IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JOSEPH JEFFRIES, Defendant/Appellant, vs. THE STATE OF NEVADA, Plaintiff/Respondent.	CASE NO. 68338

APPELLANT MICHAEL JOSEPH JEFFRIES' PETITION FOR REHEARING OF PANEL ORDER OF AFFIRMANCE

Pursuant to Rule 40 of the Nevada Rules of Appellate Procedure ("NRAP"), Michael Joseph Jeffries, Defendant-Appellant in the above-entitled matter, by and through his attorney, Vincent Savarese III, Esq., of the law firm of Gentile Cristalli Miller Armeni Savarese, hereby respectfully petitions this Honorable Court for rehearing with respect to the Order of Affirmance filed by the panel in this matter on July 6, 2017, affirming Appellant's conviction, pursuant to jury verdict, of the offense of second-degree murder.[1]

1.

INTRODUCTION

NRAP 40(c)(2) provides:

"The court may consider rehearings in the following circumstances:

[1] Under the combined provisions of NRAP 40(a)(1) and NRAP 26(a)(3), this Petition for Rehearing of the Order of Affirmance entered by the panel of this Court on July 6, 2017 is due 18 days thereafter, and is therefore timely filed.

(A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
(B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case."

NRAP 40(A)(2) provides:

> "The petition shall state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. Any claim that the court has overlooked or misapprehended a material fact shall be supported by a reference to the page of the transcript, appendix or record where the matter is to be found; any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue."

2.

ARGUMENT

I.

THE PANEL HAS OVERLOOKED OR MISAPPREHENDED MATERIAL FACTS IN THE RECORD.

A.

Prosecutorial Misconduct

1. ***The Prosecutor Argued in Rebuttal Summation that Appellant "Certainly" Corruptly Influenced the Trial Testimony of Brittany Ames in the Absence of any Supporting Evidence of Record Whatsoever.***

In its Order of Affirmance at page 6, the Panel acknowledges that, as this Court admonished in *Williams v. State,* 103 Nev. 106, 110, 734 P.2d 700, 703 (1987)

(holding that "the prosecutor . . . . [committed misconduct when] he contended that appellant purchased the alibi testimony although there was no evidence from which to draw such an inference"): "A prosecutor may not argue facts or inferences not supported by the evidence." However, the Panel asserts that "[i]n the State's rebuttal closing argument, the prosecutor [merely] ***suggested*** that Jeffries ***might have*** indirectly influenced Brittany's trial testimony," (Order of Affirmance page 3), and concludes that "[h]ere, the prosecutor's argument that Jeffries ***might have*** indirectly influenced Brittany's testimony was an appropriate comment on the evidence presented." *Id.* at page 6 (emphasis added). And the Panel concludes that "[a]ccordingly, it was proper for the State to argue that Jeffries ***could have*** indirectly influenced her testimony." *Id.* at page 7 (emphasis added).

In reaching this conclusion, the Panel observes that "Brittany's mother and Jeffries became engaged prior to trial, and Brittany admitted that she did want anything to happen to Jeffries." *Id.* at page 7. And Appellant does not quibble with the proposition that, an argument by the state "suggesting" that her testimony "might have" been influenced by those circumstances of record may have been permissible.

However, that is *not* what occurred in this case. Thus, the Panel has mischaracterized, and has thereby overlooked and inaccurately diminished the objective impropriety of the *actual language* employed by the prosecutor – who in fact expressly and *categorically* argued to the jury in his rebuttal summation, in the

absence of any arguable supporting evidence *whatsoever*, that Appellant had "***certainly***" corruptly influenced Brittany's testimony. (AA, Vol. 3, p.623).[2] And that is quite another matter entirely. Indeed, the Panel elsewhere quotes the actual language employed by the prosecutor – who in fact argued in that "***[for] three-and-a-half years*** . . . [Brittany was] ***certainly*** being worked on – by Mike Jeffries." Order of Affirmance page 6 (emphasis added). This is *not* a fair, logical or proper inference from either the fact that, prior to trial, Brittany's mother had become engaged to Appellant or Brittany's admission that she did not want to see anything happen to him. Nor is it a fair, logical and proper inference from any other evidence in the record, and the Panel cites none. Particularly in view of the abundant affirmative evidence of record to the contrary – which the Panel expressly acknowledges. *Id.* at pages 6-7. *See* AA, Vol. 1, pp. 145-147, 194-195, 240-242. Rather, it was a plainly prejudicial and improper *categorical* assertion that Appellant *had corruptly (and criminally) influenced the testimony of a witness*. And Appellant's motion for mistrial on this basis should therefore have been granted. As the United States Court of Appeals for the Eleventh Circuit explained this critical distinction in *Oliver v. Wainwright,* 795 F.2d 1524, 1532 (11th Cir. 1986): "While a prosecutor may point out that record evidence suggests that a witness may have had some ***reason*** to testify as the defendant wished, he or she may not suggest that the defendant ***has suborned***

