

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION
CASE NO. 09-14192-CV-GRAHAM

ESTATE OF CRAIG FERGUSON, by and
through his personal
representative DEBORAH FERGUSON,

Plaintiff,

FEBRUARY 10, 2011
9:11 A.M.

vs.

SHERIFF KEN J. MASCARA, as Sheriff
of ST. LUCIE COUNTY, et al.,

Defendants.

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TRANSCRIPT OF PROCEEDINGS RELATED TO MISTRIAL
BEFORE THE HONORABLE DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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1 (No Jury, 9:11 a.m.:)

2 THE COURT: Ladies and gentlemen, we have an issue I
3 need to bring to your attention. Ms. Browning was the juror
4 who was a bit tardy this morning. She came into the jury room
5 obviously shaken and upset and she advised that she wanted to
6 be excused from serving on the jury because apparently she was
7 pulled over this morning by someone from the St. Lucie
8 Sheriff's Office and she has requested to be excused. My
9 suggestion is that we bring her into the courtroom and see if
10 we can address the matter, and then after we speak with her, I
11 will entertain your suggestions as to what you think we should
12 do.

13 MR. ELSINGER: Judge, do you know if she's contacted
14 the other jurors or said anything about the issue?

15 THE COURT: No, sir, she has not. She's out front.

16 MR. ELSINGER: Oh, she's out front. Based on that
17 mere allegation alone and her expressing reservations, I would
18 like her excused.

19 THE COURT: Well, let's bring her in first. We have
20 to hear it from her first, so let's have Ms. Browning come into
21 the courtroom.

22 (Juror Browning present.)

23 THE COURT: Good morning, Ms. Browning. Come forward,
24 please, and have a seat in the jury box. How are you this
25 morning, ma'am? Ms. Browning, we understand that you brought a

1 matter to the attention of our courtroom deputy this morning
2 and so we want to discuss that matter with you so that we can
3 determine how to proceed. Can you give us a summary of what
4 occurred this morning that you reported to Ms. Foster?

5 JUROR BROWNING: I was stopped this morning. He gave
6 me a warning and he said he questioned -- and he gave me a
7 warning. But I'd like to see the tape where they said I was
8 speeding. And I got a warning. But this case, you know, it's
9 been hard enough --

10 THE COURT: Uh-huh.

11 JUROR BROWNING: -- without going through anything
12 else.

13 THE COURT: Well, Ms. Browning, you, I'm sure,
14 understand that the matter this morning has absolutely nothing
15 to do with the issues in the case.

16 JUROR BROWNING: Yeah.

17 THE COURT: And you have participated in this matter
18 for six days and you have performed your duties as a juror in
19 this matter. The parties selected you because they thought you
20 could be a fair and impartial individual. And that really is
21 the issue that is of most importance. I'm sure the parties
22 would like for you to serve if you think you can be fair and
23 impartial to both sides.

24 JUROR BROWNING: Oh, yes. Yeah, I've never had any
25 problems, you know, with our police department, you know. As a

1 matter of fact, you know -- you know, serve -- you know, they
2 come around, you know and, you know, to check, you know, see
3 how I'm doing or whatever, you know, and I've always, where I
4 live, you know. You want coffee, you want whatever, you know,
5 and I --

6 THE COURT: You don't have any issues with that.

7 JUROR BROWNING: No, I have no issues. I've always --
8 I think they've always treated me fairly, like I've treated
9 them, you know. As a matter of fact, one of my children wanted
10 to be a policeman, but I was so glad he didn't because of the,
11 you know, danger. And I cried last week when, you know, I
12 heard that someone was talking about, you know, resigning, when
13 I saw the news. You know, I was like, no, we need our police
14 department, you know. So I've never had a problem, anything,
15 you know, with the -- it probably -- he said I was speeding and
16 I don't -- like I told him, I don't disrespect him or disregard
17 his word. I'm not, you know, saying -- it's possible, it's
18 possible, because I wanted to get here and I've been under --
19 you know, all of us are under a lot of pressure, you know, with
20 trying to do the right things and make the right decision.
21 I've been praying because I want to -- I want to make the right
22 decision. Because I feel that, you know, you're going to pay
23 for what you do either in this world or in the other. The
24 Bible says in the judgment to come. If you don't pay for it
25 here, you're going to pay for it later. So that's why I try

1 and live right and treat everybody right, you know. And I felt
2 that I could be fair, you know, and pray about everything that
3 I do.

