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IN THE MATTER OF LAWRENCE TOPPIN	SUPERIOR COURT OF NEW JERSEY CRIMINAL DIVISION BERGEN COUNTY OPINION

Argued: October 6, 2011
Decided: October 11, 2011

Honorable Peter E. Doyne, A.J.S.C.

Steven M. Paul, Esq. appearing on behalf of Lawrence Toppin (Randall & Randall, LLP).

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to, as a defense against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government.[1]

[1] THE FEDERALIST NO. 83, at 614 (Alexander Hamilton) (John C. Hamilton, ed., 1866).

Introduction

Before the court is an order to show cause executed by this court on July 19, 2011, directing Lawrence Toppin ("Toppin") to appear on August 29, 2011, to show cause why he should not be held in contempt pursuant to R. 1:10-2 for violating multiple orders of the Honorable Edward A. Jerejian, J.S.C., to refrain from conducting internet research of issues involved in a criminal trial in which Toppin participated as a juror.

Facts and Procedural Posture

A. The Franklin Trial and Toppin's Misconduct

A brief overview of the criminal action in which Toppin participated as a juror, State v. Curtis A. Franklin, Indictment No. 10-05-00857-I, is provided to convey the construct which resulted in the execution of the order to show cause presented.

In Franklin, Curtis A. Franklin ("defendant") was charged in a six-count indictment, all counts charging sexual assault involving two alleged victims. Count one charged the defendant with sexual assault against the victim's sister and was severed prior to trial. The defendant was tried on counts two through five.

On May 24, 2011, the trial commenced with jury selection, which continued on May 25, May 26, June 1, June 2, and June 7, 2011. As part of supplemental voir dire questions the jury was asked:

> The only facts you can consider in this case are from the testimony and exhibits introduced at the trial. You cannot visit a place or persons mentioned or look up anything about the case on any computer or electronic device. Nor can you read about the case if it appears in any form of the media. Can you abide by my instruction?[2]

The jury was sworn on June 8, 2011, at which time it was read the Criminal

[2] Emphasis added.

Model Charge entitled "Instruction after the jury is sworn," which included in pertinent part:

> Your deliberations should be based on the evidence in the case without any outside influence or opinions of relatives or friends. Additionally, I must instruct you not to read any newspaper articles, or search for, or research information relating to the case, including any participants in the trial, through any means, including electronic means. Do not do any research on the internet, in libraries, in the newspapers, or any other manner-or conduct any investigation about this case. Do not visit or view any place discussed in this case and do not use Internet maps or Google Earth or any other program or device to search for or view any place discussed in the testimony. Also do not research any information about this case, the law, or again – the people involved, including the parties, the witnesses, the lawyers, the judge, or the court personnel. Additionally, do not read any news stories or articles, in print, on the Internet, or in any blog about this case. I do not know if there will be any newspaper or other media coverage of this trial, but you are instructed to completely avoid reading, viewing or listening to any newspaper or media accounts or listening to anyone else discuss them.
>
> I am sure that you can understand why this instruction is so important. Newspaper and media accounts are not evidence, are often based upon second or third hand information, purely hearsay, not always accurate and not subject to examination by the attorneys. I have no way to monitor you in this area but must rely upon your good faith and the fact that you have been sworn to comply with the instructions of the court so that both sides may receive a fair trial. Because instruction is so important, it is my duty to remind you of it at the end of each day's proceeding.

Presentation of evidence commenced on June 8 and continued on June 9, June 15, June 16, June 21, June 22, and June 23, 2011. The jurors were instructed each day not to discuss the case amongst themselves or with anyone else and not to read about the case, whether in the newspaper or online. Two counts of sexual assault were dismissed at the end of the State's case with the remaining three counts permitted to go to the jury.

The jury was charged on June 28, 2011. It then began its deliberations, which continued on June 29 at which time it requested two read-backs of testimony. On June 30 the jury requested an additional read-back before communicating it was deadlocked. The jurors were instructed to continue their deliberations. Later that same day they sent a second communication to the court indicating they remained deadlocked and "everyone was mentally exhausted" and requested a "break" for the July 4th holiday weekend.

Thereafter, deliberations continued on the morning of July 6 at which time the jury requested and received a lengthy read-back, which lasted the entire afternoon.

On the morning of July 7, the fifth day of deliberations, the foreperson sent a note alerting the court one of the jurors brought in materials researched on the internet from Wikipedia "regarding legal terminology."

Once the juror was identified, it was determined he had the materials in his car. With the assistance of a Sheriff's Officer, the materials were retrieved. The materials, printed from the internet, included a definition of "preponderance" and "preponderance of the evidence." Also included were Wikipedia articles regarding "legal burden of proof," "reasonable doubt," "beyond the shadow of a doubt," "jurisprudence," and "critical thinking," as well as an article by Jim Hopper, Ph.D., entitled "Recovered Memories of Sexual Abuse."

The other jurors were questioned in open court, under oath. They all confirmed Juror #4, Toppin, brought into the jury room papers in a manila envelope, which he disseminated to the other jurors. Most stated they glanced at the paperwork but did not read it and knew they should not have had it in the jury room.

