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IN THE MATTER OF
DANIEL M. KAMINSKY,
Charged with Contempt of Court

SUPERIOR COURT OF NEW JERSEY

BERGEN COUNTY

OPINION

Argued: March 9, 2012
Decided: March 12, 2012

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

Thomas W. Randall, Esq. appearing on behalf of Daniel M. Kaminsky (Randall & Randall, LLP).

"[W]hat distinguishes our legal system from all others is our unflinching insistence on the dignity of the American courtroom as the ultimate repository of our liberties." In re Daniels, 118 N.J. 51, 54 (1990). Guided by our Supreme Court, this court fulfills "the judge's nondelegable duty to 'impose the indispensable standards of dignity and austerity upon all those who participate in a criminal trial[.]'" Ibid. (quoting Sacher v. United States, 343 U.S. 1, 38, 72 S. Ct. 451, 469, 96 L. Ed. 717, 738 (1952) (Frankfurter, J., dissenting)).

Introduction

Presented is an order to show cause executed by this court on December 22, 2011, directing Daniel M. Kaminsky ("Kaminsky") to appear on February 17, 2012, to show cause why he should not be held in contempt pursuant to R. 1:10-2 for violating multiple

orders of the Honorable James J. Guida, J.S.C. to refrain from conducting independent research of the issues involved in a criminal trial in which Kaminsky participated as a juror.[1]

Facts and Procedural History

Kaminsky participated as a juror in State v. Luis A. Montas, Indictment No. S-149-11, a criminal matter in which the defendant was indicted for allegedly selling 1,500 ecstasy pills to an undercover agent. The case was tried before a jury over the course of five days: the 8th, 12th, 14th, 15th, and 16th of December, 2011. Kaminsky was designated the jury foreperson. During the jury voir dire process and throughout the trial, the court reminded the jury of its obligation to refrain from researching the law, the court, the attorneys, the judge, or the trial itself. Jurors were specifically instructed they were prohibited from using social media during the pendency of their service. Once the jury was sworn, Judge Guida read it similar instructions, which are sufficiently important to the instant order to show cause to be set forth, in relevant 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. . . . 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.
>
> 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

[1] At the request of Kaminsky's counsel, the court adjourned the hearing to March 9, 2012.

> 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 this instruction is so important, it is my duty to remind you of it at the end of each day's proceedings.
>
> . . .
>
> You are not permitted to visit the scene of the alleged incident, do your own research or otherwise conduct your own investigation. Your verdict must be based solely on the evidence introduced in this courtroom.
>
> . . .
>
> It is your duty to weigh the evidence calmly and without bias, passion, prejudice or sympathy, and to decide the issues upon the merits.[2]

Moreover, before each break and at the end of each day, the court reminded the jury it was not permitted to discuss the case, and the use of the internet to obtain any information pertaining to the case was forbidden.

As a result of a deadlocked jury, the court declared a mistrial at the end of the day on December 16, 2011. A seemingly predestined chain of events then followed, which led to the execution of the order to show cause presented. As it turns out, an alternate juror ("Fellow Juror #1") in the Montas case is a neighbor of a Superior Court Judge sitting in the Bergen Vicinage. Fellow Juror #1 informed this judge, who then informed Judge Guida, during the jury-deliberation stage of the trial the jury foreperson independently conducted an internet search and concluded therefrom the potential punishment for the crime with which Montas was charged was between ten and twenty

[2] See Model Jury Charge (Criminal), "Instructions After Jury is Sworn" (2011) (emphasis added).

years in state prison. The foreperson, later identified as Kaminsky, purportedly took the position he could not vote for a guilty verdict, which he presumed would send Montas, who was in his mid-twenties, to prison for a minimum of ten years.

