

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Apr 10 2018 08:01 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

ALFRED C. HARVEY,)	
)	
Appellant,)	
)	Case No. 72829
vs.)	
)	
THE STATE OF NEVADA,)	
)	
Respondent.)	
)	

**APPELLANT'S MOTION SEEKING STAY OF PROCEEDINGS
PENDING RESOLUTION OF DISTRICT COURT MOTIONS OR
MOTION FOR AN EXTENSION OF TIME TO FILE OPENING
BRIEF**

Comes Now Appellant ALFRED C. HARVEY, by and through Chief Deputy Public Defender SHARON G. DICKINSON, and pursuant to NRAP 27 moves for a stay of proceedings until district court decides motions filed on April 5, 2018: (1) Motion to Reconstruct the Record and (2) Motion for a New Trial and Evidentiary hearing. Alternatively, Alfred seeks a (75) day extension of time to file the Opening Brief, from Monday April 9, 2018, through and including June 23, 2018. Motion is based on

Points and Authorities, Exhibits, Affidavits, Declaration, and documents on file in this case.

DATED this 9 day of April, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By /s/ Sharon G. Dickinson

SHARON G. DICKINSON, #3710
Chief Deputy Public Defender
309 So. Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

POINTS AND AUTHORITIES

I. FACTS

Alfred Harvey filed a timely notice of appeal on April 10, 2017, appealing from a jury verdict for the crime of robbery.

During the appellate process, on November 15, 2017, Appellate Counsel discovered a jury note within the court exhibits that was not discussed on the record. The jury note said: "Can we have elaboration on the definition by means of force or violence or fear of injury. Michelle Moline." Exhibit A. At the top of the note, was a typed response: "The Court is not at liberty to supplement the evidence." Exhibit A.

Appellate Counsel immediately contacted the trial attorneys and learned that neither had any knowledge of the note. Exhibits B¹ and C. While in the process of investigating the note and the reasons why the trial attorneys never saw the jury note, another attorney substituted in on behalf of Alfred Harvey that same day - November 15, 2017. Exhibit D.

On or about February 14, 2018, the Public Defender's Office was reassigned to represent Alfred Harvey when his prior counsel withdrew. Exhibit E. On February 21, 2018, this Court re-instated briefing, ordering the Opening Brief due today, April 9, 2018.

¹ Ms. Spells' references to exhibits are the exhibits in the motions. Exhibit C in her affidavit is actually Exhibit A in this motion.

Appellate Counsel was re-assigned Alfred's appeal on March 5, 2018. *Exhibit F.* Appellate Counsel could not continue her investigation into the jury note matter without further discussing the note with Mr. Harvey's lead trial attorney, Jasmine Spells. However, Ms. Spells was on FMLA leave the beginning of December 2017 until March 26, 2018.

Upon Ms. Spells return to the office, Appellate Counsel consulted with her, obtained further information and her affidavit, and filed two motions: (1) Motion For a New Trial and Request for an Evidentiary Hearing and (2) Motion to Reconstruct the Record. *Exhibit G and H (motions without exhibits).*

Although the hearing on these motions is currently scheduled for April 16, 2018, it is unlikely the motions will be heard on that day because the motions request an evidentiary hearing before the trial judge who is in senior status. Also, the prosecutor has contacted Alfred Harvey's attorneys seeking a continuance. *Exhibit I.*

LAW AND ARGUMENT

A. Motion to Reconstruct the Record.

The record in this case contains no information as to what occurred with the jury note. Alfred Harvey's trial attorneys have no knowledge of the jury note or the process undertaken to give a typed message to the jury.

After speaking with both trial attorneys, Mr. Harvey filed a NRAP 10(c) motion with the district court seeking reconstruction of the record to include the process the court used when receiving the jury note. NRAP 10(c) provides:

if any difference arises as to whether the trial court record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the trial court record made to conform to the truth.
(Emphasis added)

Accordingly, Mr. Harvey must bring his request to reconstruct the record to the district court.

If an objection, argument, exhibit, or off the record discussion is not recorded or not made part of the record, the Nevada Supreme Court allows for reconstruction of the record. See *Lopez v. State*, 105 Nev. 68, 769 P.2d 1276 (1989) (reconstruction when a portion of the testimony was missing). Reconstruction not only applies to what is said during the trial but may also be used to describe what was viewed in the courtroom. *Philips v. State*, 105 Nev. 631, 782 P.2d 381 (1989)(court suggested appellate counsel could put together a statement regarding the race of the prospective jurors when there was an issue regarding a *Batson* claim but the record did not include any reference to the race of the prospective jurors). Additionally, the trial record

could be modified or corrected when inaccuracies exist. *Quangbengboune v. State*, 220 P.3d 1122 (Nev. 2009)(interpreter's translations of defendant's testimony were corrected during the appellate process).