The forelady testified, "[Toppin] had brought in some papers that had definitions of legal terminology . . . that he handed out, the papers." She further indicated she saw the top portion of the papers contained definitions and advised each juror had his or her own copy of the materials. She informed Toppin advised the jurors he reviewed the papers and explained they contained terminology he obtained from a computer. Juror #5 stated he glanced at the papers and Toppin told him he, Toppin, obtained them from Wikipedia and conducted independent research. Juror #5 further stated Toppin gave, what seemed to him to be, a dissertation for about two or three minutes to his fellow jurors. Juror #5 informed everyone felt uncomfortable about the circumstances surrounding Toppin's conducting independent research and sharing it with his fellow jurors. Juror #6 informed the court of Toppin's conduct. Juror #7 stated Toppin gave a speech regarding the subject matter of his independent research on the morning before "we made the request for additional testimony." Juror #9 stated, "We just skimmed through it." Juror #11 stated, "[Toppin] indicated he had done some research on his own." Juror #13 stated, "I looked at the first page . . . words, yes they did pop out." Juror #13 indicated he was directed to a page Toppin informed contained an article about the recollection of sexual abuse. Juror #13 also informed the materials stayed in the jury room for the remainder of the day, and he initially believed the envelope was "something from the court."

The jury was ordered to cease deliberations and the matter was adjourned until July 12 to allow counsel to research the issues presented.

B. Declaration of Mistrial

On July 12, 2011, the court declared a mistrial for varied reasons. First, the jury had been deliberating for five days, during which time it twice declared it was deadlocked. Once deliberations reach such a stage, substitution of a juror is precluded. State v. Jenkins, 182 N.J. 112, 132 (2004). Even if the juror was appropriately excused, but the substitution could not be made given the stage of deliberations, a mistrial would have had to be declared. State v. Williams, 377 N.J. Super. 130, 133 (App. Div. 2005). Moreover, a presumption arises a jury has progressed too far in its deliberations to permit a substitution of an alternate juror if it announces it is deadlocked. State v. Banks, 395 N.J. Super. 205, 218 (App. Div. 2007). Here, the jury had been deliberating for five days and indicated it was deadlocked twice. The court determined the jury had in fact reached a "finality" stage; a substitution of a juror would then have been in error.

In addition, even if the jury had not progressed to the point where substitution, rather than the declaration of a mistrial, would have been more appropriate, under the "inability to continue standard," a juror can only be substituted for personal circumstances. State v. Hightower, 146 N.J. 239, 254 (1996); R. 1:8-2(d). In Hightower, the Court determined a mistrial should have been declared, instead of a substitution made, when one of the jurors brought in extrinsic material related to the case as the problem created was not personal and therefore did not meet the "inability to continue standard." Hightower, supra, 146 N.J at 255. Similarly, here, Toppin brought in extrinsic material for his fellow jurors to consider, and a substitution, if made, would therefore not have been for the "juror's personal reason." Thus, a substitution was determined to be improper, and a declaration of mistrial was found to be appropriate.

Finally, though some of the jurors only glanced at the materials, some read the materials, and although all concluded they were not prejudiced by the materials, Toppin had deliberated with the other jurors and made statements based on his outside research. Therefore, the court concluded there had been an impermissible taint. See Panko v. Flintkote Co., 7 N.J. 55, 61 (1951) ("[A jury's verdict] must be . . . based solely on legal evidence produced before it and entirely free from the taint of extraneous considerations and influences.").

The circumstances surrounding the Franklin mistrial were brought to this court's attention by way of a written memorandum of Judge Jerejian dated July 18, 2011. In response, this court executed an order to show cause on July 19, 2011, directing (1) Toppin to appear before the court on August 29, 2011, to show cause why he should not be held in contempt pursuant to R. 1:10-2 for violating the orders of Judge Jerejian,[3] (2) the matter be tried without the benefit of a jury, (3) should Toppin not appear as scheduled, without justifiable, reasonable excuse, the court may issue an immediate warrant for his arrest, and (4) notice be provided to the Bergen County Prosecutor's Office, alerting that office it is not required to, but may, prosecute on behalf of the court. On the same day, the court authored a letter to Toppin, enclosing the executed order to show cause, with copy of the same to 1st Asst. Prosecutor, John L. Higgins, III.

Overview of Juror Misconduct

A. The Importance of Juries in the American Justice System

The jury is the fulcrum upon which the American justice system operates. Jurors act as the voice and conscience of their community. For this reason, "[j]ury service is a

[3] At the request of counsel on behalf of Toppin, the return date was adjourned to October 7, 2011; the court subsequently changed the return date to October 6, 2011, to conform its calendar to the Law Division's motion calendar.

duty as well as a privilege of citizenship[.]" Thiel v. Southern Pacific Co., 328 U.S. 217, 224, 66 S. Ct. 984, 987, 90 L. Ed. 1181, 1187 (1946). As unfortunate as it may be that some citizens attempt to shirk their duty, our courts operate on the basis, particularly in criminal matters, public participation in the orderly disposition of disputes remains a bedrock of the legal system. See Bloom v. Illinois, 391 U.S. 194, 209, 88 S. Ct. 1477, 1486, 20 L. Ed. 2d 522, 533 (1968) ("Perhaps to some extent we sacrifice efficiency, expedition, and economy, but the choice in favor of jury trial has been made, and retained, in the Constitution.").