Judge Guida then conducted an in camera hearing in the presence of the attorneys involved in the Montas trial and Fellow Juror #1, who appeared telephonically. Fellow Juror #1 informed the court she had been discussing the case with some members of the jury after the mistrial had been declared and had been told the foreperson said during the second day of deliberations "he didn't Google the specific case but he Googled the punishment for the specific case and . . . this kid [Montas] could have to serve ten to twenty years, and he wasn't sure that he could really vote on . . . or judge for putting someone away for ten to twenty years."[3] Fellow Juror #1 also informed Judge Guida Kaminsky was "very emotional, sobbing" in the parking lot after the mistrial was declared, and he was "really upset" about the case. Fellow Juror #1 lastly affirmed Judge Guida was "very specific" in his instructions to refrain from outside research.[4]

[3] Quotes from Fellow Juror #1's testimony are taken from the transcript of the in camera hearing conducted by Judge Guida. Prior to the return date in this matter, the court's chambers sent to Kaminsky's counsel the transcripts of the in camera hearings of Fellow Juror #1 and another juror, discussed below. At the hearing on the return date, the court asked Kaminsky's counsel whether there was any objection to the court's reliance on these transcripts, or whether the matter should be adjourned so the court could subpoena the jurors to appear as witnesses. Kaminsky's counsel declined to interpose any objection to the court's reliance on the transcripts.

[4] The court sincerely appreciates the actions of Fellow Juror #1. As she expressed during the in camera hearing, she felt some trepidation about approaching the court and revealing what she correctly identified to be improper conduct. While the same is understandable, what may be an epidemic nature of the problem of juror disobedience is made clear by her comments, "I'm sure probably every case someone doesn't follow the rules. . . . I think that probably happens a lot." While this court would like to believe this assessment is not accurate, it certainly merits close scrutiny, given this court's recent experience with similar cases, as well as the view of Fellow Juror #1 who, as a layperson and unlike a sitting judge, has experienced the contemporary jury room. Moreover, it appears other courts are experiencing similar problems. Within the past year, for example, two English courts have imposed jail sentences on jurors for misconduct. See Juror Theodora Dallas Jailed for Contempt of Court, BBC NEWS (Jan. 23, 2012), http://www.bbc.co.uk/news/uk-england-beds-bucks-herts-16676871 (six-month sentence for conducting research); Facebook Juror Sentenced to Eight Months for Contempt, BBC NEWS (June 16, 2011), http://www.bbc.co.uk/news/uk-13792080 (eight-month sentence for conducting research and contacting acquitted defendant while co-

The court then executed the instant order to show cause on December 22, 2011. By way of same, in addition to ordering Kaminsky to appear, the court ordered the Bergen County Prosecutor's Office to prosecute the contempt hearing on behalf of the court, pursuant to R. 1:10-2(c), or to advise the court within ten days it would not agree to so prosecute, in which instance the court would appoint an attorney-at-law to so do. On January 9, 2012, the Bergen County Prosecutor's Office informed the court, understandably, it would decline the appointment. Thereafter, a colleague of this court approached a member of the bar to consider the prosecution of the contempt hearing. The attorney's firm, however, would not permit his involvement in this matter. As a result, the court was placed in the uncomfortable position of having to establish the basis for the contempt while simultaneously acting as the fact-finder.[5]

Finally, subsequent to the execution of the order to show cause, this court learned another fellow juror ("Fellow Juror #2"), separate and apart from Fellow Juror #1, contacted the Bergen County Prosecutor's Office regarding the conduct of the Montas jury. Judge Guida then conducted an in camera hearing on January 13, 2012, in the

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defendants were still being tried); see also Robert Eckhart, Juror Jailed over Facebook Friend Request, SARASOTA HERALD-TRIBUNE (Feb. 16, 2012), http://www.heraldtribune.com/article/20120216/ARTICLE/120219626?tc=ar (three-day sentence for sending Facebook "friend request" to defendant in Florida auto negligence trial). Closer to home, the Hon. Shira A. Scheindlin of the United States District Court for the Southern District of New York attempts to prevent the problem by requiring jurors to sign, under penalty of perjury, the following pledge in highly publicized criminal trials:

> I agree to follow all of the Court's preliminary instructions, including the Court's specific instructions relating to Internet use and communications with others about the case. I agree that during the duration of this trial, I will not conduct any research into any of the issues or parties involved in this trial. Specifically, I will not use the Internet to conduct any research into any of the issues or parties involved in this trial. I will not communicate with anyone about the issues or parties in this trial, and I will not permit anyone to communicate with me. I further agree that I will report any violations of the Court's instructions immediately.