How the trial court responded to the jury note is important because: [W]here a jury's question during deliberations suggests confusion or lack of understanding of a significant element of the applicable law, the court has a duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion." *Gonzales v. State*, 366 P.3d 680, 682 (Nev. 2015). Additionally, a bailiff's improper ex parte contact with the jury after receiving a jury note may also be newly discovered evidence warranting a new trial. *Lamb v. State*, 127 Nev. 26, 43-46 (2011) and a violation of NRS 175.391 and NRS 175.451.

In *Manning v. State*, 348 P.3d 1015 (Nev. 2015), the Nevada Supreme Court found constitutional error violating due process when a trial court failed to notify and seek input from the parties after receiving a note from the jury that it was deadlocked. The *Manning* Court held:

[W]e believe that due process gives a defendant the right to be present when a judge communicates to the jury (whether directly or via his or her marshal or other staff). A defendant also has the right to have his or her attorney present to provide input in crafting the court's response to a jury's inquiry. Accordingly, we hold that the court violates a defendant's due

process rights when it fails to notify and confer with the parties after receiving a note from the jury... *Id.* at 1019.

While the *Manning* Court found the error harmless beyond a reasonable doubt, it is unclear if this Court would come to the same conclusion in this case. Therefore, what occurred when the trial court received the jury note is important for appellate review.

B. Motion for a New Trial.

NRS 176.515(3) allows the district court to hear a motion for a new trial if the motion is based on newly discovered evidence and filed within two years after either the verdict or finding of guilt. Although Alfred Harvey's case is on appeal at this time, the district court has the authority to hear a motion for a new trial based on newly discovered evidence even though an appeal is pending in the Nevada Supreme Court. *Vest v. State*, 120 Nev. 669 (2004).

Juror misconduct or court errors involving jury notes discovered after the jury verdict are within the definition of newly discovered evidence under NRS 176.515(3). In *Brioady v. State*, 396 P.3d 822, 824 (Nev. 2017), *reh'g denied* (Oct. 2, 2017), the Nevada Supreme Court found juror misconduct discovered more than 7 days after verdict was newly discovered evidence falling within the umbrella of a NRS 176.515(3) motion for a new trial. In *Brioady*, a juror failed to answer truthfully when asked if she had ever been a victim of a crime, hiding the fact she was a victim of childhood sexual abuse. Her response was important

because the charges were lewdness with a minor. On appeal, the *Brioady* Court held the trial court abused its discretion by not granting a new trial because the juror would likely have been excused for cause if she had answered truthfully or the Defense would have removed her with a peremptory challenge.

A bailiff's improper ex parte contact with the jury after receiving a jury note may also be newly discovered evidence warranting a new trial. *Lamb v. State*, 127 Nev. 26, 43-46 (2011). In *Lamb*, the trial judge left for the day, leaving the bailiff and another judge to handle the deliberating jury. When the jury sent a note, the bailiff did not inform anyone, taking it upon himself to respond by telling the jurors to read the jury instructions. The bailiff's actions were in direct violation of NRS 175.391 and NRS 175.451. Defense learned of the bailiff's actions during the penalty hearing of the case and moved for a new trial. The trial court held an evidentiary hearing and denied the motion, finding the ex parte communication to be innocuous and not likely to impact the jury deliberations.

In *Manning v. State*, 348 P.3d 1015 (Nev. 2015), the Nevada Supreme Court found constitutional error violating due process when a trial court failed to notify and seek input from the parties after receiving a note from the jury that it was deadlocked. However, the *Manning* Court found the error harmless beyond a reasonable doubt because the trial court did not give the jury any legal instructions and merely excused them for the day, telling them to return the next day for further deliberations. The *Manning* Court found the trial court did not abuse its discretion in denying the motion for a new trial.

Accordingly, the finding of the jury note is newly discovered evidence within the definition of NRS 176.515(3) and Alfred Harvey's filing of a new trial meritorious.

Also, if the district court does not grant Alfred Harvey's motion for a new trial, he will directly appeal that order pursuant to NRS 177.015(1)(b) and seek to consolidate the decision with the case at bar. *See, e.g., Meegan v. State*, 114 Nev. 1150 (1998) (consolidation of an appeal from a conviction for first-degree murder pursuant to a jury verdict and an appeal from a district court order denying defendant's motion for a new trial in the same case), *abrogated on other grounds, Vanisi v. State*, 117 Nev. 330 (2001). Consolidating the appeals would expedite the appellate process by using a single appendix, making it more efficient for this Court to decide both appeals at once.

C. Motion for an Extension.

If the Court is unwilling to stay the appellate process in this case, Alfred asks for a 75 day extension to complete his motion practice in district court, allowing him time to reconstruct the record. Alfred needs time to obtain the transcripts from the hearings of his motions to place in his appendix.