4 I like the police department, you know, so I have
5 nothing against them and they have nothing -- in my county
6 where -- where I am. So, but I'm just a little shook up this
7 morning by that. One has been coming out every morning, you
8 know, but he's -- and he -- you know, I usually get behind him.
9 And he's never said anything, I just, you know, come on here.
10 I don't -- it just happened. It just happened, I think, that
11 at the same time, you know, coming -- I just followed, come on
12 here, and he usually keeps going. So it's just one of those
13 things, I guess. I guess. And it really shook me up to be
14 stopped, you know, like that. But he gave me a warning, so it
15 wasn't, you know...

16 THE COURT: Well, that's probably happened to quite a
17 few folks over the years. If it's any consolation, I got
18 stopped coming up to Fort Pierce about six months ago and I was
19 advised that I was doing a certain speed, which I know I
20 wasn't, and I wasn't happy.

21 JUROR BROWNING: Yeah.

22 THE COURT: And I can understand how you feel.

23 JUROR BROWNING: It shook me up quite a bit. It shook
24 me up.

25 THE COURT: Do you think you can -- I don't know if

1 you drink coffee or have a nice cold glass of water, you think
2 you may be able to settle down and be fair and impartial to the
3 parties in this case?

4 JUROR BROWNING: I think so. I think if I didn't pull
5 myself together, it might some kind of way hurt the case and I
6 wouldn't want to do that. We've come too far, you know, in
7 this case and I wouldn't want to --

8 THE COURT: Well, here is what we're going to do.
9 We're going to let you go back into the jury deliberation room
10 and have a cup of coffee or tea and a cool glass of water. And
11 then after ten minutes or so we'll ask you how you're doing and
12 if you feel like you can perform your duties as a juror, and if
13 so, we'll continue on. We don't want you to discuss this
14 matter with any of the other members of the jury. And we'll
15 see how you feel shortly.

16 JUROR BROWNING: I should not discuss it to anyone --

17 THE COURT: All right. All right, ma'am.

18 JUROR BROWNING: -- as to the reason why I'm late.

19 THE COURT: We understand. Thank you very much,
20 ma'am.

21 JUROR BROWNING: Thank you so much.

22 (Juror Browning left the courtroom.)

23 THE COURT: Be seated, please. All right. I'll
24 entertain any position that you might have.

25 MR. ELSINGER: Judge, can I just have two minutes to

1 speak with my clients?

2 MR. BOYERS: We'd like to confer as well.

3 THE COURT: Certainly.

4 (Off-the-record discussion.)

5 THE COURT: All right. Counsel.

6 MR. BOYERS: You know, obviously on their side they
7 would be concerned that she would have some hostility toward
8 the police. She said she didn't. I think she certainly said
9 that she feels that she could still be fair and decide the case
10 based on the evidence. But after she has her rest and gathers
11 herself, our concern is that she feels intimidated and would
12 hesitate to decide in favor of the plaintiff. So we would
13 actually just ask the Court to make sure that the experience
14 would not affect her ability to decide the case for or against
15 either side and that she can put it aside and decide the case
16 solely based on the evidence she heard in the courtroom. Just
17 to get a little reassurance for both sides.

18 THE COURT: Yes, sir.

19 MR. ELSINGER: Judge, for the record, we're going to
20 object to keeping her on the jury and I'll advise the Court
21 why. We've got a juror who was stopped this morning right
22 before deliberations, not by any agency, but by the St. Lucie
23 County Sheriff's agency. When she came into this courtroom --

24 THE COURT: You know, if that was the test, probably
25 half of the people in the box couldn't serve, could they?

1 MR. ELSINGER: I understand that, but the fact of the
2 matter is, she came into court minutes from deliberating this
3 case in tears. She was crying as she was talking. Now, I
4 understand she calmed down as the Court was talking to her but,
5 you know, if a verdict comes back against the sheriff's office
6 when we've had a juror stopped by the sheriff coming to court
7 in tears 'cause she felt bad, she was shaken up about this
8 incident, I can't in good conscience say I don't think that
9 that could affect her ability to be fair and impartial. So for
10 the record, we are objecting to keeping her on the jury panel.

11 THE COURT: All right. We are going to bring her back
12 in and speak to her again and we'll see where we are and then
13 I'll make a final determination. I understand your respective
14 positions fully.

15 (Off-the-record discussion.)

16 THE COURT: I want to review a matter because I just
17 chatted with my staff. I agree with your assessment that she
18 was shaken, but I didn't see any tears. Did you see tears?

19 MR. BOYERS: No. I meant to say that. I didn't.

20 THE COURT: I didn't see any tears.

21 MR. ELSINGER: Judge, I saw tears, I'm sorry. When
22 she was sitting there talking to us, I saw tears. She appeared
23 to be crying.