[5] Parenthetically, the court questions whether this is the optimal way of proceeding.

presence of the attorneys involved in the Montas trial and Fellow Juror #2. At this hearing, Fellow Juror #2 informed the court a juror, again later identified to be Kaminsky, indicated he had looked up on the internet, prior to the start of deliberations, the possible punishments Montas could face if convicted. Fellow Juror #2 reported Kaminsky became "physically sick" over the prospect of "put[ting] someone's child in prison for 30 years, because that's what he – he understood the penalty [to be]."[6] While "literally sick to his stomach," Kaminsky purportedly "was listing things that he was trying to put into the trial or into the evidence that didn't exist" and, significantly, "[tried] to convince himself of beyond any kind of doubt that he could convince us that this kid was innocent, only for the fact that he might have to go to prison." Fellow Juror #2 felt Kaminsky became "tainted" as a result of having prematurely researched the possible penalty and feared he had influenced two other jurors.[7]

For his part, Kaminsky does not contest the allegations he researched the possible punishment Montas faced or discussed the results of his research with his fellow jurors. He adds, however, he already knew of the possible punishment as a result of attending drug education classes at his children's schools and merely conducted the research to confirm what he already knew. Kaminsky also contends, as a factual matter, the results

[6] Quotes from Fellow Juror #2's testimony are taken from the transcript of the in camera hearing conducted by Judge Guida

[7] Disappointingly, these two jurors reportedly exhibited what may be considered troubling aspects of our jury system. According to Fellow Juror #2, one of them "said that she literally turned off from listening to anymore testimony in the middle of the second detective's testimony, totally turned it off, didn't listen to anymore." The two jurors "did not want to have any conversation whatsoever" and, disturbingly, rather than engage in deliberations, "they would just put their hands up" and recommend the jurors "just tell the judge we can't make a decision, we've got to go home, we've got to take care of my daughter, I've got to work." Kaminsky largely verified the testimony of Fellow Juror #2 with respect to these two jurors. While the matter is not before this court, it is fair to say, if true, such a position taken by jurors who pledge an oath swearing to conscientiously discharge their duties would be unfortunate and might indicate the significance of the problem facing modern courts' control over juries is more serious than might be thought. Finally, as with Fellow Juror #1, the court is greatly appreciative to Fellow Juror #2 for coming forward.

of his research did not impact his decision to vote not guilty, as the two fellow jurors reported to Judge Guida. Indeed, Kaminsky argues, rather than foreclose inquiry into possible guilt, his discussion with his fellow jurors was intended to remind them of "their solemn duty."

Law

Defining Contempt

The court's power to punish for contempt extends to "[d]isobedience or resistance by any court officer, or by any party, juror, witness or any person whatsoever to any lawful writ, process, judgment, order, or command of the court." N.J.S.A. 2A:10-1 (emphasis added). "The phrase 'contempt power' really means the power to punish, and in our society that means the power to fine or imprison one who has violated judicial authority." In re Daniels, supra, 118 N.J. at 59. As the Court in Daniels further explained:

> Contempt comprehends any act which is calculated to or tends to embarrass, hinder, impede, frustrate or obstruct the court in the administration of justice, or which is calculated to or has the effect of lessening its authority or its dignity; or which interferes with or prejudices parties during the course of litigation, or which otherwise tends to bring the authority and administration of the law into disrepute or disregard. In short, any conduct is contemptible which bespeaks of scorn or disdain for a court or its authority.
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> [Id. at 68-69 (citations omitted).]

In order to find Kaminsky in contempt of court, this court must be satisfied three discrete questions can be answered in the affirmative: 1) whether Kaminsky conducted independent research; 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. See State v. Vasky, 203 N.J. Super. 91, 100 (App. Div. 1985) (citing In re Hinsinger, 180 N.J. Super. 491, 497 (App. Div. 1981)) ("Even when a person commits contempt which directly insults the court, it must still be proven that he acted with criminal intent. The contemnor must be accorded the opportunity to attempt to show that he did not possess the requisite mens rea, but this may be done at the summary hearing."). That is, a defendant is guilty of the offense of contempt when he undertakes a willful action 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."); In re Yengo, 84 N.J. 111, 128 (1980) ("[T]here must be proof of criminal intent to establish contempt as a public offense."); Dep't of Health v. Roselle, 34 N.J. 331, 337 (1961) ("The act or omission must be accompanied by a mens rea, a willfulness, an indifference to the court's command."); 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 . . . .").

