct at antique auctions, the same rules against agreements to restrain price competition apply to all economic areas. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 351 (1982). *See* Government's Response to Defendant's Motion for New Trial at 5.

The issue here is really *mens rea*, that is, the intent required for conviction. [HN3] Section One of the Sherman Antitrust Act provides:

Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal

15 U.S.C. § 1. The Supreme Court held in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), that [HN4] the criminal offenses defined [*6] by Section One of the Sherman Antitrust Act should be construed as including intent as an element. *Id.* at 435. In a conspiracy, two different types of intent are required, the intent to agree to establish the conspiracy and the more traditional intent to effectuate the object of the conspiracy. As to this second type of intent, the Court held it is necessary to prove in addition to anti-competitive effects that the chargeable conduct was undertaken with the conscious object of producing such effects (whether or not the effects came to pass) or that the conduct is shown to have been undertaken with knowledge of its probable consequences and having the requisite anti-competitive effects. *Id.* at 444.

In *United States v. Gillen*, 599 F.2d 541 (3d Cir. 1979), the Court of Appeals for the Third Circuit considered the element of intent post-*Gypsum*. In that case, the defendant contended that the district court erred in holding that specific intent was not a required element of a criminal price-fixing conspiracy. The court held that *Gypsum's* statement on intent was derived from "a

concern for borderline violations and was not meant to modify past precedent on price-fixing [*7] conspiracies." *Gillen*, *supra*, 599 F.2d at 544. The *Gypsum* court stated:

[HN5] With certain exceptions for conduct regarded as *per se* illegal because of its unquestionably anticompetitive effects, *see, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 . . . , the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct.

Gypsum, *supra*, 438 U.S. at 440-41, *quoted in Gillen*, *supra*, 599 F.2d at 544.

Thus, in price-fixing conspiracies, where the conduct is illegal *per se*, no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy. . . . The act of agreeing to fix prices is itself illegal; the criminal act is the agreement.

Gillen, *supra*, 599 F.2d at 545.

Price-fixing is an area of the law in which people either can or ought to be able to predict the legal consequences of their actions. Price fixers do not even approach 'the gray zone of socially acceptable or economically justifiable business conduct.'

Gillen, *supra*, 599 F.2d at 544 (*quoting Gypsum*).

[HN6] Bid-rigging is a [*8] form of concerted action similar to price-fixing, and is also considered a *per se* violation of the Sherman Antitrust Act. "[Bid-rigging is] deemed to be *per se* illegal, in the sense that the court will not consider evidence that [its] effects upon commerce in a relevant market might have had a pro-competitive purpose and effect." *United States v. Sargent Electric Co.*, 785 F.2d 1123, 1127 (3d Cir.), *cert. denied*, U.S. 107 S. Ct. 82, 93 L.Ed.2d 36 (1986) (explaining the elements the government needed to prove where defendants had been charged with conspiracy to rig bids for electrical construction).

Defendant was charged and convicted of conspiring with other members of dealer pools to keep down prices for antiques at public auctions in a three-state area. The conspirators agreed not to bid against each other in the public auction with the understanding that the successful low bidder would allow the other pool members to bid on an item later in a private auction. Like other *per se* violations, auction pooling "is an area of the law in which people either can or ought to be able to predict the legal consequences of their actions. [Auction pooling [*9] does] not even approach 'the gray zone of socially acceptable and economically justifiable business conduct.'" *Gillen*, *supra*, 599 F.2d at 544. Conspiracy to keep auction prices artificially low and non-competitive clearly deprives antique owners of their expectancy of the highest price in a competitive market.

There was no credible evidence of pro-competitive effects of auction pooling. Consignors and auctioneers were invariably deprived by members of the pool of their proper share of the ultimate sales prices of items purchased at public auctions and sold later for higher prices at private auctions. Agreeing not to bid is bid-rigging; keeping the prices lower than they would have been if competitive is price-fixing.

Thus, the court could have instructed the jury that defendant's conduct was a *per se* violation of Section One of the Sherman Antitrust Act and that all it needed to find was that defendant knowingly entered a conspiracy to pool at auctions. Instead, to give the defendant the benefit of a charge on specific intent, the court required the jury to find defendant's action purposely anti-competitive.

