IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

STATE OF FLORIDA,

CRIMINAL DIVISION "W"
CASE NO. 502010CF005829AXXXMB

v.

JOHN B. GOODMAN,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MAY 4, 2012 SUPPLEMENT TO RENEWED MOTION FOR NEW TRIAL AND TO VACATE HIS CONVICTION BASED ON JURY MISCONDUCT

THIS CAUSE came before the Court on the Defendant, John B. Goodman's ("Defendant"), Supplement to Renewed Motion for New Trial and to Vacate His Conviction, filed on May 4, 2012. The State submitted a Response to the Defendant's Motion for New Trial on May 8, 2012. The Court, having carefully examined and considered the Defendant's Motion, the Supplemental Authorities provided by Defendant, the State's Response thereto, having reviewed the court file and record, having heard the trial of this cause, having heard argument of counsel on May 11, 2012, and being otherwise fully advised in the premises, the Court finds as follows:

FACTUAL BACKGROUND

This is the fourth Order denying a new trial on Defendant's various claims.[1] This most recent request for a new trial stems from the revelation that one of the jurors (Mr. Dennis DeMartin) who served on the trial, self-published a thirty-two page "book" (or pamphlet) regarding his experience with serving on this jury. Included in that writing, in Chapter 9, the

[1] *See* April 2, 2012 Motion for New Trial and April 13, 2012 Order Denying the Motion. *See* April 16, 2012 Motion for New Trial and April 20, 2012 Order Denying the Motion. *See* May 3, 2012 Motion for New Trial and May 7, 2012 Order Denying the Motion.

juror writes that after the close of evidence on March 22, 2012, he returned home for the evening. He then drank three vodka and tonics at half-hour intervals in order to determine the way the alcohol would affect him and whether he would be drunk.

The next day, March 23, 2012, the jury rendered its verdict, finding Defendant Guilty of DUI Manslaughter and Failure to Render Aid. Juror DeMartin gave various television interviews and statements to the media and ultimately, this Court requested that the juror return to Court for an additional jury interview as to the events reported in his writing.[2] On May 11, 2012, the juror stated to the Court that what he wrote in his "book" was an accurate recounting of the events that took place throughout the trial. He further stated that he did not take the drinks to determine whether the Defendant was in fact guilty, instead he explained that the recordings from the 911 tapes were the critical piece of evidence upon which he based his guilty verdict. Finally, the juror stated that he did not inform any of the other jurors about this drinking before the verdict was rendered.

LEGAL ANALYSIS

Defendant moved this Court to grant additional jury interviews with regard to juror DeMartin's alleged misconduct pursuant to Fla. R. Crim. P. 3.575, because Defendant believed that the verdict in this matter may have been subject to a legal challenge. Finding Defendant's allegations sufficiently serious enough to warrant such an interview, on May 8, 2012, this Court granted an interview of juror DeMartin which was then conducted by the Court on May 11, 2012.

At the close of that interview, Defendant bore the initial burden of showing that prejudice resulted or that the juror's testimony was of such character that it raised a presumption of

[2] This Court had previously interviewed all the jurors, including Juror DeMartin and the two alternate jurors, on April 30, 2012.

prejudice. *Ramirez v. State*, 922 So. 2d 386, 390 (Fla. 1st DCA 2006). If the Defendant was able to show such prejudice, the burden would shift to the State to rebut the resulting prejudice or presumption of prejudice and to show that Defendant was not ultimately prejudiced by the juror's actions or misconduct. *Ramirez*, 922 So. 2d at 390.

This Court ruled on Defendant's Motion at the close of the juror's testimony and after having heard argument from both Defendant and the State. This Court agreed with Defendant that the juror's conduct was initially prejudicial to the Defendant because contrary to the State's argument, the juror's drinking on the night before deliberations was done for the purpose of trial. It was not analogous to a normal life experience because as juror DeMartin wrote in his "book," "[i]t was bothering me that if there was proof that if Mr. Goodman only had 3 or 4 drinks, how drunk would he be?" Juror DeMartin never testified that it was his normal practice to have alcoholic drinks every evening, or even some evenings. This Court, however, accepted the State's rebuttal argument as to the initial prejudice and reiterates that it agrees with the State, that Defendant was not ultimately prejudiced by the juror's actions or misconduct.

