**IN THE SUPREME COURT OF THE STATE OF NEVADA**

JERICHO JAMES BRIOADY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 70311



**PETITION FOR REHEARING**

Respondent, State of Nevada, petitions this Court for rehearing of its decision dated June 29, 2017, as Advance Opinion No. 41. This petition is based on NRAP 40.

The Court incorrectly assumed that the "new evidence" mentioned in NRS 176.515(3) refers to anything new. The issue is whether a motion for a new trial based on new evidence of jury misconduct must be brought within the usual seven days of the verdict, or if it may be brought within the more expansive two years allowed for a motion for a new trial based on "newly discovered evidence." Previously, this Court has held that the "new evidence" that would extend the time for a motion for a new trial, is evidence that is "material to the movant's defense" and of such probative

value to guilt or innocence as to render a different result probable upon retrial. *McLemore v. State*, 94 Nev. 237, 239, 577 P.2d 871, 872 (1978), *holding modified by Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991). In the instant case, the "new evidence" had absolutely nothing to do with guilt or innocence, but instead concerned jury selection.

There are courts that have determined that the motion for a new trial based on newly discovered evidence could go so far as to include evidence of jury misconduct, but those were applying different laws. This Court, the final arbiter of state law, has never adopted such a rule before the instant case where it seems to have been adopted without any discussion. Previous decisions have made it clear that the motion for a new trial must be brought within seven days of the verdict unless the motion is based on newly discovered evidence of guilt or innocence. In *Callier v. Warden*, 111 Nev. 976, 901 P.2d 618 (1995), this Court adopted the "probable acquittal" standard, thus indicating again that the new evidence mentioned in the statute is new evidence concerning guilt or innocence. In *Funches v. State*, 113 Nev. 916, 923, 944 P.2d 775, 779 (1997), the Court held, again, that the newly discovered evidence must be "material to the defense." This Court has never adopted the rule that a motion for a new trial may be brought within two years if it is based on newly discovered evidence concerning jury

selection. In every case it has concerned evidence of guilt or innocence. Such a tremendous shift in the jurisprudence of this state deserves more than an unspoken assumption. If this Court is going to change Nevada law so dramatically, it ought to do so explicitly, for all to see.

Finally, the Court held that the appropriate question is whether the relevant juror would have been subject to a challenge for cause. That standard was not advanced by either party and so neither party has addressed it. There is an assumption in the Opinion that a juror who has been the victim of a sexual crime, decades earlier, is subject to a challenge for cause. That is incomplete. All jurors are subject to challenges for cause and the district court would have very broad discretion to grant that challenge in regards to virtually any juror. The more appropriate question is whether the juror would have been subject to a *successful* challenge for cause. That is, the question ought to be whether an honest answer from the jury would have compelled the district court to grant the challenge for cause. "[T]he mere fact that a prospective juror has been the victim of a crime similar to the crime being tried does not by itself imply a disqualifying bias. Additional evidence of bias is required." *Brown v. Com.*, 313 S.W.3d 577, 598 (Ky. 2010). *See also*, *State v. Robinson*, 833 So. 2d 1207, 1214 (La. App. 2002).

*See also, State v. Singletary*, 402 A.2d 203, 207 (N.J. 1979); *State v. Boyatt*, 854 P.2d 550 (Utah 1993). The unexplored assumption that the district court would have been required to allow a challenge for cause ought not to drive a decision of this import. The Court ought to question that assumption, and refer the cause to the en banc Court for a decision.

DATED: July 6, 2017.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: TERRENCE P. McCARTHY
Chief Appellate Deputy

## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing 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 this petition for rehearing has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this petition for rehearing complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 10 pages.

3. Finally, I hereby certify that I have read this petition for rehearing, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition for rehearing complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in

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conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: July 6, 2017.

CHRISTOPHER J. HICKS
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## CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on July 6, 2017, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

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Destinee Allen
Washoe County District Attorney's Office