24 THE COURT: All right. That may be your observation.
25 I didn't see any tears. The court reporter states she usually

1 notes tears if she sees them. We have three staff members here
2 who didn't see tears. But maybe your eyesight is --

3 MR. ELSINGER: Well, Judge, maybe it was the cracking
4 of her voice, which there's certainly -- I don't think you can
5 say there was no cracking in her voice as she was talking,
6 because that was certainly there while she was explaining what
7 happened.

8 THE COURT: There's no question that she was affected
9 by this experience. We're not saying that. The only issue was
10 the tears and I just wanted to explain on the record that there
11 are varying positions with regard to tears.

12 MR. ELSINGER: Very well.

13 (Pause; Juror Browning present.)

14 THE COURT: Welcome back, Ms. Browning. Ms. Browning,
15 we gave you a few moments to reflect on the scenario and to
16 have some coffee or water or what have you. Having done that,
17 we would like to know whether you believe you could be fair and
18 impartial to both sides in this case in deliberating?

19 JUROR BROWNING: Yes, I do. I do.

20 THE COURT: All right. Any reservations about that
21 whatsoever?

22 JUROR BROWNING: Yes. I have --

23 THE COURT: Any reservations --

24 JUROR BROWNING: No, I don't.

25 THE COURT: -- about being fair?

1 JUROR BROWNING: No, I don't, sir.

2 THE COURT: All right, ma'am, thank you very much.
3 You may go back and join your fellow jurors.

4 JUROR BROWNING: Thank you.

5 THE COURT: Once again, don't discuss the matter that
6 we discussed here.

7 JUROR BROWNING: I won't. Thank you.

8 THE COURT: Thank you.

9 (Juror Browning left the courtroom.)

10 THE COURT: My perception was that Ms. Browning seemed
11 to be rather energetic about continuing to deliberate and
12 stated she could be fair and impartial to both sides. So I
13 don't really think there is a legitimate basis to excuse her.

14 MR. ELSINGER: I understand what she said, Your Honor.
15 I'm going to maintain our objections based on her initial
16 reaction.

17 THE COURT: I understand fully.

18 Plaintiff, what is your position?

19 MR. BOYERS: She seems very comfortable with
20 continuing and being impartial, so we're comfortable with her
21 sitting on the jury.

22 THE COURT: All right. Let's bring the members of the
23 jury in. I'm going to complete reading the instruction on
24 page 28, we were rushing yesterday, and we'll then have them
25 start the deliberative process.

1 (Reading of the jury instruction and colloquy regarding
2 playing CD and DVD exhibits in jury room held here not ordered
3 transcribed.)

4 (Recess, 9:56 a.m. to 12:24 p.m.; No Jury Present:)

5 THE COURT: All right. We have all counsel present.
6 It was brought to my attention that defense counsel wanted to
7 make some statements about some issue, so we will entertain
8 those matters now.

9 MR. ELSINGER: All right, Judge. Here's what's
10 developed. And I haven't had a chance to talk to plaintiff's
11 counsel, but here is what's developed. After the issues this
12 morning with Juror Browning's traffic stop, the sheriff's
13 office tried to make some inquiries as to who stopped her, you
14 know, what happened, all right? And they were able to speak
15 with the -- it was a deputy, it was a St. Lucie County
16 Sheriff's Office. And he said, Well, you know, the whole
17 traffic stop was caught on video, because they just put cameras
18 in their cars a month ago. And he said, Well, the first thing
19 I did when I walked up on the video was, you know, to walk up
20 to her and she said, Why are you guys stopping me? You're
21 always harassing me. I'm tired of you guys, you police
22 harassing me.

23 I cannot represent it because I haven't seen the
24 video, but that's what I am being represented. And that she
25 talked about, I had a stroke and now you're going to make me go

1 to the hospital. And, you know, he did wind up just giving her
2 a warning for 72 in a 50.

3 THE COURT: Oh, 72.

4 MR. ELSINGER: Okay. But, you know, obviously I have
5 a concern about -- I mean, I objected before and I preserved
6 it. I know the Court is going to ask me, Well, what do you
7 want me to do? I don't know. I've never been in this
8 situation before.

9 THE COURT: Why don't you view the video.

10 MR. ELSINGER: Right. And we're having it sent to the
11 courthouse.

12 THE COURT: And then we can decide --

13 MR. ELSINGER: Right.

14 THE COURT: -- what to do.

15 MR. ELSINGER: I didn't want the Court to say, Well,
16 you knew about this --

17 THE COURT: No.

18 MR. ELSINGER: -- and you let her continue to
19 deliberate at that time. I'm in new uncharted territory here,
20 Judge. As soon as the video comes, I'll watch it with
21 plaintiff's counsel and we'll advise the Court, okay?