Our Court has stressed "that the jury has a 'nondelegable and nonremovable' responsibility to find the facts and to determine ultimate guilt or innocence." State v. Corsaro, 107 N.J. 339, 346 (1987) (quoting State v. Ingenito, 87 N.J. 204, 210-12 (1981)). As a result, "[t]he sanctity of the jury role and the integrity of jury deliberations are crucial aspects of a criminal prosecution." Ibid. (citing State v. Ramseur, 106 N.J. 123 (1987); State v. Ragland, 105 N.J. 189 (1986)). Highlighting the concern courts be made aware of all the information on which a jury bases its decision, the Court went on to state:

> The key to the proper discharge of this duty by the jury is the deliberative process, which must be insulated from influences that could warp or undermine the jury's deliberations and its ultimate determination. Not surprisingly, we have held that errors related to juror substitution — with their potential for introducing
>
> extraneous influences — are cognizable as plain error. The jury's singular responsibility demands that the integrity of jury deliberations be preserved.

[Id. at 346-47 (internal citations omitted).]

Further, the Court has referenced the right to a trial by a fair and impartial jury as one of great importance:

> The fundamental right of trial by a fair and impartial jury is jealously guarded by the courts. A jury is an integral part of the court for the administration of justice and on elementary principles its verdict must be obedient to the court's charge, based solely on legal evidence produced before it and entirely free from the taint of extraneous considerations and influences. A jury can act only as a unit and its verdict is the result of the united action of all the jurors who participated therein. Therefore, the parties to the action are entitled to have each of the jurors who hears the case, impartial, unprejudiced and free from improper influences.

[Panko, supra, 7 N.J. at 61.]

It is with an eye toward the importance of, and reverence commanded by, the responsibilities of the jury the court evaluates the rise in juror misconduct across the country, as well as the law and facts of this case.

B. Increase in Juror Misconduct

Independent research conducted by jurors is not an issue left unexplored. Indeed, this has been a longstanding problem, and, with the advent of the internet, the problem has seemingly escalated. See Daniel William Bell, Note, Juror Misconduct and the Internet, 38 Am. J. Crim. L. 81, 83 (2010). In New Jersey, an appellate court has addressed directly an issue pertinent to the present order to show cause, namely the propriety of obtaining Wikipedia articles from the internet for use in a court proceeding. In Palisades Collection, L.L.C. v. Graubard, No. A-1338-07T3,

2009 N.J. Super. Unpub. LEXIS 1025, at *4 (App. Div. Apr. 17, 2009), counsel for plaintiff moved to admit "a print version of a page from the website of Wikipedia, a company which markets itself as an electronic encyclopedia." Plaintiff sought to establish a commercial transaction between two lenders occurred. Ibid. The panel held, "[t]he trial court's acceptance of Wikipedia was . . . contrary to the principle that judicial notice must

be based upon 'sources whose accuracy cannot be reasonably questioned.' We come to this conclusion after reviewing Wikipedia's own self-assessment." Id. at *7 (citing N.J.R.E. 201(b)(3)). The panel indicated, "Wikipedia bills itself as the 'online encyclopedia that anyone can edit.'" Ibid. To edit an article, one need simply have an internet connection and a Wikipedia account. Ibid. Indeed, Wikipedia warns readers the content of an article "may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields." Ibid. Thus, the problem arises, "a party in litigation [may] alter a Wikipedia article, print the article, and thereafter offer it in court in support of any given position. Such a malleable source of information is inherently unreliable, and clearly not one 'whose accuracy cannot be reasonably questioned.'" Ibid. (citing N.J.R.E. 201(b)(3)). Therefore, the instruction not to conduct independent research on the internet, particularly Wikipedia, is clearly supported.

Though an attorney's, rather than a juror's, conduct was at issue in Palisades Collection, the case is only one illustration of the internet's widespread encroachment on the sterilized atmosphere of the courtroom. The need for intensified efforts to prevent jurors from conducting research, in light of the ready accessibility of information via the internet, is evidenced by the dramatic increase in the number of incidents involving independent research conducted by jurors since the advent of the internet. Bell, supra, 38 Am. J. Crim. L. at 83 (pointing to a search in Westlaw of all state and federal cases for the term "juror misconduct," yielding (1) 2,701 results for the years 1980-1990, (2) 3,990 results for the years 1990-2000, and (3) 8,755 results for the years 2000-2010).

Anecdotal evidence, unsurprisingly, seems to support Bell's research, as there appear to be countless examples of jurors conducting internet research. Among them is a South Dakota juror who, in a seat belt product liability case, "googled" the defendant and informed five other jurors the defendant had not been sued previously. Ralph Artigliere et al., Reining in Juror Misconduct: Practical Suggestions For Judges and Lawyers, 84 Fla. Bar. J. 8, 3 (2010) (citing Russo v. Takata Corp., 2009 S.D. 83 (2009)). Additionally, a juror in a federal corruption trial in Pennsylvania posted his progress during deliberations on the internet, resulting in a motion for mistrial. Ibid. (citing John Schwartz, As Jurors Turn to the Internet, Mistrials are Popping Up, N.Y. Times (Mar. 18, 2009), available at http://www.nytimes.com/2009/03/18/us/18juries.html (last accessed Aug. 10, 2011)). Jurors were running searches in Google for lawyers and parties involved in a case, finding news articles about the case, researching definitions and information on Wikipedia, and looking for evidence excluded from the case presented. Ibid. As disconcerting as it is, while these transgressions happened to be discovered, they probably represent just the tip of the iceberg of juror (mis)behavior. Artigliere et al., supra, 84 Fla. Bar J. at 3.