CONCLUSION

In view of the above, Alfred Harvey asks this Court to grant a stay of his appeal pending the resolution of his district court motions. Alternatively, he asks for a 75 day extension to file the Opening Brief.

DATED this 9 day of April, 2018.

PHILIP J. KOHN

CLARK COUNTY PUBLIC DEFENDER

By /s/ Sharon G. Dickinson

SHARON G. DICKINSON, #3710

Chief Deputy Public Defender

309 So. Third Street, Suite #226

Las Vegas, Nevada 89155-2610

(702) 455-4685

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 9 day of April, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

SHARON G. DICKINSON
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

ALFRED HARVEY
NDOC No. 1174900
c/o Southern Desert Correctional Center
P.O. Box 208
Indian Springs, NV 89018

BY /s/ Carrie M. Connolly
Employee, Clark County Public
Defender's Office

EXHIBIT A

The Court is not at liberty to supplement the evidence.

Can we have
admission on the
depositions, by
means of force or
violence or fear of
injury.

Michelle Moline

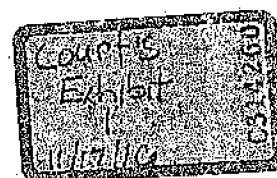


EXHIBIT B

AFFIDAVIT

JASMIN D. SPELLS makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am a Chief Deputy Public Defender assigned to handle the case of *State of Nevada v. Alfred C. Harvey*. I was the lead attorney for Mr. Harvey's trial.

2. The criminal prosecution of *State of Nevada v. Alfred C. Harvey*, case #C-16-314260-1, was in the Eighth Judicial District Court, Clark County, Nevada, which is a court of record in this State. The Defendant, Alfred C. Harvey, was accused and charged with the offense of robbery with a deadly weapon. The jury found Mr. Harvey guilty of robbery.

3. After filing a notice of appeal, Appellate counsel informed me that the jury foreman submitted a question during deliberations, asking for an elaboration on the definition of "by means of force or violence or fear of injury" during jury deliberations. Exhibit C.

4. I was not informed of this question during the trial. Appellate counsel notified me of the question after verdict and sentencing.

5. Upon information and belief, Appellate counsel discovered the jury question in the district court evidence vault, labelled as a court exhibit.

6. Counsel believes that this question is very significant because the question goes to the very crux of the defense: that the defendant did not have a weapon and that the State did not prove robbery beyond a reasonable doubt because there was no force, violence or fear of injury.

7. Had I been aware of this question during jury deliberations, I would have done a number of things. I would have objected to the court responding that the evidence could not be supplemented. See Exhibit C, because the jury question did not ask for a playback/readback or for additional evidence. The jury question asked for clarification on a point of law.

8. Specifically, I would have requested that the Court direct the jury to jury instructions 6, 11 and 12. Exhibit H. Jury instructions 6 and 11 instruct the jury that force or fear "must be used to either: (1) obtain or retain possession of taken property, (2) prevent or overcome resistance to the taking of property; or (3) to facilitate escape with the property." Jury instruction 12 further instructs the jury that in order for there to be a robbery, "the taking must be

1 accomplished by force or intimidation." These instructions are important because they direct the
2 jury to focus on examples of force and fear and how/when force or fear was used if at all.

3 9. I also would have also requested
4 the Court supplement the jury instruction packet with the jury instructions contained on pages 7
5 and 10 of the *Proposed Jury Instructions Not Used at Trial*, Exhibit I. The instruction on page 7
6 reminds the jury that the State has the burden of proof and again details the three ways in which
7 force or fear must be used for a robbery to be committed. The instruction on page 10 is a lesser
8 instruction which informs the jury that if they are not convinced beyond a reasonable doubt that a
9 robbery occurred, then they may find the defendant guilty of the lesser included offense of petit
10 larceny.

11 10. I would have also request that the court give the jury the *Crane* jury
12 instruction Exhibit I, which instructs the jury how to proceed when there are two reasonable
13 interpretations, one pointing to guilt and not. *Crane v. State* 88 Nev. 684, 504 P.2d 12 (1972).
14 Given the jury's question, its arguable the jury found two reasonable interpretations of the facts of
15 the case.

16 11. Additionally, I would have requested that the Court give the legal
17 definitions of force, fear and violence as defined in Black's Law Dictionary, as these terms are
18 legal terms, which are to counsel's knowledge are not defined by Nevada statutes. Specifically
19 these definitions are:

20 *Actual force*- force consisting in physical act, esp. a violent act directed against a
21 victim.

22 *Fear*- the strong, negative feeling that a person experiences when anticipating
23 danger or harm.

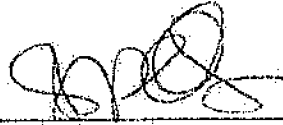
24 *Violence*- the use of physical force, usu. Accompanied by fury, vehemence, or
25 outrage; especially physical force unlawfully exercised with the intent to harm.