Defendant provided this Court with detailed supplemental authority in support of his position, in both his Motion for New Trial (dated May 4, 2012) and his Notice of Supplemental Authorities (dated May 7, 2012). For the reasons explained, *infra*, this Court finds each and every one of these cases distinguishable from the particular set of facts that were presented in the case at bar.

1. Florida Caselaw on Juror Misconduct is Distinguishable

This Court analyzed Florida caselaw on juror misconduct as it has developed in recent decades. Both Defendant and the State acknowledge the formative case from the Florida Supreme Court of *Russ v. State*, 95 So. 2d 594 (Fla. 1957). Frequently cited by various District

Courts of Appeal in Florida, *Russ* stated, unequivocally, that "[i]t is improper for jurors to receive any information or evidence concerning the case before them, except in open court and in the manner prescribed by law." 95 So. 2d at 600. In *Russ*, a murder trial, an initial vote as to guilt was taken when the jurors retired to deliberate. *Id.* at 597. The jurors voted 8 to 4 in favor of finding the defendant guilty of first degree murder with a recommendation of mercy. *Id.* After the initial vote was taken, one juror informed the rest of the jurors that he could not accept such a vote as he had personal knowledge that the defendant had severely beaten the deceased on multiple occasions, had threatened to kill the deceased on multiple occasions, and had even been shot by the deceased's father for having so badly beaten the deceased on the day prior to the shooting. *Id.* at 598. This juror informed the other jurors that while none of this evidence was presented at trial, he indeed had personal knowledge of it. *Id.* The court explained that:

> [o]ther jurors questioned said juror at great length upon such matters outside the evidence produced in the trial. Upon a second ballot, following said statements, questions and answers the jury returned its verdict of guilty of murder in the first degree without a recommendation of mercy which resulted in said judgment and sentence.

Id. Although the Florida Supreme Court did not initially grant a new trial due to a procedural consideration, the court did remand the cause, specifically stating that:

> [w]here a juror on deliberation relates to the other jurors material facts claimed to be within his personal knowledge, but which are not adduced in evidence, and which statements are received by the other members of the jury and considered in reaching their verdict it is misconduct which may vitiate the verdict, if resulting prejudice is shown.
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> ***
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> [I]t should be clearly understood that not all statements by a juror concerning evidence not properly before the jury will vitiate a verdict, even though such conduct may be improper. It is necessary either to show that prejudice resulted or that the statements were of such character as to raise a presumption of prejudice . . . . . [W]hen it is shown that the jury is influenced by considerations outside the evidence the trial court *may* set aside its verdict and grant a new trial.

Id. at 600-601. (citations omitted, emphasis added.) The Florida Supreme Court found the juror's behavior in *Russ* so offensive precisely because *he imparted material facts of which he claimed to have personal knowledge to the entire jury panel* who then questioned the juror in detail about the facts, ultimately resulting in a more severe verdict. So begins a theme in jury misconduct cases.

In *Edelstein v. Roskin*, 356 So. 2d 38, 38-39 (Fla. 3d DCA 1978), a personal injury case arising out of an automobile accident, one of the jurors, familiar with the intersection at issue, shared with the other jurors his views with respect to the visibility and structures at the intersection. The Third District Court of Appeal wrote that this was akin to allowing the juror to become a witness in the jury room and remanded for a new trial. *Edelstein*, 356 So. 2d at 39. The pivotal determination in this trial again turned on one juror who imparted outside knowledge *to the entire jury panel.*

In *Snook v. Firestone Tire & Rubber Co.*, 485 So. 2d 496 (Fla. 5th DCA 1986), a jury was asked to consider whether damages should be awarded for injuries allegedly caused by a defective tire. During the trial, one of the jurors went to a garage and conducted interviews of the personnel, questioning them as to whether an accident could occur in the manner it was described as having occurred at trial. *Snook*, 485 So. 2d at 497. The juror was told by employees at the garage that the accident could not have occurred this way. *Id.* at 497. The juror then reported these independent investigations to the rest of the jury panel and the information was determined to be influential in persuading the other jurors to her position, and ultimately, the defendant's position. *Id.* The court determined such behavior warranted a new trial, explaining that not only had the juror gone far afield of the court's instructions, the juror reported to the other members of the panel that the testimony they had heard in the case was inaccurate—yet

another example of misconduct coupled with prejudicial information *imparted to the entire jury panel.* *Id.* at 499.