22 THE COURT: All right. I appreciate you bringing it
23 to our attention. And so you all coordinate the viewing of it.

24 MR. ELSINGER: It should be on a CD.

25 THE COURT: On a CD?

1 MR. ELSINGER: Yeah, I believe so.

2 THE COURT: So you can view it and you can have the
3 tape available so I can view it, if need be, and then we can
4 make some decisions about how to proceed.

5 MR. ELSINGER: Thank you.

6 THE COURT: Anything by plaintiff's counsel?

7 MR. BOYERS: Speechless.

8 THE COURT: Nothing has been speechless in this case.

9 All right. Thank you all very much. We're going to
10 grab a bite to eat and so we'll be back after lunch.

11 (Luncheon Recess, 12:27 p.m. to 1:50 p.m.)

12 (Sidebar Conference:)

13 THE COURT: I'll take the issues in order. As I was
14 leaving to go out to lunch, I observed one of the jurors
15 speaking on her cell phone. And usually during a lunch hour
16 Ms. Foster will give the jurors their cell phones and they can
17 call their families, et cetera. She retrieves them while they
18 are deliberating, so that's not unusual. But it just surprised
19 me, because I'm leaving the building and I see a juror there on
20 the cell phone. It was Ms. Browning. And Ms. Browning had
21 indicated to Ms. Foster that -- well, actually what happened is
22 Ms. Browning's son had been calling because apparently he
23 learned of the altercation this morning, so he wanted to speak
24 to his mother. And Ms. Foster told him, Your mother is fine.
25 The judge had her in, discussed the issues with her, gave her a

1 chance to relax. She's well. We can have her contact you
2 during her lunch break because that's when they next can use
3 the phone.

4 So the other courtroom deputy, Ms. Israel, overheard
5 Ms. Browning say to the person she was talking to on the phone,
6 They already like one of the deputies. He helped her with her
7 car yesterday.

8 MR. ELSINGER: Oh.

9 THE COURT: So of course that triggered other
10 thoughts. So I understand that a CSO was aware of this matter.
11 Apparently it happened two days ago. I just found out about
12 it. But apparently a juror was having trouble with her vehicle
13 on Tuesday evening. The CSO went out to assist her and said it
14 may be the battery. They opened the hood. And while standing
15 there, Officer Meslin came over to the vehicle and said
16 something, I'm not exactly sure what it was, like, do you need
17 some help or something like that, and the court security
18 officer said, you can't speak to the jurors and you have to
19 leave. And so he left.

20 MR. ELSINGER: Okay.

21 THE COURT: What troubled me was that Ms. Browning
22 recounted to her son, No. 1, anything about the case; and
23 No. 2, that the jurors like a defendant because he helped one
24 of the jurors with the car. So how do the jurors even know
25 that? So apparently whoever the juror was must have said

1 something to the other members of the jury for Ms. Browning to
2 even know that.

3 And if that wasn't enough, we just received a
4 communication from the jury which reads, "We cannot possibly
5 come to a unanimous decision! What is the next step!"

6 And it looks like Mr. -- what's his name, Chanin, is
7 the foreperson.

8 So, and then you want to show me a tape. And I have
9 to tell you, counsel, I'm a little troubled about all of this
10 because, frankly, we would have to inquire of the juror with
11 regard to what happened with Officer Meslin coming over and
12 find out what was -- what she said to each juror. And then
13 have to question each juror about what they heard with regard
14 to that. Ms. Browning about, why are you talking about the
15 case to your son, period. And with this note, which I didn't
16 even anticipate, this came out as I was walking out here, my
17 inclination is to declare a mistrial. So what I want to do is
18 give you all a chance to go back and chat and then I'll let you
19 tell me what you want to do. And I think I need to summarize
20 kind of publicly what we've said here. Because initially my
21 thought was that I would bring in Ms. Browning first, in the
22 attorneys' presence only, to question her. And then I would
23 bring the juror who had the car issue in the attorneys'
24 presence only to inquire of her. And then have the public
25 involved. My thought obviously is it's a public trial and they

1 should be aware of everything and lots of people are
2 interested, but I thought because of the circumstances with
3 Ms. Browning and then with the officer contact, we would do
4 that out of the presence of others and summarize it later.
5 But, given all of these issues --

6 MR. ELSINGER: I'd like to talk with my clients.

7 THE COURT: Well, of course. Of course.

8 MR. BOYERS: And before you go anywhere.

9 THE COURT: I'm just alerting you of my concern.

10 MR. BOYERS: I would also like to look at some cases
11 in terms of asking for a remedy when responding to the Court's
12 proposed remedy.