26 Black's Law Dictionary (10th ed. 2014). These definitions directly answer the jury's question. Jury
27 instruction 23, which the court gave informed the jury that should they have a question, the
28 information sought would be given.

1 12. I was informed of the jury question on or about late November, 2018.
2 Counsel was out of the office from early December 2017 to the end of March 2018. I reviewed the
3 instant case and prepared this affidavit upon my return.

4 13. I declare under penalty of perjury that the foregoing is true and correct.
5 (NRS 53.045).

6 EXECUTED this 3rd day of April, 2018.

7
8 

JASMIN D. SPELLS

9 County of Clark
10 State of Nevada

11 SUBSCRIBED and SWORN to before me
12 this 3rd day of April, 2018.

13 
14 NOTARY PUBLIC

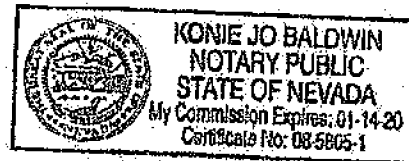


EXHIBIT C

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AFFIDAVIT

KELLEY JONES makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am a Deputy Public Defender who assisted in representing the Defendant in the instant matter.

2. The criminal prosecution of *State of Nevada v. Alfred C. Harvey*, case #C-16-314260-1, was in the Eighth Judicial District Court, Clark County, Nevada, which is a court of record in this State. The Defendant, Alfred C. Harvey, was accused and charged with the offense of robbery with a deadly weapon.

3. I was informed a jury question was located in the post-conviction file. The juror's question asked for elaboration of "by means of force or fear of injury."

4. To my knowledge, this question was never presented to the defense.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 5th day of December, 2017.

COUNTY OF CLARK
STATE OF NEVADA

Kelley R. Jones
KELLEY R. JONES

SUBSCRIBED and SWORN to before me
this 5th day of December, 2017.

Jacqueline Kay Vance
NOTARY PUBLIC

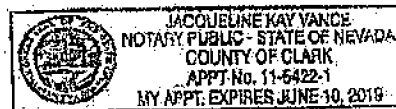


EXHIBIT D

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent..

Case No. 72829

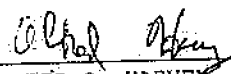
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Nov 15 2017 02:44 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S NRAP 46(a) (2) NOTICE OF SUBSTITUTION OF COUNSEL AND REQUEST FOR
EXTENSION OF TIME TO FILE OPENING BRIEF

COMES NOW the Appellant, ALFRED C. HARVEY, and hereby substitutes
TIMOTHY R. TREFFINGER, ESQ., Bar #12877, as attorney of record who will
handle the appeal in this matter, in the place and stead of prior counsel,
the Clark County Public Defender's Office. This notice is filed pursuant
to NRAP 46(a) (2) and requests the Court add Timothy R. Treffinger, as
attorney of record for the above-entitled case.

Additionally, the Appellant requests a forty-five (45) day extension to
the time permitted to file the opening brief, as it is due on even date and
no brief has been filed.

DATED this 15th day of November, 2017


ALFRED C. HARVEY, Appellant.

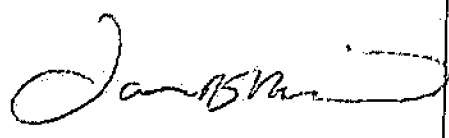
I hereby accept the above-referenced Substitution.

/s/ Timothy R. Treffinger, Esq.
Timothy R. Treffinger, Esq.
Nevada Bar No. 12877
LAW OFFICE OF TIMOTHY TREFFINGER
1148 S. Maryland Parkway
Las Vegas, NV 89104
702-333-5594
AttorneyTreffinger@gmail.com

1 //

2 I hereby consent to the above-referenced Substitution.

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SHARON G. DICKINSON, 197174
Deputy Public Defender
309 So. Third Street, Suite 6220
Las Vegas, NV 89101
702-495-4669

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 15th day of November, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

- CATHERINE CORTEZ MASTO
- STEVEN S. OWENS
- SHARON G. DICKSON
- TIMOTHY R. TREFFINGER
- HOWARD S. BROOKS.

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

Alfred C. Harvey
NDOC No. 1174900
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

By: /s/ Timothy R. Treffinger, Esq.
LAW OFFICE OF TIMOTHY R. TREFFINGER

//
//
//

EXHIBIT E



**EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT**

REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3rd FL.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

Electronically Filed
Feb 16 2018 08:12 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Acting Court Division Administrator

February 16, 2018

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: STATE OF NEVADA vs. ALFRED HARVEY
S.C. CASE: 72829
D.C. CASE: C-16-314260-1

Dear Ms. Brown:

Pursuant to your Order Granting Motion to Withdraw and Remanding to Secure Counsel, dated January 25, 2018, enclosed is a copy of the District Court minute order from the February 14, 2018 hearing in which the Public Defender's Office was confirmed as counsel in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

A handwritten signature in black ink, reading "Heather Ungermann". The signature is fluid and cursive, with a long horizontal stroke at the end.