A few years after the Third District's decision in *Edelstein*, the court reversed a conviction where it was revealed that:

> [d]uring the deliberations, the six jurors took a vote as to whether we believe Mr. Weber shot Ricky Facen. After the vote, one of the jurors commented that Mr. Weber was convicted of these charges in a case previously and received a 99-year sentence that was later overturned on appeal for a technicality. The source from which the information came was the jury pool room yesterday, Thursday, November 14th, 1985. Two people were discussing the case and the juror overheard the comment.

Weber v. State, 501 So. 2d 1379, 1381 (Fla. 3d DCA 1987). The Third District followed the rationale of *Edelstein* and again reversed where prejudicial extraneous information was disclosed to the entire jury panel.

The Fifth District's *Snook* decision is referenced by the Second District Court of Appeal when it remanded a case for juror interviews where they had been denied by the trial court. In *Bickel v. State Farm Mutual Auto. Ins. Co.*, 557 So. 2d 674, 675 (Fla. 2d DCA 1990), the court found that an allegation by appellant's counsel that the jury foreman had announced that he drove to the scene of the accident to perform an experiment warranted further investigation in the form of a jury interview. Although this case does not ultimately discuss whether such behavior warranted a new trial, this Court again notes that the experiment, if it was in fact performed, was announced to the entire rest of the jury panel.

One year later, the Second District considered a wrongful death case where multiple jurors reported misconduct to the court after the trial. *City of Winter Haven v. Allen*, 589 So. 2d 968 (Fla. 2d DCA 1991.) The jurors explained that they were aware that the cause they heard was the second time the case was tried and that the previous verdict had been for a substantially

larger verdict award. *Allen*, 589 So. 2d at 969. After conducting jury interviews, the court determined that "one juror did inform some of the other jurors that the last trial resulted in a $600,000 verdict." *Id.* The court concluded that "the *juror's disclosure* of the prior verdict and its *significance to the jury's verdict* is an overt prejudicial act . . . and it authorizes a new trial." *Id.* (citation omitted, emphasis added.)

In two Florida Supreme Court cases only a year apart the court denied new trials to Defendants in a murder case and in a DUI manslaughter case. In *Johnson v. State*, 696 So. 2d 317, 321-22 (Fla. 1997), the defendant raised allegations that jurors had improperly communicated with each other prior to deliberations, including discussing evidentiary matters. While this jury did not consider any evidence that was not presented at trial, the Florida Supreme Court noted the following:

> Mr. Gomez testified that the jury had joined in a discussion about the meaning of the white paper (confession). Mr. Gomez, while being very candid, also expressly testified that none of the jurors had forwarded a premature opinion that Johnson was guilty. In fact, he stressed that the jury agreed that they had to have an "open mind." He further testified that "[e]verybody is saying that nobody is admitting he is guilty." To that end, Mr. Gomez stated that he had not heard any juror prematurely say that Johnson was guilty. It is natural for jurors not trained in the law to suffer confusion when a confession is introduced while the defense is proclaiming that the State has not satisfied its burden. Most jurors, no doubt, struggle internally with this conundrum. However, there was no justification for this jury to discuss its internal confusion. *Once that improper discussion did take place, however, they commendably agreed among themselves to resolve their confusion in favor of the defendant and "keep an open mind." We cannot find that Johnson was prejudiced by this conversation.* In sum, none of the improper juror conduct, even in aggregate, can withstand the record rebuttal support that clearly demonstrates that the defendant was not prejudiced. The trial court did not abuse its discretion in denying Johnson's motion for mistrial.