Importantly, the court must be satisfied each question is answered affirmatively beyond a reasonable doubt. Amoresano v. Laufgas, 171 N.J. 532, 549 (2002) (quoting In re Yengo, supra, 84 N.J. at 119-20 (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, 50 N.J. 501, 516 (1967) ("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.").

Possible Punishments for Contempt

In determining the appropriate punishment, it is helpful to briefly distinguish among the various types of contempt and identify that which is at issue here. There have developed two strands of "contempt": one, normally denominated as "civil" contempt, describes a private wrong, i.e., one litigant seeking redress from an adversary, and is primarily coercive and compensatory in nature. See In re Daniels, supra, 118 N.J. at 59-60; Roselle, supra, 34 N.J. at 336-37; R. 1:10-3. Any jail time imposed should only last until the contemnor purges himself of contempt. Id. at 60. "Criminal" contempt is a public wrong, i.e., "a defiance of public authority," and is punitive in nature. Roselle, supra, 34 N.J. at 337. Criminal contempt seeks to "vindicate[] the authority of the court" and, significantly, as it functions as a sanction, requires a fixed term of punishment. In re Daniels, supra, 118 N.J. at 60. Procedurally, criminal contempt differs from civil contempt in that the court, rather than a litigant, institutes the action.[8] Ibid.; R. 1:10. Here, Kaminsky's allegedly contumacious act was committed in his role as a juror and

[8] Criminal contempt can be further classified as contempt in the court's presence, R. 1:10-1, and contempt outside the presence of the court, R. 1:10-2. In the case of the former, the contempt proceeding may be adjudicated by the aggrieved judge forthwith, as the temerity of the affront to the court necessitates a swift response; in the case of the latter, a judge other than the aggrieved judge should normally hear the matter, as the need for action is less immediate. Kaminsky's purportedly contumacious conduct occurred outside of Judge Guida's presence. It was therefore appropriate for a judge other than Judge Guida to preside over the order show to cause under R. 1:10-2. See also In re Buehrer, supra, 50 N.J. at 515; In re Yengo, supra, 84 N.J. at 121.

occasioned public, rather than private, harm. Consequently, the nature of Kaminsky's contempt is criminal, rather than civil.

As for determining the proper means of vindicating the court's interests, due to the summary nature of contempt proceedings, the maximum punishment is six months' imprisonment or a fine of $1,000 or both.[9] See In re Yengo, supra, 84 N.J. at 120-21 ("Notwithstanding the legislative changes since Buehrer, we affirm the conclusion that there is no right to indictment and trial by jury in a summary criminal contempt proceeding where punishment does not exceed six months' imprisonment or a fine of $1,000 or both."); In re Buehrer, supra, 50 N.J. at 516-22 (analogizing contempt to "petty offenses" under previous classification of crimes and limiting punishment for contempt to that imposed for other offenses tried without indictment or jury); Pressler & Verniero, Current N.J. Court Rules, comment 3.3 on R. 1:10-2 (2012).

While courts have imposed punishments of varying degrees within the wide range permitted, 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. There has been at least one occasion, though, for a court to hold a juror in contempt for misconduct. In In Re Jeck, 26 N.J. Super. 514, 520 (App. Div. 1953), the appellate panel

[9] It is beneficial to explain the "fine not exceeding $50" mentioned in N.J.S.A. 2A:10-5 is not intended as a limit on the possible punishment imposed for either "civil" or "criminal" contempt. See 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."). The designated fine, rather, is merely a maximum amount which the court can require the contemnor to reimburse the court, essentially for having to hold a "civil" contempt proceeding; it is unrelated to the permissible punishments for a "criminal" contempt proceeding brought to vindicate a wrong committed against the court. See Roselle, supra, 34 N.J. at 346 (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."); In re Buehrer, supra, 50 N.J. at 513 n.3 ("[N.J.S.A. 2A:10-5] relate[s] to a proceeding for further relief of a party to the cause and not to a proceeding to punish for contempt.").

affirmed the trial court's imposition of a $300 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. Pertinent to the instant matter, the panel stated:

> If jurors may leave the jury room and privately obtain evidence elsewhere . . . 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.
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> [Id. at 521 (quoting In re Summerhayes, 70 F. 769 (N.D. Cal. 1895)).]