Heather Ungermann, Deputy Clerk

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor

COURT MINUTES

February 14, 2018

C-16-314260-1 State of Nevada
 vs
 Alfred Harvey

February 14, 2018 8:00 AM Status Check: Confirmation of Public Defender as
 Appellate Counsel

HEARD BY: Smith, Douglas E. COURTROOM: RJC Courtroom 11B

COURT CLERK: Carol Donahoo

RECORDER: Gina Villani

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- Vivian Luong, Dep DA, present on behalf of the State and Kelli DeVaney-Sauter, Dep PD, present on behalf of Deft. Harvey, who is not present. Deft. is incarcerated in the Nevada Department of Corrections (NDC).

This is the time set for the Status Check on Confirmation of Public Defender as Appellate Counsel. Ms. DeVaney-Sauter advised that the Public Defender's office performed a conflict check and it appears there are none; therefore, they can CONFIRM as Appellate Counsel at this time. COURT SO NOTED.

NDC

EXHIBIT F

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

2 ALFRED C. HARVEY,)

3)

4 Appellant,)

5 vs.)

6)

7 THE STATE OF NEVADA,)

8 Respondent.)

9 _____)

Electronically Filed
Mar 05 2018 08:10 a.m.
Case No. 72829
Elizabeth A. Brown
Clerk of Supreme Court
E-File

10 **APPELLANT'S NRAP 46(a)(2) NOTICE**

11 COMES NOW Appellant, ALFRED C. HARVEY, by and through

12

13 the Clark County Public Defender's Office, and adds Chief Deputy SHARON G.

14 DICKINSON, Bar #3710, as attorney of record who will handle the appeal in this

15 matter. This Notice is filed pursuant to NRAP 46(a)(2) and requests Court add

16 Sharon G. Dickinson as an attorney of record in the above entitled case.

17

18 DATED this 2 day of March, 2018.

19

20 PHILIP J. KOHN

21 CLARK COUNTY PUBLIC DEFENDER

22

23 By: /s/ Sharon G. Dickinson

24 SHARON G. DICKINSON, #3710

25 Deputy Public Defender

26 309 So. Third Street, Suite #226

27 Las Vegas, Nevada 89155-2610

28 (702) 455-4685

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ADAM LAXALT
STEVEN S. OWENS

SHARON G. DICKINSON
HOWARD S. BROOKS

ALFRED C. HARVEY
NDOC No. 1174900
c/o Southern Desert Correctional Center
P.O. Box 208
Indian Springs, NV 89070

2

EXHIBIT G



MOT
PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
SHARON G. DICKINSON, CHIEF DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 3710
JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11635
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4588
Facsimile: (702) 383-2849
Attorneys for Defendant

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

v.

ALFRED C. HARVEY,

Defendant,

CASE NO. C-16-314260-1

DEPT. NO. VIII

DATE: 04/16/18

TIME: 8:00 AM

**DEFENDANT'S MOTION TO RECONSTRUCT THE RECORD AND
MOTION ASKING TRIAL JUDGE TO MAKE
A DECISION IN THIS MATTER**

COMES NOW, the Defendant, Alfred Harvey, by and through his attorneys, JASMIN SPELLS and SHARON G. DICKINSON, Deputy Public Defenders, and respectfully moves this Honorable court to direct this motion be heard by the trial judge, Judge Bixler, to reconstruct the record regarding the jury note found in the District Court Evidence Vault. This Motion is made and based

1 upon all the papers and pleadings on file herein, the attached Declarations of
2 Counsel, and oral argument at the time set for hearing this Motion.

3 DATED this 5 day of April, 2018.

4 PHILIP J. KOHN
5 CLARK COUNTY PUBLIC DEFENDER

6 By: /s/ Sharon G. Dickinson
7 SHARON G. DICKINSON, #3710
8 Chief Deputy Public Defender

9 PHILIP J. KOHN
10 CLARK COUNTY PUBLIC DEFENDER

11 By: /s/ Jasmin D. Spells
12 JASMIN D. SPELLS, #11635
13 Chief Deputy Public Defender
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When something is missing from the record, the parties have an obligation to reconstruct or clarify the record. If an objection or argument or exhibit is not recorded or not made part of the record or if the transcript is incomplete, the Nevada Supreme Court allows for reconstruction of the record. See *Lopez v. State*, 105 Nev. 68, 769 P.2d 1276 (1989) (reconstruction when a portion of the testimony was missing). Reconstruction not only applies to what is said during the trial but may also be used to describe what was viewed in the courtroom. Accordingly, in *Philips v. State*, 105 Nev. 631, 782 P.2d 381 (1989), the court suggested that appellate counsel could put together a statement regarding the race

