

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : **No. 06-CR-319-03**
 : (Ronald L. Buckwalter, J.)
 VINCENT J. FUMO, :
 : **FILED ELECTRONICALLY**
 Defendant. :

MOTION OF DEFENDANT FUMO
FOR IMMEDIATE VOIR DIRE OF DELIBERATING JURORS

The jury in this case has been deliberating for five days. Information available publicly on the internet suggests that at least one juror has apparently violated this Court's admonitions by disclosing the status of deliberations to his "friends" (and a vast number of strangers) through a page on Facebook, a social networking site, as well as on Twitter, a "micro-blogging" service. What is visible to the public, which is all that defense counsel know, appears to invite private responses to this juror from the juror's "friends," thus suggesting a distinct probability that the juror has been the recipient of third-party contacts during deliberations. An immediate suspension of deliberations and a delicate but probing judicial inquiry is warranted. Depending on the results of that inquiry, it seems that one or more jurors ought to be removed and possibly replaced, see Fed.R.Crim.P. 23(a)(3), 24(c)(3), or that a mistrial will be required. In support of this motion, the defendant states:

1. Following a trial lasting more than four months, the jury retired to deliberate in this case on Thursday, March 5, 2009. Deliberations continued for four days last week, Monday through Thursday, March 9-12. The jury was not sequestered for trial, and has not been sequestered during its deliberations.

2. On March 5, at 1:25 p.m., a juror sent a text message via Twitter which stated, "Day 1 has come to a close." (Out of an abundance of caution, the movant is not identifying the juror in this motion; the juror's identity is being provided directly to the court privately. The juror is sometimes referred to herein as "he," without intending to suggest that the juror is in fact a male.) On March 9, following the second full day of deliberations, this juror posted a "status" report on his Facebook page stating that "today was much better than expected and tomorrow looks promising too!" On Thursday evening, following the fifth day, he posted that he "is staying silent for now." However, on Friday, March 13, at 12:49 p.m., the juror sent a text message to Twitter announcing, "This is it...no looking back now!" (punctuation, including ellipsis, per original). Later that day, at 10:46 p.m., the juror posted this "status" announcement on Facebook: "Stay tuned for a big announcement on Monday everyone!". At no time since the jury was selected in this case has this juror posted any message in any public area discouraging or warning against responses from his "friends" or others about his participation in jury duty.

3. The self-created "profile" of this juror on Facebook states, in part, that one of his favorite "activities" is

"Blogging on the web" and one of his principal "interests" is "Blogs."

a. The defense has located only one web log ("blog") maintained by the juror in question; this blog mentions he is on jury duty but says nothing inappropriate about that subject. However, the home page of this blog also states that "most of my other sites are all personal ones that only my real friends and family would know about who wrote it" (sic). What these "other sites" may be and what may be contained on them -- including the distinct possibility of "comments" received from others -- is unknown to the movant at this time.

b. Due to its high profile nature, the instant case has been covered and followed on many "blogs" written by others, both amateur and professional. These "blogs" contain a mixture of fact and opinion which is no way limited to that which has been presented in the courtroom before the jury or even in the mainstream press. There is therefore also a reasonable probability that this juror, given his interest in blogs, his apparent enthusiasm and his seeming lack of discretion, may have sought out and examined blogs which are discussing this trial.

4.a. The public Facebook page established by the juror in question states that he has 93 "friends" on Facebook, that is, individuals who have access to the private areas of his Facebook participation, including the ability to "message" him and receive private messages in return. In addition, any member of one of the Facebook "networks" that the juror has joined can access the public areas of his Facebook "page." One such

"network" is very broad -- Facebook's Philadelphia geographical network.

b. According to this juror's Twitter webpage, another five individuals are "followers" of his occasional "tweets" via the Twitter service. (The Twitter service allows participants to send text messages of up to 140 characters at a time to "followers" and for posting on the individual's webpage.)

5. Based on the foregoing, the defendant respectfully suggests there is "substantial evidence," United States v. Kemp, 500 F.3d 257, 301 (3d Cir. 2007), that the juror in question has violated the Court's admonition against disclosing the status of deliberations. Given the addressing of his comments to almost 100 particular individual "friends" and an unknown number of others in the "network" (referred to by the juror on March 5 as "everyone," with a clear implication that these persons will know exactly what he is referring to as "a big announcement"), there is also a substantial probability that this juror has been inviting and receiving communications about the case, during deliberations, in the form of Facebook messages, e-mail, or "tweets" from persons who are not members of the jury. If so, it is impossible to know the extent to which other members of the jury may have been affected indirectly by third-party communications addressed to this juror.

WHEREFORE, the defendant prays, for the reasons set forth in this motion and elaborated in the memorandum of law to be filed shortly, that the Court call an immediate, temporary halt to deliberations and conduct an individual, in camera voir dire

of the referenced juror at least, and then to remove him from the jury and take other appropriate action.

Dated: March 15, 2009

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Respectfully submitted,

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CERTIFICATE OF SERVICE

On March 15, 2009, I served a copy of the foregoing document through the Court's electronic filing system on the attorneys for the government, as follows:

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