Moreover, there is no dearth of cases punishing other participants in our justice system. For example, in Vasky, under R. 1:10-1, the trial court imposed a $250 fine as a punishment for the defendant's reoccurring, disruptive conduct during a court proceeding. Supra, 203 N.J. Super. at 95. When the defendant persisted, despite additional warnings from the trial judge, an additional sentence of fifteen days in jail was imposed. Id. at 96. On appeal, the court affirmed the fine but remanded the jail sentence for further findings. Id. at 101-02. Significantly, the Appellate Division noted, while the jail sentence may have been justified, and a remand was necessary for a more thorough inquiry into and explanation of mitigating and aggravating factors, still, it was "not certain that 15 days incarceration without any time off for good behavior was necessary, particularly where the judge refused to permit service of the sentence on weekends or nights." Id. at 101.

There have been other instances of courts' hesitance to incarcerate contemnors, even for short periods. In Daniels, for example, the defendant-attorney was held in contempt under R. 1:10-1 for laughing and acting disrespectfully in response to adverse

court rulings. See In re Daniels, supra, 118 N.J. at 53-57. As a punishment, the trial judge imposed a $500 fine and two days in jail. Id. at 58. Noting the somewhat extraordinary nature of the summary contempt power, i.e., punishment imposed "without the familiar procedures that ordinarily attend the criminal law," id. at 60, concern for which is particularly acute in the context of R. 1:10-1, the Court affirmed the Appellate Division's ruling to reverse the two-day jail sentence. Id. at 68. The Court held even in the case of contempt in the court's presence, if the contemnor faces the possibility of jail time, he should be given notice, and the contempt proceeding should be adjudicated by a different judge. Id. at 70-71. More importantly for the instant matter, the Court added the following "note of concern" when dealing with imprisonment:

> There is a difference between money and freedom. No one can deny that the loss of liberty, next to the loss of life, is the greatest deprivation that a free citizen may suffer. In addition, imprisonment poses an extraordinary threat to the person who is imprisoned, both of violence in the prison setting, see Newark Star-Ledger, Jan. 17, 1990, at 36, col. 1 (man placed in an overcrowded county jail for traffic violations had his neck broken by another inmate), and the unknown and unanticipated reaction of the prisoner, see Hake v. Manchester Township, 98 N.J. 302 (1985) [wrongful death action in which plaintiffs' seventeen-year-old son hanged himself at police headquarters].
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> [In re Daniels, supra, 118 N.J. at 65.]

That is not to say, however, there is no precedent for punishment harsher than monetary fines. The Court in Buehrer, for example, upheld fines of up to $1,000, suspended jail sentences of up to ninety days, and the imposition of a one-year term of probation on members of a teachers' union held in contempt for violating a court order enjoining a strike. See In re Buehrer, supra, 50 N.J. 501. At the same time, the Court reinforced a conviction of contempt (even "criminal" contempt) does not carry the same

long-term consequences conviction for a crime does. See id. at 516, 522 ("[A] summary conviction for contempt does not constitute a conviction within the meaning of statutes imposing disability or disqualification or otherwise discrediting an individual because of a prior conviction for 'crime.'").

Finally, in Amoresano, the Court reversed one thirty-day jail term for contempt under R. 1:10-2 but affirmed two separate jail terms of sixty days, one each under R. 1:10-1 and R. 1:10-2. Supra, 171 N.J. at 536-37. The thirty-day sentence failed as the defendant did not have an opportunity to cross-examine the witnesses of the State, which chose to rely on transcripts of witness testimony from prior proceedings. Id. at 556-57. However, the sixty-day sentence imposed under R. 1:10-1 was upheld as appropriate punishment for the numerous bizarre and inappropriate letters the defendant sent to the court and his opposing counsel, id. at 543-46, and the sentence imposed under R. 1:10-2 was upheld as punishment for defendant's attempts to intimidate his adversary's wife and opposing counsel. Id. at 548. The Court concluded its opinion by conveying its sentiment it did not "relish seeing a litigant incarcerated for contempt, [but,] regrettably in this case such 'punishment is essential to prevent demoralization of the court's authority . . . before the public.'" Id. at 560-61 (quoting In re Oliver, 333 U.S. 257, 275, 68 S. Ct. 499, 509, 92 L. Ed. 682, 695 (1948)).

Analysis

Kaminsky's Guilt Has Been Established Beyond a Reasonable Doubt.