Unfortunately, the internet aside, it appears wayward jurors already had sufficient resources to satisfy their curiosity, with cases reported of jurors having looked up ambiguous terms in dictionaries, conducted substantive legal research, engaged in at-home experiments, visited accident scenes, and otherwise obtained specialized knowledge. Bell, supra, 38 Am. J. Crim. L. at 83. Further demonstrating juror misconduct is not a new phenomenon, many juror misconduct cases involving the internet mirror more traditional cases. For example, in United States v. Bristol-Martir,

570 F.3d 29, 36 (1st Cir. 2009), a juror admitted researching on the internet the terms "attempt," "distribution," and "possess." In Commonwealth v. McCaster, 710 N.E.2d 605, 606 (Mass. Ct. App. 1999), a juror used the web to research the chemical composition of cocaine. As Juror Misconduct and the Internet correctly indicates:

> Errant jurors, if motivated to do so, have always been capable of using their privately-owned resources or visiting libraries to access reference books. Search engines such as Google.com and encyclopedic web sites such as Wikipedia.org, however, are accessible from home computers and mobile electronic devices at the mere click of a button. These sources, therefore, are not only more expansive (and numerous) than their printed analogues, but far more accessible as well.

[Bell, supra, 38 Am. J. Crim. L. at 84.]

C. Effects of juror misconduct

What seems obvious, but should be stated explicitly, are the effects of juror misconduct. As demonstrated by the facts of the instant matter, juror misconduct can result in substantial and unnecessary expense which must be borne by the litigants, their attorneys, the court system, and the public at large. The juror himself or herself faces public censure, at a minimum, and possibly other penalties as well, some of which are discussed more fully below. The litigants are faced with the reality, in the case of a mistrial, the initial trial is a nullity, and all the attendant time (including time taken off from work), money, and emotional travail are for naught. Similarly, time spent in preparation for the trial and at trial by the attorneys and judge involved is wasted. Perhaps as importantly in these times of acute sensitivity to governmental expenditures of taxpayer money, the public at large, who effectively pays for the initial, now meaningless trial, has had its resources wasted. Not only is the initial trial rendered meaningless, but

even more resources must be expended on a new trial. Moreover, and again with an eye to today's economic conditions, the time of fellow jurors, spent fulfilling their civic duties in service of their community, is squandered; this was time that was sacrificed and could have been spent working, running a business, looking for a job, or at school. Even if the other consequences of juror misconduct seem more removed or abstract, the court expects future jurors considering disobeying the court's orders may consider the effects their actions may have on those sitting with them in the jury box.

D. Infrequency of Punishment for Juror Misconduct

In New Jersey, the sanctioning of a juror who has violated a jury instruction to refrain from independent research, generally by way of the internet, appears to be absent. However, generally, a "civil" contempt finding shall result in a fine not exceeding $50.[4] N.J.S.A. 2A:10-5 ("Any person who shall be adjudged in contempt of the Superior Court by reason of his disobedience to a judgment, order or process of the court, shall, where the contempt is primarily civil in nature and before he is discharged therefrom, pay to the clerk of the court, for every such contempt, a sum not exceeding $50 as a fine, to be imposed by the court, together with the costs incurred."). This $50 fine is not a limit on the permissible punishment which may be imposed, however, but is rather merely a maximum amount which the court can require the contemnor to reimburse the court,

[4] The court has sought to avoid the distinction between "civil" and "criminal" contempt, as it may work more mischief than good; rather, it seems the nature of the conduct at issue is determinative of the nature of the contempt proceeding. See Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 1:10 ("The contempt itself is criminal conduct constituting the same offense in every case. The real distinction is between those contempts that may be dealt with summarily . . . and those that must be prosecuted as crimes . . . ."). Thus, where the prosecuted contempt "bears no consequence more serious than that normally attached to a 'petty offense,'" the requirement for a trial by jury may be dispensed with. Ibid.; see also comment 3.2 on R. 1:10-2 ("[T]he rule deals only with those contempts that may be proceeded upon summarily, i.e., where the penalty will not exceed that imposable for a 'petty offense.' Where there is a possibility [it] will exceed that maximum, the contempt must be proceeded upon in a plenary manner as in any other indictable offense and the procedures of R. 1:10 do no apply at all.").

essentially for having to take the trouble of holding a contempt proceeding. See Dep't of Health v. Roselle, 34 N.J. 331, 346 (1961) (internal citation omitted) ("[D]espite the usual penal connotation of 'fine,' the word must here be understood to describe only an imposition in the nature of costs . . . to reimburse government for the pecuniary burden imposed by the breach of the order and the civil proceeding which that breach precipitated. . . . In short, one must look through the label to discover what lies beneath it."). Indeed, should the court find it warranted, even a jail sentence could be imposed. See, e.g., In re Buehrer, 50 N.J. 501, 513, 522 (1967) (finding punishment for contempt is not limited to $50 fine and can be as severe as "six months' imprisonment or a fine of $1,000 or both").