13 THE COURT: You're going to find it is discretionary.

14 MR. ELSINGER: No, I know a lot of it is.

15 THE COURT: All of it is.

16 MR. BOYERS: Here's what I'm -- or all of it is. But
17 here is what I'm concerned about, and it's way beyond this at
18 this point. I mean, we were planning to come back after
19 consulting with some experts and people. First of all, with
20 regard to this tape, in Miami -- and first of all, I think the
21 lawyers, they're not allowed an audiotape without someone's
22 consent because I think, No. 1, it's illegal.

23 THE COURT: I don't know about that. There's
24 definitely a law enforcement exception. And if there's a
25 matter that the police are investigating, I think it's -- I

1 don't think it's illegal, let's put it that way. There is an
2 exception in the Florida statute for law enforcement purposes.

3 MR. BOYERS: Well, I don't know.

4 THE COURT: Actually, I'm pleased, because I've been
5 harping on law enforcement agencies for years. You have the
6 Highway Patrol who arrest people for DUI, which is a
7 misdemeanor, and it's all on tape. You have a defendant who is
8 looking at 50 years to life with a confession and it's never
9 recorded.

10 MR. BOYERS: Yeah. But if I may, Judge, we spoke to
11 television production people, independently, who both
12 indicated -- we said, you know, could something like that be
13 altered, you know, in two hours? I know you're suspect, but
14 frankly, Judge, you heard the evidence, the 911, they said in
15 five minutes. In five minutes.

16 THE COURT: Well --

17 MR. BOYERS: So this would involve, you know, a trial
18 within a trial regarding the authenticity of that tape, like we
19 had a trial about the authenticity of that 911. And the case
20 law, U.S. versus Laird (sp), Eleventh Circuit case, 1992, only
21 requires the Court to make an inquiry of the juror, and if the
22 juror says she can be fair, then that's sufficient. But now
23 what we hear, frankly, is something akin to jury tampering.
24 They understood --

25 THE COURT: Well, why is it -- oh, you mean Officer

1 Meslin.

2 MR. BOYERS: Yes, the other matter. I mean, they
3 understood that they ought not to be either trying to curry
4 favor by having contact with them or intimidating them. And to
5 go over there and to do that in the midst of this trial is
6 unbelievably inappropriate. And I think it would be
7 appropriate to strike their pleadings as a consequence of that.
8 We should not be penalized, after spending \$150,000 and
9 litigating this case, for their irresponsibility and violation
10 of the rules.

11 THE COURT: Well, there are a lot of issues. In
12 addition, we have a note here that tells us that they're hung.

13 MR. BOYERS: Which may be influenced by the fact that
14 they love Detective Meslin because he violated the rules.

15 THE COURT: Well, if that was the case, they would
16 have a verdict. If they loved him.

17 MR. BOYERS: Well, he didn't do it for everybody and
18 I'm sure everyone didn't react the same way, but there are
19 certain people there who feel favorably towards him because he
20 violated the rules.

21 THE COURT: I understand your position. You all can
22 go chat and then we'll have a session where I will recount what
23 we have discussed.

24 MR. ELSINGER: Can we go outside?

25 THE COURT: Just one moment.

1 (Off-the-record discussion.)

2 THE COURT: Counsel? One other fact. As I understand
3 it, when our trainee courtroom deputy advised Ms. Foster of
4 Ms. Browning's comments, the particular juror who had the car
5 issue was identified. I'm not exactly sure how. And
6 Ms. Foster said, Did you have car trouble yesterday? Or the
7 day before I guess. And she said yes. And then the question
8 was, Did anyone help you? And she said, Yes, the court
9 security officer helped me. And then she said, Did anyone else
10 help you? And again the juror responded by saying, Well,
11 Officer Meslin did come over, but the court security officer
12 told him that he couldn't have any contact with me. And then
13 the juror said, But I did think it was awfully nice of him to
14 try to help me, or words to that effect. All right?

15 MR. ELSINGER: All right, Judge.

16 THE COURT: So you know everything that I know.

17 MR. BOYERS: I want to add one other thing, Judge.
18 And I think it's -- I don't believe in coincidences of this
19 nature, that the one black juror was suddenly stopped for
20 speeding the day deliberations are going to start and I find
21 that incredibly disturbing. And audiotaped. It's unbelievable
22 that that should happen on the day we're about to begin
23 deliberations.

24 MR. ELSINGER: I hope you'll apologize when you see
25 the video and hear it.

1 MR. BOYERS: No, I'm not because I heard that that can
2 be altered in five minutes.

3 THE COURT: Well, listen, ladies and gentlemen, let's
4 just take the issues -- we have enough issues without glossing
5 over other issues. So let's, right now, let's just deal with
6 the issues before us. Okay?