Whether Kaminsky is guilty of contempt turns on his intent at the time he committed the act. That is, Kaminsky admits he conducted independent research, and it is obvious Kaminsky's conduct, in direct disobedience of Judge Guida's instructions to

refrain from conducting research, was contemptuous. The issue, then, is whether Kaminsky conducted the research "with criminal intent." Vasky, supra, 203 N.J. Super. at 100.

The court finds, beyond a reasonable doubt, Kaminsky possessed the requisite intent to sustain a charge of contempt. That is, he willfully conducted independent research and did so knowing Judge Guida had prohibited such conduct. That Kaminsky understood his actions to be contrary to the court's order is made clear, not only by resort to common sense and the straightforward language of Judge Guida's instructions, but by the testimony of his fellow jurors. As indicated above, for example, Fellow Juror #1 reported Judge Guida was "very specific" in his instructions to refrain from outside research.

This description is confirmed by the testimony of Fellow Juror #2, who relayed several instances of the jury's recognition Kaminsky's outside research, and his consideration of it during deliberations, were improper. For example, when Kaminsky expressed his reservations about the anticipated severity of Montas' penalty, other jurors reportedly responded, correctly, "the penalty is not our thing. We're supposed to just talk about the facts of the case and decide whether he's guilty or not guilty of the charges that were filed." In addition, Fellow Juror #2 reports again telling Kaminsky, "[Y]ou shouldn't know what the penalty is. . . . [W]e've got to find what's going on with the facts of the case." Furthermore, Fellow Juror #2 and other jurors reportedly admonished Kaminsky, "you've got to get [the question of punishment] out of your mind." It is clear, then, the other members of the jury understood clearly their duty to base their decision

solely on what was presented to them during the trial, without resort to outside research and without regard to additional considerations.[10]

Even aside from the testimony of Kaminsky's fellow jurors, though, the court is at a loss to understand how Kaminsky could have believed his research of possible prison sentences was not contrary to Judge Guida's instructions. Kaminsky's own testimony belies the notion he did not understand his research was prohibited. For example, at the hearing, Kaminsky testified in response to this court's questions he heard Judge Guida's instructions 1) researching the law was prohibited; 2) jurors' deliberations were to be based on the evidence in the case without any outside influence; 3) jurors were not to do any research on the internet; and 4) the jury's verdict was to be based solely on the record introduced into the courtroom. Furthermore, the topic of Kaminsky's research is unlike that with which the court was faced in In re Toppin, 2011 N.J. Super. Unpub. LEXIS 2573 (Law Div. Oct. 11, 2011), where it was at least conceivable the defendant thought his research was not "about the case," as such research was prohibited by the trial court's instructions in the case in which Toppin sat as a juror. In Toppin, the defendant researched some general legal terms, which, while admittedly concerning "the law," he characterized as too general to be "about the case," as well as a scholarly article, which he felt was outside the subjects prohibited by the court's instructions and therefore again not "about the case." In re Toppin, 2011 N.J. Super. Unpub. LEXIS 2573, at *36-38 (Law Div. Oct. 11, 2011).[11]

[10] Fellow Juror #2 also reported Kamisnky's decision to conduct independent research was not made known to the court as there was hope Kaminsky was "intelligent enough to get by it."

[11] The court refers to its unpublished opinion in Toppin merely for purposes of comparison and as a record of its efforts to prevent further juror misconduct, not as precedent. R. 1:36-3.

Kaminsky likewise argues he did not believe his research was in violation of Judge Guida's instructions, as his research did not involve Montas or the facts of the case itself. Moreover, Kaminsky "does not recall instructions addressing his knowledge of penalties and [does] not believe a knowledge of a general penalty pertained to the specific case. He [does] not recall during the initial instructions of the [c]ourt, or before deliberations, having an express or implied prohibition on knowing a potential sentence."[12] Clearly, Judge Guida's failure to specifically prohibit researching the possible punishment for Montas does not exculpate Kaminsky. A trial judge need not elucidate every single possible subject which a juror is prohibited from researching. This court is satisfied Judge Guida's instructions were more than sufficient to put Kaminsky on notice his research was prohibited.[13]

In spite of the instructions, however, Kaminsky researched the possible punishment for the crime for which Montas was charged, i.e., the possible punishment for the defendant in the very case on which he sat as a juror. There hardly can be a more direct link between the subject of Kaminsky's research and that which was prohibited by Judge Guida's instructions. As such, the court finds, beyond a reasonable doubt, Kaminsky knew his actions violated Judge Guida's order.