1 of the prospective jurors when there was an issue regarding a *Batson* claim but the
2 record did not include any reference to the race of the prospective jurors.
3 Additionally, in *Quangbengboune v. State*, 220 P.3d 1122 (Nev. 2009), the Court
4 held that the trial record could be modified or corrected when inaccuracies in the
5 interpreter's translations of the defendant's testimony were verified during the
6 appellate process. The *Quangbengboune* Court held that the defendant could bring
7 a motion in district court pursuant to NRAP 10 (c) to correct the record.
8
9

10 The basis for a motion for reconstruction as found within NRAP 10(c)
11 provides that:
12

13
14 if any difference arises as to whether the trial court
15 record truly discloses what occurred in the district
16 court, the difference shall be submitted to and settled by
17 that court and the trial court record made to conform to
the truth. (Emphasis added)

18 In view of this, the district court has the authority to reconstruct off the record
19 discussions or missing objections and arguments and to clarify the rulings in order
20 to protect Mr. Harvey's right to due process on appeal and to ensure that he is
21 given the correct standard of review on appeal.
22

23 In this case, the trial record contains no information on Court Exhibit 1.
24 Alfred Harvey's trial attorneys have no knowledge of the jury note or the process
25 undertaken to give a typed message to the jury. This information is important for
26 his direct appeal regarding the issue involving the jury note that he intends to raise.
27
28

1 Here, although the jury requested clarification on a legal matter, the trial
2 court told them: "The Court is not at liberty to supplement the evidence." *Exhibit*
3 *C*. However, the content and the process of the court giving a written response are
4 not within the record. The content and process used conflicts with NRS 175.451.
5

6 The Legislature enacted NRS 175.451 to allow the jury to receive additional
7 information on the law if confused. Accordingly, in *Gonzales v. State*, 366 P.3d
8 680, 682 (Nev. 2015), the Nevada Supreme Court held: [W]here a jury's question
9 during deliberations suggests confusion or lack of understanding of a significant
10 element of the applicable law, the court has a duty to give additional instructions
11 on the law to adequately clarify the jury's doubt or confusion." However, no error
12 occurs if the Defense does not provide the court with proffered instructions to
13 clarify the jury's doubt or confusion. *Jeffries v. State*, 397 P.3d 21, 28 (Nev.
14 2017), *reh'g denied* (Sept. 29, 2017)
15

16 Additionally, a bailiff's improper ex parte contact with the jury after
17 receiving a jury note may also be newly discovered evidence warranting a new
18 trial. *Lamb v. State*, 127 Nev. 26, 43-46 (2011). In *Lamb*, the trial judge left for
19 the day, leaving the bailiff and another judge to handle the deliberating jury. When
20 the jury sent a note, the bailiff did not inform anyone, taking it upon himself to
21 respond by telling the jurors to read the jury instructions. The bailiff's actions
22 were in direct violation of NRS 175.391 and NRS 175.451. Defense learned of the
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1 bailiff's actions during the penalty hearing of the case and moved for a new trial.
2 The trial court held an evidentiary hearing and denied the motion, finding the ex
3 parte communication to be innocuous and not likely to impact the jury
4 deliberations.
5

6 In *Manning v. State*, 348 P.3d 1015 (Nev. 2015), the Nevada Supreme Court
7 found constitutional error violating due process when a trial court failed to notify
8 and seek input from the parties after receiving a note from the jury that it was
9 deadlocked. The *Manning* Court held:
10

11 [W]e believe that due process gives a defendant the right to be present
12 when a judge communicates to the jury (whether directly or via his or
13 her marshal or other staff). A defendant also has the right to have his
14 or her attorney present to provide input in crafting the court's
15 response to a jury's inquiry. Accordingly, we hold that the court
16 violates a defendant's due process rights when it fails to notify and
17 confer with the parties after receiving a note from the jury... *Id.* at
18 1019.

19 However, the *Manning* Court found the error harmless beyond a reasonable doubt
20 because the trial court did not give the jury any legal instructions and merely
21 excused them for the day, telling them to return the next day for further
22 deliberations. The *Manning* Court found the trial court did not abuse its discretion
23 in denying the motion for a new trial.
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1 Because Alfred intends to argue that reversible error occurred by court
2 instructing the jury without giving his attorney's input, he seeks an evidentiary
3 hearing to reconstruct the trial record.
4

5 III. CONCLUSION

6
7 In view of the above, Alfred Harvey asks this court to grant his motion and
8 reconstruct the record of his trial so that he has a record as to what occurred with
9 the jury note.
10