7 MR. ELSINGER: Can we go outside, Judge, and speak?

8 THE COURT: Yes, you may.

9 (Recess, 1:58 p.m. to 2:09 p.m.; No Jury Present:)

10 THE COURT: All right. All of the counsel are
11 present.

12 We had a sidebar conference previously to discuss
13 several issues.

14 During lunch, jurors are able to call family members.
15 Their cell phones are retrieved during deliberations. During
16 the lunch hour they are given their phones and they are able to
17 call family members, et cetera, to discuss issues which should
18 not relate to the case. Ms. Browning desired to speak with her
19 sons because apparently they called the court this morning
20 inquiring about their mother. Ms. Foster advised them that
21 there had been a hearing, that she was fine, she was
22 deliberating, and that she would be able to speak with them
23 during the lunch hour. You should also be aware that the sons
24 came to the courthouse, but I'm not sure, did they interact
25 with Ms. Browning?

1 COURTROOM DEPUTY: No.

2 THE COURT: They did not interact with her. They came
3 to the courthouse but did not speak with Ms. Browning because I
4 think at that time they were deliberating.

5 One of our courtroom deputies overheard Ms. Browning
6 say on the phone, when talking to her sons, something to the
7 effect, They already like one of the defendants because he
8 tried to help her with her car. And so of course that was an
9 odd comment which caused me to make further inquiry. I was
10 able to speak with the court security officer who apparently
11 was familiar with this incident. It occurred two days ago. A
12 juror was having a problem with her vehicle at the end of the
13 day. Apparently the vehicle stalled out and she couldn't get
14 it started. The court security officer attempted to assist her
15 by raising the hood of the car to inspect the battery,
16 et cetera, and apparently at some point in time Deputy Meslin
17 approached the vehicle and this juror, I suppose to offer
18 assistance, and the court security officer said words to the
19 effect, No, you are not allowed to interact with jurors,
20 something to that effect, and apparently Deputy Meslin departed
21 the area.

22 Apparently, the juror who had the car problem made a
23 comment to the effect that Officer Meslin was a nice man or
24 must have been a nice man because he tried to help me or
25 something to that effect.

1 So there are a couple of issues in that regard. One,
2 Ms. Browning's conversation with perhaps her son -- I think it
3 was one of her sons about the trial.

4 Secondly, what did the juror who had the car problem
5 say to the other jurors for Ms. Browning to even be aware of
6 this incident? I was unaware until lunchtime today.

7 And then thirdly, we received a communication from the
8 jury saying, "We cannot possibly come to a unanimous decision!
9 What is the next step!" Signed by Mr. Chanin.

10 And so as I advised the attorneys sidebar, after
11 advising them of substantially the same thing that I have just
12 recounted, that I of course am concerned about all of these
13 issues and I gave them an opportunity, that is, the attorneys,
14 to confer to let me know what they think the next step should
15 be. And I essentially stated my concern.

16 The reason that I had them come sidebar was because
17 frankly, until I got this last note, my thought was that we
18 should speak to Ms. Browning outside of the presence of
19 everyone else in the courtroom other than the lawyers, and
20 possibly speak to the juror who had the car problems outside of
21 the presence, so that they wouldn't feel influenced by any of
22 the participants, and then we would tell you in detail what
23 happened. But given the fact that we have the most recent
24 note, I'm not sure that there is an alternative.

25 Counsel.

1 MR. BOYERS: Your Honor, I stated my opposition to a
2 mistrial up at sidebar, but if the Court is ultimately inclined
3 to grant a mistrial notwithstanding our position --

4 THE COURT: Well, what is it that you propose --
5 notwithstanding all of the other issues, with regard to a
6 mistrial, what would you propose when the jurors say we cannot
7 possibly come to a unanimous decision?

8 MR. BOYERS: Well, I mean, something akin to I guess
9 the state case is Allen, an Allen charge.

10 THE COURT: I'm sorry, I didn't hear you.

11 MR. BOYERS: I guess the only alternative would be
12 something akin to what in state court is called an Allen
13 charge.

14 THE COURT: Same in federal court.

15 MR. BOYERS: Okay. It's actually a federal case,
16 yeah. But in any event, I'm not convinced that that's going to
17 be fruitful, realistically, and I understand the Court's
18 position on that. But here is what the Court I think did not
19 just articulate in expressing those things which the Court is
20 concerned about. The Court did not articulate the blatant
21 impropriety of Detective Meslin going up to a juror during the
22 course of this case. And the fact that the jurors are
23 saying -- or several of them that they think -- one is saying
24 awfully nice, and at sidebar we heard that others seem to feel
25 the same way, at least with respect to what Ms. Browning had

1 said. Her recounting of things to her son was that they,
2 plural, already like Detective Meslin because he had helped one
3 of them with her car or sought to help one of them with her
4 car.