In Light of the Finding of Contempt, Punishment Is Appropriate in This Matter.

Our system of justice cannot function if a juror's distrust of, or lack of confidence in, the court legitimized his disobedience of its orders or if a judge's instructions were deemed merely "advisory," with jurors free to violate them when they saw fit, even if in

[12] Def.'s Br. at 3.

[13] As stated above, Judge Guida read the jury the following instructions once the jury was sworn: "Your deliberations should be based on the evidence in the case without any outside influence . . . . Do not do any research on the Internet . . . . [D]o not research any information about . . . the law . . . . Your verdict must be based solely on the evidence introduced in this courtroom."

good conscience. Jurors are not at liberty to disregard the court's instructions, even when they fear obedience would somehow result in injustice. In re Buehrer, supra, 50 N.J. at 508 ("The notion that some higher right justifies concerted defiance of law can have no role in the courtroom. It cannot excuse; on the contrary, it emphasizes the deliberate nature of the violation."). On the contrary, court proceedings have a calculated, purposeful order, informed by centuries of common-law experience. Significantly for this case, it is black-letter law the court determines, within its discretion, the sentence to be imposed on a defendant – after a verdict of guilty is rendered. See State v. Hess, 207 N.J. 123, 151 (2011) (quoting State v. Warren, 115 N.J. 433, 447 (1989)) ("A criminal sentence is always and solely committed to the discretion of the trial court to be exercised within the standards prescribed by the Code of Criminal Justice.") (internal alterations and quotations omitted). The possible consequences of a guilty verdict are not to enter into a juror's thought-process, as whether a defendant is guilty of a crime and what the punishment in his particular case should be and are two separate and distinct inquiries. A miscarriage of justice may occur when strict barriers between the two are not maintained, as, here, Kaminsky's "not guilty" vote may well have been motivated solely by what he thought would be an unjust punishment.[14] Kaminsky's function, however, was not to weigh the merits of a particular punishment; it was to determine guilt or lack thereof. This was his charge from Judge Guida, no more and no less. His deviation from this charge, knowing his actions were prohibited, constitutes contempt and, consequently, calls for an appropriate response from this court.

[14] Kaminsky maintains the research did not affect his vote. The court must question this assertion, as it is contradicted by the sworn testimony of two fellow jurors who independently and voluntarily reported Kaminsky's conduct. Importantly, though, even if it were true, Kaminsky's act, as it was in direct disobedience of Judge Guida, would still be contemptuous.

To be clear, ensuring obedience to, and maintaining the dignity of, the court, while values in themselves, are not the sole ends the court seeks to protect by enforcing, through its contempt power, the prohibition against independent research. There exist other meaningful reasons – namely, fairness, justice, and due process – for requiring jurors to refrain from conducting independent research. First, it is essential to our system of justice all parties know and are able to address the information on which a fact-finder is to base its decision. When a juror conducts his own research, the parties are deprived of this opportunity, contrary to our elementary notions of fairness.

Secondly, our court system operates under a set of evidence rules, which guides the court in determining what information may and may not be considered by a jury; the court, then, is entrusted with ensuring only competent evidence, which is reliable, relevant, and not unduly prejudicial, is introduced. The theory behind this intended safeguard is by reducing the amount of impermissible information a jury may consider, the chances of the jury's coming to the "correct" conclusion – the ultimate goal of the criminal justice system – are increased. When a juror conducts independent research, he bypasses the rules of evidence and allows the information to evade the judge's scrutiny, thereby running the risk he is considering improper information and, consequently, reducing the chances of a just verdict.

Lastly, and related to the goal of achieving justice by obtaining the "correct" result, the disobedient juror runs a serious risk of basing his decision, which may impact someone's liberty, on incompetent or irrelevant information. This is particularly troublesome as jurors have no reliable method of ensuring the accuracy or relevance of

the information they independently obtain as it is not vetted by a judge, subject to the rules of evidence, or addressed by either party.