11 DATED this 5 day of April, 2018.

12
13 PHILIP J. KOHN
14 CLARK COUNTY PUBLIC DEFENDER

15 By: /s/ Sharon G. Dickinson
16 SHARON G. DICKINSON, #3710
17 Chief Deputy Public Defender

18 PHILIP J. KOHN
19 CLARK COUNTY PUBLIC DEFENDER

20 By: /s/ Jasmin D. Spells
21 JASMIN D. SPELLS, #11635
22 Chief Deputy Public Defender
23
24
25
26

27 PHILIP J. KOHN

1 **NOTICE OF MOTION**

2 TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff

3 YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office
4 will bring the above and foregoing MOTION on for hearing before the Court on
5 the 16th of April, 2018, at 8:00 AM

6 DATED this 5th day of April, 2018.

7
8 PHILIP J. KOHN
9 CLARK COUNTY PUBLIC DEFENDER

10 By: /s/ Sharon G. Dickinson
11 SHARON G. DICKINSON, #3710
12 Chief Deputy Public Defender

13 PHILIP J. KOHN
14 CLARK COUNTY PUBLIC DEFENDER

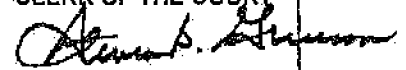
15 By: /s/ Jasmin D. Spells
16 JASMIN D. SPELLS, #11635
17 Chief Deputy Public Defender

18
19
20 **CERTIFICATE OF ELECTRONIC SERVICE**

21 I hereby certify that service of the above and forgoing MOTION was
22 served via electronic e-filing to the Clark County District Attorney's Office at
23 motions@clarkcountyyda.com on this 5 day of April, 2018.

24 By: /s/ Carrie M. Connolly
25 An employee of the
26 Clark County Public Defender's Office
27
28

EXHIBIT H



0031
PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
SHARON G. DICKINSON, CHIEF DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 3710
JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11635
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4588
Facsimile: (702) 383-2849
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

ALFRED C. HARVEY,

Defendant,

CASE NO. C-16-314260-1

DEPT. NO. VIII

DATE: 04/16/18

TIME: 8:00 AM

MOTION FOR A NEW TRIAL PURSUANT TO NRS 176.515
BASED ON GROUNDS OF NEWLY DISCOVERED EVIDENCE AND MOTION
FOR EVIDENTIARY HEARING AND DECISION BY TRIAL JUDGE

COMES NOW, Defendant, Alfred Harvey, by and through Deputy Public
Defender, JAMIN SPELLS, and files this motion for a new trial pursuant to NRS
176.515(3) based on the grounds of newly discovered evidence. Alfred Harvey also asks
for an evidentiary hearing and that this motion for a new trial be decided by the trial
judge, Judge Bixler, because he is the only person who knows about the jury note

1 discussed in this motion. This motion is based on the points and authorities attached and
2 on such argument as this court will entertain at a hearing on this motion.

3 DATED this 3 day of April, 2018.

4
5 PHILIP J. KOHN
6 CLARK COUNTY PUBLIC DEFENDER

7 By: /s/ Sharon G. Dickinson
8 SHARON G. DICKINSON, #3710
9 Chief Deputy Public Defender

10 PHILIP J. KOHN
11 CLARK COUNTY PUBLIC DEFENDER

12 By: /s/ Jasmin D. Spells
13 JASMIN D. SPELLS, #11635
14 Chief Deputy Public Defender
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POINTS AND AUTHORITIES

I. FACTS

On November 18, 2016, the jury returned a guilty verdict against Alfred Harvey for the crime of robbery. Exhibit A. The Judgment of Conviction was filed on March 17, 2017. Exhibit B. Alfred filed a notice of appeal on April 10, 2017.

During the appellate process, on November 15, 2017, Appellate Counsel discovered a jury note within the court exhibits that was not discussed on the record. Exhibit F. The jury note said: "Can we have elaboration on the definition by means of force or violence or fear of injury. Michelle Moline," Exhibit C. At the top of the note, was a typed response: "The Court is not at liberty to supplement the evidence." Exhibit C.

Appellate Counsel contacted the trial attorneys and learned that neither had any knowledge of the note. Exhibits D and E. While in the process of investigating the note and the reasons why the trial attorneys never saw the jury note, another attorney substituted in on behalf of Alfred Harvey. Exhibit F. Thereafter, further investigation into the matter ceased.

On or about February 21, 2018, the Public Defender's Office was reassigned to represent Alfred Harvey when his prior counsel withdrew. Exhibit F. The lead trial attorney, Jasmine Spells was out of the office until March 26, 2018. Upon her return to the office, this motion was put together for court's consideration. Exhibit F.

II.

THIS COURT HAS JURISDICTION TO GRANT THIS MOTION FOR A NEW TRIAL PURSUANT TO NRS 176.515 BECAUSE THE MOTION IS FILED WITHIN THE TWO YEAR TIME LIMIT.