[2] References herein to Appellant's Appendix are designated "AA."

perjury where such a suggestion finds no support in the record. Although the prosecutor merely insinuated that Oliver had the opportunity to influence the testimony of . . . witnesses . . . such veiled hints are beyond the scope of proper argument") (emphasis added). And as the court held in *Tran v. State of Florida,* No. 94-1141, 655 So. 2d 141, 142 (Fla. App. 1995): "The implication by the prosecutor . . . was that the defense 'got to' the witness. That suggestion that the defense was engaged in witness tampering with a witness and suborning perjury, both criminal offenses. Such a comment is highly irregular, impermissible, and prejudicial." In these persuasive authorities – both squarely on point – prosecutorial misconduct was found on the basis of mere prosecutorial *insinuation* that the accused had a mere *opportunity* to influence witnesses and mere prosecutorial *implication* that the defendant had done so. Here, the prosecutor did far more than that. He *categorically asserted* to the jury *in the absence of any evidence at all* that the proof had shown that Appellant Jeffries had "***certainly***" done so.[3]

2. *The Trial Court had Taken Critical Notice of the Prosecutor's "Inappropriate" Vouching for Brittany Ames sua sponte.*

The Panel acknowledges that – also during his rebuttal summation – and in conjunction with his false claim that the evidence proved that Appellant had

[3] Moreover, the fact that the prosecutor saved this improper argument for rebuttal constitutes "sandbagging" to which Appellant's trial counsel was unable to respond, thus exacerbating its prejudicial effect.

"certainly" influenced her trial testimony – the prosecutor, urging the jury to rely upon her pre-trial statements that were admitted into evidence, further told the jury that he "really grew to like to like Brittany . . . during this whole period that I've had this case." Order of Affirmance pages 5-6. *See* AA, Vol. 3, p. 623.

The Panel did *not* find that this *failed* to constitute improper prosecutorial vouching for Brittany. Nor did the panel find that the State had shown on appeal that the same was harmless beyond a reasonable doubt. Rather, the Panel found that harmless-error review did not apply because the objection and motion for mistrial of Appellant's trial counsel to the prosecutor's witness-influencing assertion did not address the improper vouching issue. Order of Affirmance pages 5-6. The Panel therefore found that plain-error review was applicable; placed the burden on Appellant to show plain error; and "conclude[d] that he fails to demonstrate that plain error exists . . . ." *Id.*

However, in so doing, the Panel overlooks the fact that the trial judge took critical notice of the prosecutor's vouching for Brittany Ames *sua sponte*, and expressly found it "inappropriate." AA, Vol. 3, p. 637. The Panel has therefore failed to take into consideration that – although he applied no remedy – the trial court was well aware of the impropriety of this prosecutorial vouching. *See* AA, Vol. 3, p. 637-638. Accordingly, the Panel should have applied harmless-error rather than plain-error review on this issue. And this was not harmless error. Particularly considered

in conjunction with the prosecutor's false and improper argument that the evidence proved that Appellant had "certainly" corruptly influenced Brittany's trial testimony.

B.

Evidence Consistent With, At Minimum, The Lesser-Included Offense Of Voluntary Manslaughter

In characterizing the underlying historical facts of record, the Panel states that Appellant shot Eric Gore as the latter merely "approached" him, (Order of Affirmance page 3), and states that the pre-trial statements admitted into evidence and trial testimony of Brittany Ames "discredited the defense theory that Gore ran aggressively toward Jeffries before Jeffries shot him in self-defense."