The court instructed the jury on defendant's knowledge of the [*10] law as follows:

Now, I want to make clear in that sense that ignorance of the antitrust laws isn't a defense. It's not necessary for the prosecution to prove that the defendant had an evil motive or a bad purpose to violate the law. What they have to show was that the evidence in the case proves beyond a reasonable doubt that there was a conspiracy knowingly formed, that the defendant knowingly became a member of this conspiracy with a substantial purpose to purchase antiques at artificially low and noncompetitive prices. And if you find that, the fact that the defendant might have believed or may have believed in good faith that what was being done was not unlawful, that would not be a defense.

Charge of the Court, October 26, 1987, Tr. at 28. This instruction was paraphrased from 2 Devitt & Blackmar, *Federal Jury Practice and Instructions* (1977) § 55.21, p. 409. The court added that the defendant had to have "a substantial purpose to purchase antiques at artificially low and noncompetitive prices." The indictment included that language, Indictment, para. 12, p. 4, and the court repeatedly emphasized (not always in the same exact words) that the indictment charged, and the [*11] government needed to prove beyond a reasonable doubt, that defendant knowingly entered the pooling conspiracy, *and* that he had a substantial purpose to purchase antiques at artificially low and non-competitive prices. *See Charge of the Court*, October 26, 1987, pp. 14, 16, 17, 18, 19, 20, 22, 23, 24, 25-26, 27, 28, 29, 32, and 34.

The same language on purpose was included on the verdict form.² By finding defendant guilty of this offense, the jury specifically found that defendant conspired for the purpose of purchasing antiques at artificially low and non-competitive prices.

² The Form of Verdict read as follows:

Beginning at least as early as 1980, and continuing thereafter until September, 1985, in the Eastern District of Pennsylvania, defendant Ronald Pook conspired with others to refrain from bidding against each other at various public auctions for the purpose of purchasing antiques at artificially low and non-competitive prices in violation of Section One of the Sherman Act, 15 U.S.C. § 1.

Guilty Not Guilty

The Court of Appeals approved a similar instruction to that given here in another bid-rigging conspiracy case:

[T]he jury was asked to [*12] find not only that the defendants knowingly joined or formed the conspiracy, but that they also meant to bring about or did bring about the effects proscribed by the Sherman Act.

United States v. Fischbach and Moore, Inc., 750 F.2d 1183, 1196 (3d Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985).

The court's charge was adequate with regard to the requisite intent, and defendant Pook was not entitled to a charge on "fair notice."

2. Exclusion of Evidence

Defendant protested the exclusion at trial of evidence of the appraisal value of a particular antique highboy. The government presented evidence that the highboy was sold at public auction to a pool member for \$ 6,000, and that defendant purchased it at a knock out for "several thousand more." The defendant sought to offer documentary evidence that this highboy had been appraised at \$ 3,000 at some undisclosed prior time by some undisclosed appraiser for the consignor. This evidence was ruled inadmissible hearsay. Defendant then offered to bring in the appraiser to testify to the value of the highboy. The court ruled that any evidence of the past appraised value of this highboy was not relevant and not admissible.

[HN7] Federal [*13] Rule of Evidence 402 provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

"Relevant" evidence is defined in Fed.R.Evid. 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The government's case was based on proving that defendant engaged in the practice of pooling with the purpose of buying items at prices lower than if he had not agreed to pool. To prove that the purpose of pooling was to suppress public auction prices for the benefit of the pool members, the government introduced evidence of the results of specific pooling operations. From this evidence a jury could and did find that the conspirators, including defendant, were willing and able to, and did in fact pay more for an item in the knock out immediately after a public auction than their representative successfully bid for the same item at the [*14] public auction.

At trial, counsel for defendant argued that the highboy's prior appraised value was somehow relevant to the issue of whether defendant's specific intent in pooling was to create artificially low prices. There was no foundation that defendant had seen the appraisal prior to the public auction or that he relied on the appraisal in his bidding. When offered, it was to show that the public auction bid price was fair or "reasonable." However, [HN8] the appraised value of an item to be auctioned, especially if prepared well in advance of the auction, bears no certain relationship to the fair market value or competitive price of that item. The appraisal merely purports to be an estimate of an item's fair market value at the time of the appraisal, and some appraisers are more expert than others.