Johnson, 696 So. 2d at 324. The trial court in *Johnson* was interviewing a juror with respect to reported premature deliberations and the juror volunteered information that arguably went outside the scope of the court's question ("[h]as, in any of the discussions, anyone made their

minds up about the defendant being guilty or not guilty?"). *Id.* at 322. The Florida Supreme Court considered the jury's agreement to keep an open mind and properly deliberate and described it as "commendable." *Id.* at 324. This Court makes note of this portion of *Johnson* as an aside, noting juror DeMartin's testimony: "[i]f this book ever comes out, it says that myself and one other juror did not vote guilty on the first round. We – I asked to have the tapes played again because I was undecided until after the tapes. I'm sorry if I'm talking too much."[3] The fact that the 911 tapes were played again for the jurors during deliberations seems to support DeMartin's testimony.

In 1998, the Florida Supreme Court reversed the District Court's grant of a new trial in *Devoney v. State*, 717 So. 2d 501 (Fla. 1998) where jurors considered a defendant's prior speeding ticket which had been erroneously mentioned at his DUI manslaughter trial (with a following curative instruction). Although the jurors clearly discussed the prior charge and even used it to persuade one hold-out juror to vote guilty, the Florida Supreme Court explained that this action did not warrant a new trial. The *Devoney* court distinguished the case from *Baptist Hospital*,[4] explaining that the jury's discussions about the speeding ticket inhered in the verdict. *Devoney*, 717 So. 2d at 504. The court stated, "there is no allegation here of an express agreement among the jurors to disregard their oaths and instructions." *Id.* Where no agreement existed among jurors to disregard their oaths, the court did not find the jury's consideration of material not in evidence prejudicial enough to vitiate the jury's ultimate finding of guilt.

In more recent cases from our own Fourth District Court of Appeal, the standard on jury misconduct has continued to crystallize. In *Pozo v. State*, 963 So. 2d 831, 836-37 (Fla. 4th DCA 2007), the District Court reversed to grant jury interviews on allegations of juror intimidation

[3] (*See* Exhibit 1, Defense May 3, 2012 Renewed Motion for New Trial.)

[4] *Baptist Hosp. v. Mahler*, 579 So. 2d 97 (Fla. 1991).

and issues that arose during jury deliberations. In an attempt to explain what type of prejudice warrants jury interviews and potentially a new trial, the court explained:

> [a]ctual prejudice does not mean that the juror is actually influenced by the external or overt act to reach a particular verdict. Because a court may not inquire into a juror's thought processes, a court's inquiry as to influences over a jury's verdict is necessarily limited to:
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> *objective demonstration of extrinsic factual matter disclosed in the jury room.* Having determined the precise quality of the jury breach, if any, the [trial] court must then determine whether there was a reasonable possibility that the breach was prejudicial to the defendant . . . . In this determination, prejudice will be assumed in the form of a rebuttable presumption, and the burden is on the Government to demonstrate the harmlessness of any breach to the defendant.

Pozo, 963 So. 2d at 836-37. (emphasis added.) The Defendant in the case at bar, cannot overcome the most obvious piece of information. Juror DeMartin did not tell the other jurors about the results of his drinking. This information was never revealed to the other jurors during their deliberations and could not have had any effect on the mental processes of the other five jurors who found Defendant guilty beyond a reasonable doubt. Not only would juror DeMartin be the only juror who potentially harbored any misinformation about Defendant's actions on the night of the crash, he remarked on various occasions that he was one of two initial "hold-out jurors," a notion that belies juror DeMartin having used this information to prejudice Defendant.

A 2008 case from the Fourth District Court of Appeal stands in a somewhat different posture as the Appellate Court was asked to consider whether the trial court erred in allowing the jurors to wet a sponge that had been admitted into evidence in the privacy of the jury room in a medical malpractice case. *Castillo v. Visual Health & Surgical Ctr., Inc.*, 972 So. 2d 254 (Fla. 4th DCA 2008.) The primary error alleged on appeal was that the trial court allowed the experiment in the jury room and outside the presence of the parties (though it was unclear whether the jurors actually did wet the sponge). *Castillo*, 972 So. 2d at 255. The District Court

ultimately found no error with the trial court allowing the jurors to perform the experiment and distinguished the case from the cases cited by the appellants explaining:

> [t]he cases cited by appellants, on the other hand, are distinguishable from the instant case in that they involve situations where (1) the evidence admitted is not in the same condition it was in at the time of the relevant incident (*See United States v. Beach*, 296 F.2d 153, 158 (C.A.Va.1961)); (2) jurors performed their own experiments at home and *later testified before the jury much like an expert would* (*See Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co.*, 234 Cal.App.3d 1724, 1746, 286 Cal.Rptr. 435 (Cal.App. 4 Dist.1991)); (3) jurors conducted experiments outside the courtroom with a vehicle not in evidence (*See Jennings v. Oku*, 677 F.Supp. 1061, 1063 (D.Hawai'i 1988)) [see discussion of this case, *infra*]; (4) jurors used tools and other objects which were not even present at the trial or which were not used to aid the jury in understanding of testimony (*See Jensen v. Dikel*, 244 Minn. 71, 69 N.W.2d 108, 115 (1955)) [see discussion of this case, *infra*]; (5) jurors used string in place of wire to conduct an experiment and string would obviously be different from the actual condition of the electric cable (*See King v. Ry. Express Agency, Inc.*, 94 N.W.2d 657, 660 (N.D.1959)) [see discussion of this case, *infra*]; and (6) one juror had conducted an outside experiment and told the jury that the accident could not have occurred as they described at trial (*See Bickel v. State Farm Mut. Auto. Ins. Co.*, 557 So. 2d 674, 675 (Fla. 2d DCA 1990)) [see discussion of this case, *supra*].

Id. at 256. Although the *Castillo* case does not share the same posture as the case at bar, the cases to which it cites and distinguishes further support the rationale applied by this Court.

Finally, in *Tapanes v. State*, 43 So. 3d 159 (Fla. 4th DCA 2010), a juror used her cell phone to search the definition of the word "prudent" (a term used in the jury instructions and during closing argument) and then shared the definition with the other jurors during deliberations. In granting a motion for a new trial, the District Court very clearly took issue with "[t]he fact that the foreperson utilized the smartphone to look up the definition of the word during a break and later *shared his recollection of the definition with other jurors* during deliberations." *Tapanes*, 43 So. 3d at 162. (emphasis added.)

Florida caselaw is consistent. When jurors consider evidence that was not presented at trial *and* share their consideration of that extraneous evidence with other jurors and those jurors

use that information to prejudice the complaining party, a mistrial is generally warranted.

2. Federal & Other State Caselaw on Juror Misconduct is Distinguishable

This Court also considers the myriad supplemental authority that Defendant provides in order to show that the Florida standard is consistent with both state and federal caselaw from varying jurisdictions.

The Supreme Court of Kansas granted a new trial in an auto accident case where multiple jurors performed experiments by taking measurements and doing test-drives at the accident scene, then returning to deliberate and discussing the results of their experiments prior to reaching their verdict. *Downs v. Fossey*, 61 P.2d 875, 876-77 (Kan. 1936). In a North Dakota Supreme Court case, an entire jury pool requested, and the court granted permission, to conduct an experiment using a length of string and a ruler during their deliberations so that they could better visualize the accident scene and the manner in which the accident occurred. *King v. Railway Express Agency, Inc.*, 94 N.W.2d 657, 659-60 (ND 1959). The Minnesota Supreme Court granted a new trial in an auto accident case where jurors were given tools to disassemble and reassemble car parts in the jury room, and subsequently found, based on this experiment, that it was impossible for the accident to have occurred in the manner the plaintiff suggested it had occurred. *Jensen v. Dikel*, 69 N.W.2d 108, 114 (Minn. 1955).

Case after case that Defendant presents to this Court detail instances of jurors infecting the entire jury panel with extraneous evidence and frequently, the jurors then basing their verdicts on that information. *See, e.g., Aluminum Co. of America v. Loveday*, 273 F.2d 499 (6th Cir. 1959) (granting a new trial where one juror traveled to area at issue in the case, visited cattle and returned to the jury room reporting to his fellow jurors that the cattle were the best he had seen in a long time, and therefore, had not been damaged by gasses); *Durr v. Cook*, 589 F.2d