5 And so I would ask that if this case is mistried, two
6 things. One, that we receive costs for that improper blatantly
7 and inexcusably improper conduct that seems to have had a
8 demonstrable impact on several of the jurors and their view of
9 the defendants.

10 And the other thing that I would ask for is that if
11 the case is going to be retried, which it would apparently have
12 to be, that it be retried in Miami. Because it is clear that a
13 fair trial cannot be had here. When they can stop jurors and
14 produce videotapes and so forth and arrest them or pull them
15 over or give them warnings, we have something to be concerned
16 about. This case now ought to be tried in a place where they
17 don't have influence over jurors and their ability to go or
18 stay or conduct their lives.

19 So there was one instance of demonstrably improper
20 conduct and there is another instance that is highly suspicious
21 in light of the fact that it happens on the day of
22 deliberations and this is the only black juror and they're
23 trying to eliminate her.

24 And I understand that there is a -- supposedly an
25 audio and videotape, but we spoke during the break to TV

1 production people who indicated that -- and we could do a
2 demonstration in court if the Court wanted to have a hearing on
3 this.

4 THE COURT: Well, do you have any evidence or are you
5 speculating?

6 MR. BOYERS: Well, we would have to do discovery on
7 this.

8 THE COURT: I'm just asking you, do you have any
9 evidence?

10 MR. BOYERS: I haven't seen the tape yet, Judge.

11 THE COURT: So the answer is no.

12 MR. BOYERS: Of course not. But we would have to have
13 a hearing on this and do discovery on it like we did on the 911
14 tape. But in terms of technology, all you have to do is record
15 the person's voice and have them say certain words and then you
16 can move the words around.

17 THE COURT: I'm not entertaining this argument at this
18 time. If you want to pursue it and you have some evidence,
19 then I can listen to that, but I'm not going to listen to your
20 speculation about what's going to happen, et cetera, at this
21 time. Right now -- and you'll have plenty of time to file any
22 motions you desire. Those are post-trial motions or
23 post-action motions. But right now the decision I have to make
24 is whether I should declare a mistrial. And it seems to me,
25 from everything that has occurred, frankly I don't know that I

1 have any alternative under the circumstances other than to
2 declare a mistrial.

3 MR. BOYERS: I don't think -- I don't know that the
4 Court does. I would make one request on the record, and that
5 they produce the original audio and videotape of that
6 vehicular -- the original, not a copy, the original of the
7 vehicular stop. Is the defense willing to do that?

8 MR. ELSINGER: Judge, I mean, the original is
9 recorded, as far as my knowledge, into the car camera DVD
10 system and then downloaded to the sheriff's office mainframe
11 and then they cut a copy of it over to us here today. It's a
12 running time recording that starts before the traffic stop,
13 goes through the traffic stop through, Have a nice day. I hope
14 you get to court safe. I mean, it's just a running with a
15 clock and it's running the whole time. I'll do my best to see
16 if there's such a thing as an original when it's downloaded
17 from the car camera system to a mainframe, but all I can give
18 the Court is the copy from that that was made this morning as
19 of right now.

20 THE COURT: Have you viewed it as of yet?

21 MR. ELSINGER: I just viewed it right before we
22 started this hearing, Judge.

23 THE COURT: Does it have a timer on it?

24 MR. ELSINGER: It does.

25 THE COURT: And it goes through?

1 MR. ELSINGER: It does.

2 THE COURT: You have conversations with defense
3 counsel. I'm sure they're willing to work with you in
4 obtaining any copies, originals, et cetera, whatever is in
5 existence. So you all have those discussions. I think the
6 only issue right now is whether or not the Court should declare
7 a mistrial.

8 Given everything that has occurred in this case,
9 unfortunately, the Court is going to declare a mistrial.

10 Let us have the members of the jury --

11 MR. ELSINGER: Judge, I'm sorry, I didn't want to
12 interrupt. I did want to see if I could make the traffic stop
13 a court exhibit, just so it's part of our record. Because I
14 don't want anyone to say that I came in well after the fact
15 with something that I had time to otherwise, you know, doctor
16 or anything.

17 THE COURT: If you want to mark it as a court exhibit
18 then that means that it stays with us.

19 MR. ELSINGER: That's what I'd prefer.

20 THE COURT: We can certainly do that. We'll mark that
21 Court Exhibit 1. You can put a sticker on it.

22 MR. BOYERS: And I'm going to make a clearer request
23 that the hard drive in that car -- I'll speak once defense
24 counsel is listening.