Pertinent to this case, there is precedent for exceeding the $50 fine of N.J.S.A. 2A:10-5 in the case of a juror held in "criminal" contempt. In In Re Jeck, 26 N.J. Super. 514, 520 (App. Div. 1953), the appellate panel affirmed the trial court's imposition of a $300 dollar sanction when a grand juror communicated with an individual who filed a complaint against his acquaintance, trying to convince the individual to dismiss the complaint and revealing his status as a grand juror in the matter. The panel stated:

> If jurors may leave the jury room and privately obtain evidence elsewhere, if the jury can be dismissed from a court or jury room, and the individual members be permitted to interview parties or witnesses outside of the jury room, the courts may as well close their doors, and let the administration of justice fall into the hands of those who will deal in it as an article of personal favor or purchasable merchandise.

[Id. at 521 (quoting In re Summerhayes, 70 F. 769 (D.C. 1895)).]

Despite the court's authority to impose punishment, it appears punishment of jurors for misconduct remains rare. This is likely due to a variety of reasons: it may be

perceived as unfair to punish someone for research which is otherwise legal but becomes unlawful in the course of compulsory state service; response rates to jury service are already barely adequate and threats of punishment may further discourage participation in jury pools; jurors may perceive conducting independent research as being beneficial to their service; punishment may prevent jurors from reporting misconduct.

One reason punishment may remain rare is judges' concern for fairness in the treatment of jurors. Bell, supra, 38 Am. J. Crim. L. at 88-89. In light of this concern, jury consultants Douglas Keene and Rita Handrich have advised judges should "make it clear that violations of [judicial instructions] are a violation of law, for which punishment can be imposed." Ibid. (quoting Douglas L. Keene and Rita R. Handrich, Online and Wired for Justice: Why Jurors Turn to the Internet, The Jury Expert, 14, 20 n.10 (Nov. 2009)). However, even such an advance warning fails to address the potential objection to punishment of jurors for "ordinary, otherwise legal conduct that occurs in the course of compulsory state service." Ibid.

Second, courts may refrain from punishing jurors as "response rates to jury summonses are already barely adequate." Id. at 89. To an average juror, as apparently was the case here, conducting independent research may seem "relatively innocuous if not beneficial to their service as jurors." Ibid. The threat of punishment for such behavior "might discourage even more potential jurors from responding to their summonses, further compounding the already difficult task of empanelling juries." Ibid.

Third, some legal analysts are concerned primarily with "the chilling effect" penalties, especially criminal charges, may have on reporting misconduct. David P. Goldstein, note, The Appearance of Impropriety and Jurors on Social Networking Sites:

Re-booting the Way Courts Deal with Juror Misconduct, 24 Geo. J. Legal Ethics 589, 600 (2011). According to the article:

> Juror self-reporting is a key method of discovering juror misconduct, and there is reason to believe that misconduct observed by other jurors is already underreported. The threat of severe sanctions may further diminish this valuable source of information as jurors may shy away from exposing their peers to such harsh treatment.

[Ibid.]

Fourth, imposing "stiff penalties" for juror misconduct is said to have an "adverse impact . . . on the already negative view generally held by the public regarding jury duty." Id. at 601. Having knowledge one may face fines or prosecution for "updating a Facebook status or sending Twitter messages" is said to be a cause of jurors taking stronger measures to avoid jury duty. Ibid. One suggestion in discouraging such misconduct is to balance deterring misconduct, by imposing fines and/or prosecution, against the "damages [such actions] pose to the jury trial system." Ibid.

E. Examples of Sanctions Imposed in Response to Juror Misconduct

Although uncommon, it is not unheard of for a juror to be sanctioned for misconduct. Examples of punishment include fines in various amounts, probation, incarceration, and writing an essay on the Sixth Amendment.

A San Diego Superior Court Judge has recently adopted a novel policy requiring jurors to sign declarations stating they will not use the internet or other media to conduct research. Bell, supra, 38 Am. J. Crim. L. at 88 (citing Rosalind R. Greene & Jan Mills Spaeth, Are Tweeters or Googlers in Your Jury Box?, Arizona Att'y, 38, 42 (Feb. 2010)). Should a juror violate his or her signed declaration, the juror is subject to punishment by a fine, probation, or incarceration. Ibid.

In a 2009 case in which a juror's internet research caused the judge to declare a mistrial, the judge fined the juror $1,200, representing the amount paid by the court to the jury for its two days of deliberation. Ibid. (citing Moore v. Am. Family Mut. Ins., 576 F.3d 781, 787 (8th Cir. 2009)).