[HN9] Anti-competitive purpose and effect are not measured in relation to some subjective baseline value. An "artificially low price" is a price lower than that which would have been established through competition. Whether the conspirators thought they were paying or paid an otherwise fair or reasonable price for the items they purchased at the public auction was

not relevant in determining whether [*15] the pooling was intended to result in lower public auction prices than might have been bid had pool members not agreed to refrain from bidding against each other. *See Socony-Vacuum Oil Co., supra*, 310 U.S. at 221; *Continental Baking Co. v. United States*, 281 F.2d 137, 143-44 (6th Cir. 1960). Defendant's proffered evidence of a non-participant's subjective, noncompetitively set valuation of the highboy was not relevant to defendant's purpose in pooling. If relevant for this purpose, its exclusion was harmless error because its probative value was diminished by the undisputed evidence that defendant paid a significantly higher price than the public auction price immediately after the public auction.

Post trial, Pook also contended that evidence of a \$ 3,000 appraisal would have established the credibility of Pook's testimony and refuted the government's contention that the pool kept the public auction prices lower than they would have been had there been no pool. Pook testified that he would not have bid more on that item than the successful bid at the public auction even if he were not then a member of a pool. Defendant contended that the excluded evidence would have shown [*16] that the successful public auction bid on the highboy was twice its appraised value. It was argued that this evidence supported Pook's contention that he would never have outbid the successful bidder because the public bids were too high.

The government proved that Pook did bid higher than the successful bidder on that antique highboy immediately after the public auction. Pook was the highest bidder at the private knock out. If the low appraised value would have affected his bidding at the public auction if he were not pooling, it would have equally affected his bidding at the knock out. It is unlikely that evidence establishing a relatively low appraisal value for any item would have helped establish Pook's credibility in testifying that the public auction price was higher than he would have bid when Pook himself bid and paid a substantially higher price for that very item at the after auction among pool members.

Defendant was allowed to offer other evidence that his conduct was economically justifiable. Excluding evidence on appraisal values estimated by an appraiser neither at the auction in question nor in court was within the discretion of the judge. If the evidence had probative [*17] value, such value would have been substantially outweighed by its tendency to confuse the issues, mislead the jury and lead to a decision on improper grounds. *See Fed.R.Evid.* 403.

3. Jury Misconduct

On October 27, 1987, counsel for defendant brought to this court's attention that one of the jurors, William A. Marquess, had approached and spoken with defendant, his wife, and counsel in the courthouse lobby about an hour and a half following the verdict.³ Mr. Marquess allegedly said that during deliberations, the foreperson told the other jurors that defendant had already been convicted by the judge and that the trial was really an appeal or retrial.

3 [HN10] Local Criminal Rule 15(c) provides:

After the conclusion of a trial no attorney, party or witness shall communicate with or cause another to communicate with any member of the jury without first receiving permission of the Court.

While it appeared from counsel's account (later confirmed by Marquess) that this rule was violated, and the court could have exercised its discretion to disregard the evidence for that reason, *Cf. Tanner v. United States*, 483 U.S. , 107 S. Ct. 2739, 97 L.Ed.2d 90, 109-10 (1987), the court decided, in the interest of justice, to pursue the matter further.

[*18] Traditionally, [HN11] courts have been reluctant to allow the impeachment of jury verdicts in order to discourage juror harassment, encourage open discussions during deliberation, reduce the incentive for jury tampering, promote the finality of verdicts, and maintain the viability of the jury as a decision maker. *See Government of Virgin Islands v. Gereau*, 523 F.2d 140, 148 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976); *see also McDonald v. Pless*, 238 U.S. 264 (1915); *Mattox v. United States*, 146 U.S. 140 (1892). Those concerns must be balanced by the need for assurance the verdict was rendered by an impartial jury.

[HN12] To impeach a jury verdict: (1) defendant must produce evidence competent to attack the verdict; (2) defendant must establish the existence of grounds recognized as adequate to overturn the verdict; and (3) the court must find that defendant has suffered prejudice from the misconduct. *Gereau, supra*, 523 F.2d at 148.

[HN13] Federal Rule of Evidence 606(b) codifies the common law test for competent testimony:

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 [*19] the jury's deliberation or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or to dissent from the verdict or indictment or concerning his mental processes in connection

therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

In *Tanner v. United States*, 483 U.S. , 107 S. Ct. 2739, 97 L.Ed.2d 90 (1987), the Supreme Court discussed the historic distinction between "external" influences, which are admissible, and "internal" influences, which are not.