891, 893 (5th Cir. 1979) (juror goes to car dealership to test car and whether it could have been maneuvered in the manner claimed, ultimately relaying the results of his experiments to the other jury members); *In re Beverly Hills Fire Litigation v. Bryant Electric*, 695 F.2d 207, 215 (6th Cir. 1982) (reversing where during the course of a civil lawsuit where multiple people died in a fire, one juror performed an experiment with the wiring in his own home to determine the cause of the fire. The juror shared the information with at least six other jurors during the trial and one juror recalled having discussed the experiment during deliberations. The court specifically noted that "the juror's letter made clear that the results of his investigation were a factor in his decisionmaking [sic].");[5] *United States v. Posner*, 644 F. Supp. 885, 888-89 (S.D. Fla. 1986) (granting a new trial upon multiple issues of juror misconduct—1) two jurors having knowledge of prior conviction of co-defendant; 2) jury foreperson reading newspaper accounts of trial during trial and informing the other jurors about the defendant's prior conviction in the same court; 3) one juror visiting property at issue in the tax case and relaying to her fellow jurors her impressions about the property; 4) jurors continuously discussing the case amongst themselves during trial—and prompting the court to write, "[a]lthough I have not chosen to find this jury in contempt of court, they are certainly the best candidates that I have ever seen for just such a sanction.").

In *People v. Castro*, 184 Cal. App. 3d 849, 852 (Cal. Ct. App. 1986), a juror stated that he "went home and used binoculars to see if a witness could have possibly seen what he said he did. After using the binoculars I took that information back to the deliberations of the jury the next day." While it is not entirely clear whether this statement means that the juror shared this information with other jurors or simply that it was in his own mind as he deliberated, the

[5] The federal court also noted, in a footnote, that "[b]ecause the juror discussed his findings with other jurors, we need not decide whether an uncorroborated claim that an experiment was conducted, which potentially could be used merely as a tool to manipulate the verdict, would support a mistrial." *Bryant Electric*, 695 F.2d at 215, n.11.

California court acknowledged that "[b]ecause the record before us discloses no evidence whatsoever by the prosecution to rebut the presumption of prejudice arising from [the juror's] misconduct, the only way to affirm this case would be to find the misconduct harmless on an examination of the entire record. This we cannot do." *Castro*, 184 Cal. App. 3d at 856. This Court is satisfied that in the case at bar, the prosecution has successfully rebutted any presumption of prejudice imparted to Defendant.

In *Marino v. Vasquez*, 812 F.2d 499, 502-03 (9th Cir. 1987), one juror gave other juror a dictionary definition of the word malice that differed from the jury instruction definition. This hold-out juror, after weeks of deliberations, changed his vote. *Marino*, 812 F.2d at 505. In the same case another juror performed a test with a handgun at home with her ex-husband to see if she could pull the trigger from a certain position. *Id.* at 503. Additionally, it was revealed that all jurors performed the same test with a toy gun during deliberations. *Id. And see People v. Andrew*, 156 A.D.2d 978 (N.Y. App. Div. 1989) (gun taken back into jury room and test fired by all jurors except one.)

In the United States District Court in Hawaii, a new trial was granted where jurors performed a test on one of the jurors' cars to see if a fingerprint (the only piece of evidence linking the defendant to the murder) could be left in the location it was left on the victim's car according to the defense's theory. *Jennings v. Oku*, 677 F.Supp 1061, 1062 (D. Haw. 1988). After performing this experiment, the jurors returned a guilty verdict in approximately one hour. *Jennings*, 677 F.Supp at 1062. The District Court in this case also reiterated the instructive standard articulated by the Ninth Circuit Court of Appeals to determine whether extrinsic evidence tainted a verdict:

> (1) whether the material was actually received, and if so how, (2) the length of time it was available to the jury; (3) the extent to which the juror discussed and

> considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict."

Id. at 1065. In the case at bar we see that only one juror participated in the drinking on the night prior to deliberations. This information was available to no juror other than juror DeMartin and became available to him the night before deliberations. The jurors did not discuss or consider the information outside of juror DeMartin's own mental impressions. The material was not introduced to the other jurors prior to the verdict. Finally, juror DeMartin stated, on more than one occasion, that *even after participating in the drinking*, he voted not-guilty on a preliminary poll. Under the standard articulated in *Jennings*, it seems obvious to this Court that juror DeMartin's consideration of extrinsic evidence did not taint this jury verdict.