Instructions and warnings have, at times, failed to prevent jurors from discussing cases on the internet, and, as a result, some courts have adopted various forms of punishment for disobedience. Goldstein, supra, 24 Geo. J. Legal Ethics at 600. Some judges use relatively minor penalties as a reprimand for misconduct, as was the case when a Michigan judge fined a juror $250 for sharing her belief the defendant was guilty on her Facebook page. Ibid. The judge also required the juror to write a short essay on the Sixth Amendment. Ibid. Others have called for a harsher financial penalty, thereby holding jurors who have engaged in misconduct on the internet financially accountable for the costs of retrial. Ibid. The harsher penalty is justified, it is argued, by the egregious nature of the misconduct. Ibid. Some advocate the use of contempt or criminal charges against jurors who commit misconduct via the use of social networking sites. Ibid. While courts in this country do not typically use this approach, supporters of these measures view them as a deterrent against misconduct rather than a punishment that should actually be used. Ibid.

In lieu of punishment, the next section addresses preventative measures available in an attempt to avoid juror misconduct.

F. Preventative Measures

A number of courts have taken measures to prevent juror misconduct, including jury instructions addressing the "internet," "iPhone," and" blackberry" and confiscation of mobile phones and iPods during trial. As a New York Times article reports:

> There appears to be no official tally of cases disrupted by Internet research, but with the increasing adoption of Web technology in cellphones, the numbers are sure to grow. Some courts are beginning to restrict the use of cellphones by jurors within the courthouse, even confiscating them during the day, but a majority do not . . . . And computer use at home, of course, is not restricted unless a jury is sequestered.

[Schwartz, supra, N.Y. Times (Mar. 18, 2009), available at http://www.nytimes.com/2009/03/18/us/18juries.html (last accessed Aug. 10, 2011).]

In New Jersey, the Supreme Court Model Criminal Jury Charge Committee attempts to ensure each juror acts responsibly. Since January 10, 2011, the model instruction to be provided after the jury is sworn sets forth:

> Do not do any research on the internet . . . . [D]o not use internet maps or Google earth or any other program or device to search for or view any place discussed in the testimony. Also do not research any information about the case, the law, or again - the people involved . . . . Additionally, do not read any news stories or articles, in print, on the Internet, or in any blog about the case.[5]

A Michigan rule requires judges to instruct against use of electronic devices at the time the panel is sworn. The rule states:

> (2) The court shall instruct the jurors that until their jury service is concluded, they shall not . . .
>
> (c) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used

[5] Prior to January 10, 2011, and after the revision to the model instructions of June 4, 2007, the model instruction made no reference to the internet.

> during breaks or recesses but may not be used to obtain or disclose information prohibited in subsection (d) below;
>
> (d) use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose information about the case when they are not in court. As used in this subsection, information about the case includes, but is not limited to, the following:
>
> (i) information about a party, witness, attorney, or court officer;
>
> (ii) news accounts of the case;
>
> (iii) information collected through juror research on any topics raised or testimony offered by any witness;
>
> (iv) information collected through juror research on any other topic the juror might think would be helpful in deciding the case.

[M.C.R. 2.511.]

Where state model jury instructions excluded reference to use of electronic sources to conduct independent research, an Oregon judge warned jurors not to read information about the case on any internet site or use iPhones, blackberries or other devices "in the courthouse or at home to conduct any research during the trial." Adam Worcestor, Jurors' Tweets, Texts Upset Trial Judges, Portland Bus. J. (Sept. 23, 2009), http://www.bizjournals.com/portland/stories/2009/09/21/focus2.html (last accessed Aug. 20, 2011).

A Florida judge chose to "remove [the] distraction and temptation" of cell phones, iPods, and other such devices by requiring jurors to leave the devices on a table by the witness stand when court is in session and during jury deliberations. Artigliere et al., supra, 84 Fla. Bar J. at 12. In the event of emergency and to alleviate juror anxiety, jurors

were given an "emergency court telephone number so loved ones can reach them in a true emergency." Ibid. Others, alternatively, "simply require electronic equipment to be turned off in the courtroom and to be turned in to the bailiff during deliberations [or,] reluctant to take charge of the juror's property and lifeline to their loved ones[,] admonish jurors against improper use of the equipment in trial and in deliberations." Ibid.

An assembly bill in California, signed by the Governor on August 5, 2011, added an admonishment to ward off independent electronic research by jurors. A.B. 141, ch. 181, 2011-2012 Gen. Assemb., Reg. Sess. (Cal. 2011). The bill states, "[t]he court shall clearly explain, as part of the admonishment, that the prohibition on research, dissemination of information, and conversation applies to all forms of electronic and wireless communication." Ibid. Additionally, the California legislation sets forth, "[the] officer having [the jury] under his or her charge shall not permit any communication to be made to them, including any form of electronic or wireless communication . . . ." Ibid.

G. Scholarly Suggestions for Addressing the Issues Posed to a Contemporary Juror by Readily Accessible Information

One article suggests tempered enhancement of the standard jury instructions and practical methods for judges and lawyers to express clearly to jurors what is expected of them. Artigliere et al., supra, 84 Fla. Bar J. at 11 ("Good communication with jurors is more than words: It is timing, delivery, and creating the best climate for juror acceptance of the message. Jurors should hear the message, understand it, and be motivated to follow the instructions."). According to the authors, the best way to accomplish this laudable goal is to make the jurors feel comfortable and present to them a collective and clear message along with reasonable and consistent reminders throughout the duration of the trial. Ibid. Additionally, the reader is warned, "all of this instruction needs to fit in the

context of all the other important things the jurors need to hear about the case, because brevity and scale are important." Ibid.