However, in its factual discussion, the Panel overlooks the ample independent testimonial and circumstantial evidence of record demonstrating that, having engaged in verbally-abusive and physically-threatening conduct toward others present throughout the evening in question, (AA, Vol. 1, pp. 23, 133, 135-138, 216-219; Vol. 2, pp. 307-308, 314, 323, 325-327, 331-332; Vol. 3, p. 542-548); having refused to leave Appellant's home despite repeated demand, (AA, Vol. 1, pp. 25-26, 221-224, 227-228); having engaged in a heated verbal argument with Appellant, (AA, Vol. 1, pp. 224-225); having threatened to physically attack Appellant, (AA, Vol. 1, pp. 24, 26, 48); having engaged Appellant in a fistfight within Appellant's own home, (AA, Vol. 1, pp. 138-139; Vol. 2, p. 283); having chased Appellant in anger from the kitchen to Appellant's bedroom at the other end of the house, (AA,

Vol. 1, pp. 83, 139); and having charged at a now conspicuously armed Appellant standing at the bedroom door,(AA, Vol. 1, pp. 1-4, 27-28, 31-33), Gore was not shot until he had closed to within two feet of Appellant, (AA, Vol. 1, pp. 27-28, 31-33, 141; Vol. 2, pp. 6465-466), his forward momentum propelling him past Appellant's location at the time of the shot, and causing him to fall to the floor behind Appellant with his head toward the bedroom and his feet toward the kitchen. AA, Vol. 2, pp. 278-279, 288, 291, 414; Vol. 3, pp. 523-525, 528.

This evidence was abundantly consistent with, at minimum, the lesser-included offense of voluntary manslaughter, if not outright self-defense. And therefore illustrates the potentially plain prejudicial effect of the undisputed juror misconduct committed in this case in considering gradations of punishment simultaneously with deliberation on the question of guilt or innocence as to the three levels of homicide submitted to the jury by instruction of the trial court, and the failure of the trial court to conduct an investigation into the attachment of actual prejudice to Appellant's detriment as a result of that misconduct with respect to the jury's proper and untainted consideration of the lesser offense of manslaughter strictly on the basis of the facts in evidence.

...

...

II.

THE PANEL HAS OVERLOOKED OR MISAPPREHENDED MATERIAL QUESTIONS OF LAW IN THIS CASE AND HAS OVERLOOKED, MISAPPLIED OR FAILED TO CONSIDER DECISIONS DIRECTLY CONTROLLING DISPOSITIVE ISSUES.

A.

Prosecutorial Misconduct

By failing to apply the actual language employed by the prosecutor in presenting the jury with a false, unsupported and improper categorical argument in rebuttal summation that the evidence at trial proved that Appellant had "certainly" corruptly influenced the trial testimony of Brittany Ames over the course of three-and-a-half years and thereby committing prosecutorial misconduct, the Panel has overlooked, misapplied or failed to consider the Nevada Supreme Court jurisprudence of *Williams v. State*, 103 Nev. 106, 734 P.2d 700 (1987).

The foregoing issue and jurisprudence is discussed in Appellant's Opening brief at pages 41-47, and in Appellant's Reply Brief at page 20.

B.

Juror Misconduct

In finding that a *sua sponte* judicial investigation as to whether actual prejudice to Appellant had attached, the Panel has failed to consider the peculiarly prejudicial effect of the *particular type* of acknowledged and undisputed juror misconduct in considering corresponding gradations of punishment ranges while simultaneously deliberating upon the question of guilt or innocence as to the three

levels of homicide submitted to them that occurred in this case and its recognized threat to Appellant's fundamental constitutional right to a fair trial regarding the lesser-included offense of voluntary manslaughter. And in so doing, the Panel has overlooked, misapplied or failed to consider the jurisprudence of the *en banc* Nevada Supreme Court in *Valdez v. State*, 117 Nev. 53, 17 P.3d 397 (2001) (*en banc*).[4]

The foregoing issue and jurisprudence is discussed in Appellant's Opening brief at pages 23-32, and in Appellant's Reply Brief at pages 7-16.

C.