Appropriate Punishment for Kaminsky

As punishment for contemptuously violating a direct order of the court, Kaminsky is fined $500. The circumstances of this case, namely, Kaminsky's knowing disobedience of a court order, mandate the court exercise its discretion to impose more than a nominal fine, although the court had considered fining Kaminsky the highest amount permissible. A clear message apparently need be sent the offense of contemptuously violating a court's instruction concerning internet use is serious, with consequential ramifications.[15] On the other hand, while Kaminsky knowingly violated

[15] This court sought, perhaps not forcefully enough, to convey this message to the public with its opinion in In re Toppin, 2011 N.J. Super. Unpub. LEXIS 2573 (Law Div. Oct. 11, 2011), where, as discussed above, this court declared the defendant's actions – conducting independent research and bringing outside materials into the jury room – to be contemptuous but failed to find him in contempt as it did not appear, beyond a reasonable doubt, the defendant knew his conduct was contrary to the trial judge's instructions. Significantly, the court found Toppin was a unique, and very close, case, and its result was strictly limited to its facts:

> 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.
>
> . . .
>
> 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.
>
> [In re Toppin, 2011 N.J. Super. Unpub. LEXIS 2573, at *41-42 (Law Div. Oct. 11, 2011).]

See also Kibret Markos, Juror Who Caused Mistrial Won't Be Held in Contempt, THE RECORD (Oct. 12, 2011), http://www.northjersey.com/news/bergen/Juror_who_caused_mistrial_wont_be_held_in_contempt.html. One purpose for holding a hearing in open court and publishing the court's opinion online was to

Judge Guida's order, the court finds he may have done so with understandable, though misguided, intentions. While clearly insufficient to prevent a finding of contempt, Kaminsky's mindset is still a relevant factor for consideration in the determination of the appropriate punishment. Furthermore, the court found Kaminsky to be a sincere, conscientious person who, again, though mistakenly, sought to fulfill his duty as jury foreman and lead the jury to a proper verdict. The court does not seek to be overly punitive and must consider Kaminsky has three children, two of whom are college-age, and, unfortunately, Kaminsky has recently lost his job. Therefore, it appears a fine of $500 strikes the correct balance of appropriate consideration of attendant circumstances, on the one hand, and, on the other, the vindication of the court's interest in ensuring compliance with its orders and, it is hoped, placing the public on notice the consequences of juror misconduct are real. Moreover, the court is satisfied incarceration is not appropriate in light of Kaminsky's background and the apparent absence of a need to deter him from making the same mistake again. Accordingly, and giving due weight to the Supreme Court's admonitions regarding imprisonment for contemnors, the court declines to impose any additional punishment.

Conclusion

The court holds Kaminsky in contempt of court for disobeying Judge Guida's order and fines him $500. It is important, though, to keep in mind the meaning and significance of the court's holding. The adjudication of contempt is a formal declaration Kaminsky willfully and knowingly disobeyed the court's order; it is not a pronouncement Kaminsky is evil or even had malevolent intentions when he made the decision to

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discourage the reoccurrence of juror misconduct, whether by the conducting of independent research or any other means. The fact yet another case of a juror conducting independent research is so soon before this court is both troubling and disheartening.

conduct independent research. That Kaminsky may not have understood the significance of his actions, or why they were wrong, is ultimately of no moment, however. Having found Kaminsky understood and was aware his actions were contrary to a court order, the court has no hesitation holding him in contempt.

It is hoped today's decision will resonate with the contemporary juror. The court understands instant access to seemingly endless amounts of information is a reality of today's world. And this fact, by and large, should be celebrated. That being said, this court rejects the notion the American courtroom, with its constraints and controls developed over the centuries, with its methodical and deliberate means of proceeding, is somehow incompatible with or outdated in today's world of high-speed information on demand. Indeed, the proliferation of electronic information renders the sterilized atmosphere of a courtroom even more important. Conversely, the court remains confident American jurors, and more specifically New Jersey's jurors, possess sufficient discipline, patience, and sense of civic duty to obey a court's order to refrain from researching a case on their own. With today's decision, jurors should be aware the American court system, as well as their own liberty, depend on their ability not to betray that confidence.[16]

[16] In light of the above, the court again recommends to The Supreme Court Committee on Model Criminal Jury Charges a possible revision of the Model Charges may be in order. Specifically, to better communicate the importance of obedience to the court's instructions, it may be appropriate to further explain reasons for the prohibition on juror research and, even, possible punishments for disobedience.