With respect to incoming messages during trial, the suggestion made is judges should recommend jurors send an e-mail, text, and/or tweet to friends and family immediately subsequent to their swearing in stating:

> I am sending this note to you as instructed by Judge [_____]. I am now a sworn juror in a trial. I am sequestered. This means I am not allowed to read or comment upon anything having to do with the subject of the trial, the parties involved, the attorneys, or anything else
>
> related to my service as a juror. Please do not send me any materials; don't e-mail, text, or tweet me any questions or comments about this case or my service as a juror. Please do not text or e-mail me during the course of this trial except in an emergency. I will send you a note when I am released from my duty as a juror.

[Id. at 16.]

The recommendation includes leaving a voicemail conveying a similar message and leaving an emergency number for use by a caller when necessary. Ibid.

Most importantly, the author suggests, "judges and trial lawyers should regain control by changing the fabric of jury duty." Id. at 18. Jurors should take "personal responsibility" to "sequester" themselves to ensure the "jury as a whole performs its duty untainted from influences outside the trial." Ibid. The objective "is to eliminate inadvertent misbehavior and reduce intentional misconduct as much as possible." Ibid. "Clear instructions, reducing temptation, motivating, and empowering jurors are suggested means to this end." Ibid.

The Burden of Proof in Contempt Proceedings and Its Application Here

In order to find Toppin in contempt of court, this court must be satisfied three discrete questions can be answered in the affirmative: 1) whether it was Toppin who brought the materials into the jury room; 2) whether such act was contemptuous; and 3) whether such act was performed willfully and contumaciously, with a complete disregard of the court's authority and instructions. Importantly, the court must be satisfied each question was affirmatively answered beyond a reasonable doubt. Amoresano v. Laufgas, 171 N.J. 532, 549 (2002) (quoting In re Yengo, 84 N.J. 111, 119-20 (1980) (internal citations omitted)) ("A defendant [in contempt proceedings] is entitled to certain safeguards accorded criminal defendants. Those safeguards include the presumption of innocence, the privilege against self-incrimination, the right of cross-examination, proof of guilt beyond a reasonable doubt, and the admissibility of evidence in accordance with the rules of evidence.") (emphasis added); see also In re Buehrer, supra, 50 N.J. at 516 ("The presumption of innocence of course obtains, and the burden of the prosecution is to prove guilt beyond a reasonable doubt."); State v. White, 248 N.J. Super. 515, 522 (App. Div. 1991) ("In order to establish the offense of contempt, the prosecutor must prove beyond a reasonable doubt that the defendant purposely or knowingly disobeyed a judicial order.").

Toppin's identity as the juror who brought the materials into the jury room has never been in question. Similarly, the court has no reservations classifying Toppin's conduct, in this case and for all future jurors, as irreparably flawed and inconsistent with our system of justice. As such, the court is satisfied, beyond any doubt, Toppin's acts of conducting independent research and subsequently bringing outside materials into the

jury room qualify as contemptuous. What gives the court pause, however, and ultimately prevents a finding of contempt, is the very close question of whether Toppin acted with the requisite intent to contemptuously disobey Judge Jerejian's orders. That is, an element of the offense of contempt is a willful action taken in deliberate disregard of the court's orders. State v. Garcia, 195 N.J. 192, 204-05 (2008) ("[T]he court is responsible for ensuring that its duly issued orders are honored. To that end, the court is armed with the power to hold those in willful disobedience of its commands in contempt.") (emphasis added); In re Mattera, 34 N.J. 259, 273-74 (1961) ("[A]mple protection lies in the basic proposition that a mere violation would not sustain a charge. The infraction must be knowing and willful and evidence an intent to flout the authority of the Court. It is only in those terms that the contempt power applies . . . ."); Roselle, supra, 34 N.J. at 337 ("The act or omission must be accompanied by a mens rea, a willfulness, an indifference to the court's command.").

On the record before this court, there is not enough evidence to find, beyond a reasonable doubt, Toppin possessed the requisite intent to be held in contempt of court. Essentially, it appears Toppin believed he was not disobeying the court's orders when he conducted independent research and brought the materials into the jury room, as the subject of his research and the materials was not "about the case." During his hearing, Toppin, through his counsel and on his own, submitted he believed the prohibition on outside research pertained only to the case, i.e., the facts, people, and issues of the case proper. Conversely, Toppin characterized his research on legal terminology and psychological concepts as something outside of the case, done to assist his fellow jurors. As such, it was not unique to the case itself and, he apparently thought, was permitted.

At best, it is troubling to accept Toppin's position. Indeed, Toppin's apparent distinction as to what research was and was not permitted may, at first blush, appear difficult to grasp. Toppin, who apparently has a two-year college degree and has been steadily employed on Wall Street as a network specialist since the 1970s, testified the other jurors immediately put down the materials within about ninety seconds of receiving them, presumably with recognition of their impropriety. This testimony certainly weighs against the plausibility of Toppin's belief those same materials were permitted. Moreover, Toppin recognized the jury had asked the court, on two separate occasions, questions regarding the burden of proof, which was one of the issues Toppin researched on Wikipedia; Toppin thus was aware of the proper procedure to be taken in the event the jury was unclear on an issue or a definition.