Supplemental Jury Instruction

In finding that the trial court was not required to provide the jury with supplemental legal instruction notwithstanding its finding that the jury in fact expressed confusion as to the element of malice aforethought and the distinction between second degree murder and voluntary manslaughter, (Order of Affirmance pages 10, 12), upon the presence or absence of which precise element that distinction hinges, the Panel has overlooked, misapplied or failed to consider the jurisprudence of the *en banc* Nevada Supreme Court in *Gonzalez v. State*, 131 Nev. Adv. Op. 99, 366 P.3d 680 (2015) (*en banc*), *rehearing denied*, (2016). And in so doing, the Panel has placed an untenable burden upon the accused to somehow independently divine,

[4] The Panel simply observes that "[t]he juror misconduct at issue here involved ***independent research*** . . . ." Order of Affirmance page 8 (emphasis added).

without investigative inquiry by the trial court of the jury as to *the particular and specific nature of the confusion in question*, and nonetheless propose adequate supplemental instruction sufficient to alleviate that particular confusion as the *en banc* jurisprudence of *Gonzalez requires* to be done.

The application of *Gonzalez v. State*, 131 Nev. Adv. Op. 99, 366 P.3d 680 (2015) (*en banc*), *Rehearing denied*, (2016) is discussed in Appellant's Opening brief at pages 35-40, and in Appellant's Reply Brief at pages 16-19.

D.

Cumulative Error

In dismissing Appellant's contention that cumulative error attaches in this case, the Panel has overlooked, misapplied or failed to consider the prejudicial cumulative effect of acknowledged prosecutorial vouching for a prosecution witness in simultaneous conjunction with the impermissible, categorical prosecutorial assertion, in the absence of any arguable evidentiary support, that Appellant had "certainly" corruptly influenced the trial testimony of that same witness.

The Panel has likewise overlooked, misapplied or failed to consider the prejudicial cumulative effect of acknowledged, undisputed, impermissible, yet uninvestigated, juror misconduct in engaging in forbidden consideration of sentencing ranges during deliberation on the question of guilt or innocence as to corresponding levels of homicide in simultaneous conjunction with acknowledged,

yet unaddressed, juror confusion regarding the trial court's instructions as to an essential element of the offense of conviction that the jury were required to consider and understand. The Panel has thereby failed to fairly consider the cumulative erroneous effect of the fact that no judicial investigation was conducted as to the attachment of actual prejudice to Appellant after the jury in this case revealed that they had considered that which they were forbidden from considering, in conjunction with the fact that no clarifying instruction was given after the jury further revealed that they did not understand that which they were required to consider.

Cumulative error is discussed in Appellant's Opening brief at pages 48-51.

...

...

...

...

...

...

...

...

...

3.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Appellant MICHAEL JOSEPH JEFFRIES respectfully prays that this Honorable Court grant rehearing in this matter, together with such other and further relief as the Court deems fair and just in the premises.

Respectfully submitted this 24th day of July, 2107,

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

VINCENT SAVARESE III
Nevada Bar No. 2467
410 South Rampart Blvd., Suite 420
Las Vegas, Nevada 89145
(702) 880-0000
Attorney for Appellant
Michael Joseph Jeffries

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 40 and 40A

1. I hereby certify that this Petition for En Banc Reconsideration complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[**X**] It has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 font size and Times New Roman; or

[ ] It has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

[**X**] Proportionately spaced, has a typeface of 14 points or more, and contains **2800** words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[ ] Does not exceed 10 pages.

Dated this 24th day of July, 2017.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

VINCENT SAVARESE III (NV Bar 2467)
410 South Rampart Blvd., Suite 420
Las Vegas, Nevada 89145
(702) 880-0000
Attorney for Appellant
Michael Joseph Jeffries

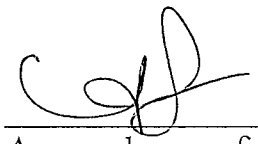
CERTIFICATE OF SERVICE

I hereby certify and affirm that the above and foregoing **APPELLANT MICHAEL JOSEPH JEFFRIES' PETITION FOR REHEARING OF PANEL ORDER OF AFFIRMANCE** was filed electronically with the Nevada Supreme Court on the 24th day of July, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

STEVEN B. WOLFSON
District Attorney
BERNARD ZADROWSKI
Chief Deputy District Attorney
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155

ALAN P. LAXALT
Attorney General
100 North Carson Street
Carson City, Nevada 89701

MICHAEL JEFFRIES, JR.
INMATE NO.: 1141219
High Desert State Prison
22010 Cold Creek Road
Indian Springs, Nevada 89018



An employee of
Gentile Cristalli Miller Armeni Savarese