[HN14] Once competent testimony is heard, the defendant must demonstrate sufficient grounds to overturn the verdict in order to obtain a new trial on the basis of jury misconduct. The standard "overlap[s] extensively" with Fed.R.Evid. 606(b). There must be some kind of "extraneous influence." *Gereau, supra*, 523 F.2d at 150. Bribes offered to [*20] jurors, bailiffs' comments to jurors, and newspaper articles containing prejudicial information about the case read during deliberations are examples of extraneous influences. *See Tanner, supra*, 483 U.S. at , 107 S. Ct. at 2746, 97 L.Ed.2d at 104-5. Such influences do not include "evidence of discussions among jurors, intimidation or harassment of one juror by another, and other intra-jury influences on the verdict." *Gereau, supra*, 523 F.2d at 150-51 (citations omitted).

On the basis of counsel's representation and submissions, and remote possibility that the jury was exposed to improper "extraneous prejudicial information" or "outside influences," the court conducted sworn, on-the-record interviews of Mr. Marquess, the foreperson, and two randomly-selected jurors, one male and the other female. The court asked the questions, but allowed counsel for the government and the defendant to submit additional questions. All submitted questions, sometimes slightly altered as to form, were posed to the jurors.

At his interview, Mr. Marquess confirmed that he had waited for defendant in the courthouse lobby because he was curious about certain remarks made by other jurors [*21] in the jury room. Specifically, he stated he wanted to know if defendant had been convicted before because the foreperson had said so during jury deliberations. He could not remember if the foreperson said she had read about Pook's conviction in the newspaper. However, he believed it to be true because none of the other jurors seemed surprised. He claimed he was the last juror to vote for conviction, and he "felt bad" about defendant's conviction.

Under the court's questioning, the foreperson denied any knowledge of a previous conviction of defendant, denied having made any statements regarding a previous conviction of defendant, and denied having heard any such statements. She said she did not bring any newspapers into the jury room. She claimed the only newspaper she ever read was the *Philadelphia Daily News*, that she read it only occasionally, and that she had never seen any articles about defendant or other members of auction pools.

Neither of the other two jurors interviewed remembered hearing anything about a previous conviction of defendant during deliberations. Both testified that during their deliberations there was no discussion of any newspaper articles about defendant. [*22] Nor were there any other outside influences on them during the course of the trial. Their testimony was credible. All of the prospective jurors were asked during voir dire whether they knew anything about this case or similar pooling cases, and none of the jurors selected reported any such knowledge. The jurors interviewed confirmed the accuracy of these earlier responses.

Defense counsel submitted articles from *The Philadelphia Inquirer* and the *Maine Antique Digest* (but not the *Philadelphia Daily News*) as possible extraneous information and outside influences. The articles discussed defendant's indictment and guilty pleas and sentences of other members of auction pools. None of the articles mentioned any previous trial of defendant; of course, there was no previous trial. It is theoretically possible that a juror could have misread one of the articles, thought that defendant as well as others had been previously convicted, and communicated that misinformation to the other jurors, but even such a misinformed internal communication would not likely rise to the level of an extraneous influence sufficient to impeach the jury's guilty verdict.

However, there was no factual [*23] basis to conclude that the jury was exposed to any improper extraneous prejudicial information or outside influences. Mr. Marquess properly performed his duty as a juror, but was remorseful about convicting the defendant, perhaps because of defendant's testimony that he did not know his conduct was illegal and/or the character testimony on defendant's behalf. One of the jurors interviewed shed some light on the discrepancy between the statements of Mr. Marquess and the other jurors. He informed the court that immediately after the verdict was rendered and the jury was dismissed, newspaper reporters covering the case told some jurors that several government witnesses (the pool members) had been convicted or pled guilty to the same offense for which defendant had been tried. Mr. Marquess may have elaborated on the reporters' statements after the jury was discharged to ease his conscience. Whatever the explanation, his post-verdict statements are unsubstantiated and not credible. Therefore, it is unnecessary to consider further whether, if Mr. Marquess' allegations were true, the jury was exposed to improper information or influences.

In addition, the jurors were specifically charged:

[*24] I've told you that your verdict must be based solely on the evidence and I've explained to you that you can draw inferences from the evidence, but it can't be based on anything, any publicity outside the courtroom. If any of you has read or heard anything relating to this case in the newspaper, radio or television, and I'm not sure there have been any reports in any of the media but you're to disregard those reports entirely because those reports are not evidence and should have no influence on your verdict.

Charge of the Court, October 26, 1987, Tr. at 10. There is no evidence of prejudice on this record.

For the foregoing reasons, defendant's motion for a new trial was denied by Order of this court filed on January 27, 1988.