Yet, the court cannot find, beyond a reasonable doubt, Toppin knew the character of his actions was wrong and acted anyway. Rather, it appears Toppin made a genuine, though perhaps reckless, mistake. To illuminate the court's understanding of Toppin's thought processes, resort to the model criminal instructions used by Judge Jerejian is necessary. Reviewing them from the perspective of a layman, it may be seen how one may reasonably, but incorrectly, understand the instructions to be limited to "the case" itself. For example, the supplemental voir dire questions included the instructions, "You cannot look up anything about the case on any computer or electronic device. Nor can you read about the case if it appears in any form of the media."[6] The model charge read after the jury was sworn included:

> I must instruct you not to read any newspaper articles, or search for, or research information relating to the case, including any participants in the trial, through any means,

[6] Emphasis added.

> including electronic means. Do not do any research on the internet, in libraries, in the newspapers, or any other manner-or conduct any investigation about this case. Do not visit or view any place discussed in this case . . . . Also do not research any information about this case, the law, or again – the people involved, including the parties, the witnesses, the lawyers, the judge, or the court personnel. Additionally, do not read any news stories or articles, in print, on the Internet, or in any blog about this case.[7]

Reading the model instructions, and having had the benefit of evaluating Toppin's testimony presented and finding him to appear to be sincere, it may be understandable how a lay person might think what Toppin himself apparently thought, i.e., the prohibition against outside research was a limited one, and research of some kind — pertaining to matters somehow outside "the case" — was permitted. Accordingly, even though he should have known, it appearing Toppin did not know his actions were contrary to the court's instructions, he cannot be held in contempt of court. To avoid any similar instances from happening again, the court recommends the model instructions to the attention of The Supreme Court Committee on Model Criminal Jury Charges for a possible revision, which should make unquestionably clear the prohibition on juror research and outside materials is absolute. That is, there should be a clear mandate no research, in any manner, may be conducted, on any topic, definition, or concept involved with the case, the law, the participants, etc. While, again, the instructions used in the Franklin trial were clear enough to warrant the exercise of Toppin's better judgment, rather than maintaining the status quo and any possible ambiguities which exist, the court finds it wiser to err on the side of caution and recommend a revision of the model instructions which would make the juror's responsibilities clear and unequivocal.

[7] Emphasis added.

Conclusion

A broad panoply of interests has been implicated by the construct presented. One of two alleged victims of sexual assault had awaited the result of the trial, presumably hoping for closure. The defendant, too, had awaited the result of the trial, his liberty in the balance. The court had expended its resources to allow the trial to move forward. Counsel for the State and defense counsel had spent many hours in preparation for and in participating in this extended trial. Both during the trial and since the declaration of mistrial, the State and the defendant have incurred costs, whether indirectly or directly, for the services performed by their respective counsel. The emotional strain on everyone involved in this highly sensitive legal journey has likely been enormous. Jurors had freely given their time away from families and offices, with little remuneration. Lastly, and possibly most importantly, the judiciary has an overarching interest in the fair administration of justice, which requires a properly functioning jury system. All this, and the mistrial was, with other reasons, caused as Toppin chose to conduct independent research contrary to multiple instructions provided by the court.

This is not to say Toppin is evil or even that he contumaciously violated Judge Jerejian's orders. The court believes it preferable to afford to Toppin the benefit of the doubt he believed his actions were a service and in assistance to arriving at a fair and just verdict. Indeed, Toppin argued he understood the court's prohibitions regarding outside research to be limited to the facts of the case. Thus, he thought, researching legal or psychological concepts was permitted. Accordingly, the court cannot find, beyond a reasonable doubt, Toppin willfully violated Judge Jerejian's orders not to conduct any outside research during the trial.

Ultimately, such actions, as those of Toppin, are simply not permitted by the laws of this State, nor nationwide. Toppin, and all currently serving and future jurors, must refrain from conducting independent research and must listen and pay obeisance to the court's instructions, which they promise to uphold. No juror may make a unilateral determination as to the appropriateness of his or her actions as they pertain to a matter in which he or she is participating as a juror. See Corsaro, supra, 107 N.J. at 346-47; Panko, supra, 7 N.J. at 61.

In sum, giving Toppin the benefit of all doubt and finding his purpose, although misguided, may have been to help, the court finds insufficient proofs to hold him in contempt of court.[8] This holding should be narrowly construed given it appears our courts have given little written consideration to sanctioning a juror for conducting independent research contrary to court instruction, and the result based on similar facts may not be the same if such a matter comes before the court again.

The court emphasizes such conduct cannot be tolerated and jurors must heed instructions to refrain from conducting independent research.

[8] However, though self-imposed, the court assumes Toppin has already been sanctioned to some degree by the very fact of his having to go through this entire ordeal, which included learning of his error and having it exposed in open court during the Franklin trial; enduring the stress of being called before this court and not knowing, for three months, what his fate would be; and retaining a lawyer, with the attendant expenses of both time and money.