25 MR. ELSINGER: I'm sorry.

1 MR. BOYERS: I'm going to make a request that the hard
2 drive in the car be preserved and not altered in any way.

3 MR. ELSINGER: I'll do everything in my power to make
4 sure that that happens. Obviously I don't know -- I -- don't
5 have any technical knowledge but --

6 THE COURT: All right. You can communicate that to
7 your clients and get that issue resolved.

8 It's Court Exhibit 2. Court Exhibit 2.

9 Bring the jurors in, please.

10 (Jury Present:)

11 THE COURT: Be seated, ladies and gentlemen. We have
12 received the recent communication from you and it reads, "We
13 cannot possibly come to a unanimous decision! What is the next
14 step!"

15 Given your statement and other issues, the Court has
16 decided that it will declare a mistrial in this case, which
17 unfortunately means that we will have to select a jury in the
18 same way in which you were selected and retry the case. It's
19 unfortunate because the parties have expended a lot of time and
20 effort, et cetera, but this does happen on occasion and that is
21 what we will have to do.

22 I want to thank you very, very much for your
23 participation in the trial. You have been very attentive, you
24 have been timely, and you have carried out your
25 responsibilities well and we are grateful for that and we

1 appreciate that. We thank you very, very much and we'll look
2 forward to seeing you again. Maybe next time you can sit on a
3 case where you will be able to resolve the factual issues.
4 That may be in our new building.

5 If you would like to receive an attendance certificate
6 from the clerk's office, Ms. Foster and Ms. Israel will assist
7 you in doing that. Other than that, thank you again. You are
8 excused.

9 (Jury not present:)

10 THE COURT: Be seated. I think what I will do,
11 counsel, is give you all a few weeks to file any motions that
12 you would like, and then after receiving those motions we can
13 resolve those matters and then we will put the case back on the
14 calendar and decide -- for calendar call and then we will
15 decide when the case will be retried.

16 MR. ELSINGER: Judge, because I anticipate motions
17 coming, is there any way we could identify which court security
18 was involved in the issue? In case we need a witness, do we
19 know who it was?

20 THE COURT: John McLaughlin. He was the gentleman who
21 recounted the incident with Mr. Fallon.

22 MR. ELSINGER: Okay.

23 MR. BOYERS: Are we permitted to know the juror who
24 received help with her car?

25 THE COURT: Yes. I don't know who it was, but I'll

1 get that information for you.

2 MR. BOYERS: Thank you.

3 THE COURT: Now, you know there is a local rule which
4 prohibits you from discussing matters with jurors, so if for
5 any reason you think that is appropriate, you would have to
6 file a motion in order to obtain court approval.

7 MR. BOYERS: Okay.

8 THE COURT: Ms. Theresa Fahringer. She was in Seat
9 No. 7. Theresa Fahringer.

10 MR. BOYERS: Thank you.

11 MR. ELSINGER: Judge, I'm sorry, just because I don't
12 have the local rule in front of me. I just want to make sure
13 we're clear. If a juror -- I understand we're never allowed to
14 initiate contact. If a juror attempts to contact one of the
15 parties, are we to advise them we're not allowed to talk to
16 them?

17 THE COURT: Yes, sir, by local rule.

18 MR. BOYERS: And should we also report to the Court --

19 THE COURT: And you should report that to the Court.

20 MR. ELSINGER: Very good, Judge.

21 THE COURT: All right. Lady and gentlemen, is there
22 anything else we can resolve today?

23 MR. BOYERS: Thank you for presiding over the case,
24 Judge.

25 MR. ELSINGER: Thank you, Judge. No.

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THE COURT: All right. Let's give the jurors a few moments to depart the area and then of course you all may be excused. Thank you for your participation in the trial. Unfortunately we were not able to get the issues resolved, but we will try it again.

Thank you and have a great day. You are excused.
(Proceedings concluded at 2:29 p.m.)

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1 UNITED STATES OF AMERICA)
2 SOUTHERN DISTRICT OF FLORIDA) SS:
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4 C E R T I F I C A T E

5 I, Carly L. Horenkamp, Certified Shorthand
6 Reporter in and for the United States District Court for the
7 Southern District of Florida, do hereby certify that I was
8 present at and reported in machine shorthand the proceedings
9 had the 10th day of February, 2011, in the above-mentioned
10 court; and that the foregoing transcript is a true, correct,
11 and complete transcript of my stenographic notes.

12 I further certify that this transcript contains
13 pages 1 - 32.

14 IN WITNESS WHEREOF, I have hereunto set my hand at Miami,
15 Florida, this 14th day of February, 2011.

16
17
18 /s/ Carly Horenkamp
19 Carly L. Horenkamp, RMR, CRR
20 Certified Shorthand Reporter
21
22
23
24
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