And while Defendant relies on *Gorz v. State*, 749 P.2d 1349,1355 (Alaska Ct. App. 1988) to support a grant of a new trial, the *Gorz* court merely stated that under the circumstances, remand was required for additional jury interviews where the testimony on appeal was "far too conjectural to permit any definitive reasoning of the timing and scope of the misconduct." Beyond that, *Gorz* was more recently abrogated by the Court of Appeals of Alaska in *State v. Pease*, 163 P.3d 985, 992-93 (Alaska Ct. App. 2007):

> [i]t may be true that the rule stated in *Gorz* is "clear" and uncomplicated, but this is only because *Gorz* does not accurately describe the complexity of the law on this point.
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> In *Gorz*, the discussion of the issue of jury experimentation is both short and conclusory.
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> The *Gorz* opinion does not acknowledge any of the court decisions discussed [in Pease] (or any others like them). In these decisions—many of which were issued decades before *Gorz*—courts upheld jury experiments that were similar in nature to the experiment conducted by the jurors in Pease's case.

> Judging from this Court's comment in *Gorz* that the claim of juror misconduct "[was] not seriously disputed by the state", it appears that this Court may not have received adversarial briefing on the issue of what types of jury experimentation are lawful—and, thus, this issue may not have received focused attention. But in any event, a review of the cases in this area demonstrates that the bright-line rule stated in *Gorz* does not accurately reflect the law on this subject.

Id.

Similarly, Defendant's remaining two cases in support of his Motion, *People v. Legister*, 552 N.E.2d 154 (N.Y. 1990) (juror asked other juror to enter her hotel room in dim lighting to see if she could see his face in the dark; upon resuming deliberations, the juror discussed the test with some of the other jurors who then soon returned a guilty verdict) and *People v. Vigil*, 191 Cal. App. 4th 1474 (Cal. Ct. App. 2011) (juror performed an experiment at home substituting a broom handle for a gun and later reporting his findings (unfavorable to the defense) to his fellow jurors who had been struggling over a crucial issue in the case), likewise align with the standard this Court has applied in reaching its ruling on Defendant's Motion for New Trial.

In fact the single case which is not completely clear on this issue is *Butters v. Wann*, 363 P.2d 494 (Colo. 1961), where a juror called a trial witness during the trial and questioned him extensively about the deceased driver's drinking habits. It is not clear from the language of this case whether that juror ever shared the information he learned with his fellow jurors.

In sum, this Court acknowledges that juror DeMartin behaved inappropriately. His unsophisticated and objectionable actions the night prior to deliberations place this Court in the unenviable but seemingly necessary position of having to admonish a juror in so public a fashion. As this Court has previously stated, this trial, and any criminal trial, is a life-altering event for both the family of the victim and the Defendant. It is inappropriate for such a solemn endeavor to become so protracted and ostensibly theatrical. Nonetheless, "addressing allegations

of juror misconduct is left to the sound discretion of the trial judge." *Pham v. State*, 70 So. 3d 485, 493 (Fla. 2011). And although juror DeMartin's actions rise to the level of misconduct:

> reversal is not required, per se, because not every irregularity which would subject a juror to censure should overturn the verdict. In order to authorize the setting aside of a verdict on account of misconduct of the jury, it must appear that such misconduct may have had an influence upon the final result, and caused injury to the complaining party."

James v. State, 843 So. 2d 933, 936-37 (Fla. 4th DCA 2003). This Court finds that any misconduct did not influence the final result, nor did it cause injury to Defendant. Having considered the body of both the controlling and supplemental authority on this subject, this Court is satisfied that no ground exists upon which to grant Defendant a new trial. Accordingly, Defendant's Supplement to Renewed Motion for New Trial and to Vacate His Conviction, is hereby **DENIED**.

DONE AND ORDERED, in Chambers at West Palm Beach, Palm Beach County, Florida this 21 day of May 2012.

JEFFREY COLBATH
CIRCUIT JUDGE

Copy provided to:

Roy Black, Esq. & Mark A.J. Shapiro, Esq., Black, Srebnick, Kornspan, & Stumpf, P.A., 201 South Biscayne Boulevard, Suite 1300, Miami, Florida 33131

Ellen Roberts, Esq., Assistant State Attorney, West Palm Beach State Attorney's Office, Traffic Homicide Unit, 401 North Dixie Highway, West Palm Beach, Florida 33401