NRS 176.515(3) allows this court to hear a motion for a new trial if the motion is based on newly discovered evidence and within two years after either the verdict or finding of guilt. Accordingly, this court has jurisdiction to decide this motion because it falls within the two year time limit.

Although Alfred Harvey's case is on appeal at this time, the Nevada Supreme Court holds that the district court has the authority to hear a motion for a new trial based on newly discovered evidence even though an appeal is pending in the Nevada Supreme Court. *Vest v. State*, 120 Nev. 669 (2004).

III.

A NEW TRIAL IS WARRANTED BASED ON NEWLY DISCOVERED EVIDENCE FOUND IN COURT RECORDS – JURY QUESTION.

A. Granting a motion for a new trial.

The test for the court granting a motion for a new trial based on newly discovered evidence directs the court to determine if the evidence was:

1. newly discovered
2. material to movants defense
3. such that it could not with reasonable diligence have been discovered and produced for the trial
4. not cumulative
5. such as to render a different result probable upon retrial
6. such that it does not attempt only to contradict a former witness or impeach or discredit him, unless the witness to be impeached is so important that a different

1 result must follow and
2 7, that these facts be shown by the best evidence the case admits.

3 *McLemore v. State*, 577 P.2d 871 (1978); NRS 176.515(3).

4 **B. The note was newly discovered.**

5 As addressed above, on November 18, 2016, the jury returned a guilty verdict
6 against Alfred Harvey for the crime of robbery. The jury's note to the trial court was
7 found in the court exhibits in the District Court evidence vault on or about November 15,
8 2017. Neither trial attorney was aware of the note prior to it being found on or about
9 November 15, 2017. *Exhibits D and E*.

11 Alfred Harvey brought this motion for a new trial as quickly as possible. The
12 motion for a new trial was not brought to the court's attention sooner because on
13 November 15, 2017, Alfred hired another attorney who substituted in and took over
14 Alfred Harvey's case.

16 The Public Defender's Office was reappointed as Alfred's attorney in February of
17 2018. His current Appellate Attorney was reassigned his case on March 8, 2017. Alfred
18 Harvey's trial attorney was out of the office until March 26, 2018. *Exhibit F*. Appellate
19 Counsel needed to wait for Alfred's Trial Attorney to write an affidavit. Thus, this
20 motion for a new trial is being brought in a timely manner.

22 **C. Jury notes discovered after the verdict are new evidence.**

24 Juror misconduct or court errors involving jury notes discovered after the jury
25 verdict are within the definition of newly discovered evidence under NRS 176.515(3).
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1 In *Brioady v. State*, 396 P.3d 822, 824 (Nev. 2017), *reh'g denied* (Oct. 2, 2017),
2 the Nevada Supreme Court found juror misconduct discovered more than 7 days after
3 verdict was newly discovered evidence falling within the umbrella of a NRS 176.515(3)
4 motion for a new trial. In *Brioady*, a juror failed to answer truthfully when asked if she
5 had ever been a victim of a crime, hiding the fact she was a victim of childhood sexual
6 abuse. Her response was important because the charges were lewdness with a minor. On
7 appeal, the *Brioady* Court held the trial court abused its discretion by not granting a new
8 trial because the juror would likely have been excused for cause if she had answered
9 truthfully or the Defense would have removed her with a peremptory challenge.
10
11

12 A bailiff's improper ex parte contact with the jury after receiving a jury note may
13 also be newly discovered evidence warranting a new trial. *Lamb v. State*, 127 Nev. 26,
14 43-46 (2011). In *Lamb*, the trial judge left for the day, leaving the bailiff and another
15 judge to handle the deliberating jury. When the jury sent a note, the bailiff did not inform
16 anyone, taking it upon himself to respond by telling the jurors to read the jury
17 instructions. The bailiff's actions were in direct violation of NRS 175.391 and NRS
18 175.451. Defense learned of the bailiff's actions during the penalty hearing of the case
19 and moved for a new trial. The trial court held an evidentiary hearing and denied the
20 motion, finding the ex parte communication to be innocuous and not likely to impact the
21 jury deliberations.
22
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24

25 In *Manning v. State*, 348 P.3d 1015 (Nev. 2015), the Nevada Supreme Court found
26 constitutional error violating due process when a trial court failed to notify and seek input
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1 from the parties after receiving a note from the jury that it was deadlocked. The *Manning*

2 Court held:

3 [W]e believe that due process gives a defendant the right to be present
4 when a judge communicates to the jury (whether directly or via his or her
5 marshal or other staff). A defendant also has the right to have his or her
6 attorney present to provide input in crafting the court's response to a jury's
7 inquiry. Accordingly, we hold that the court violates a defendant's due
8 process rights when it fails to notify and confer with the parties after
9 receiving a note from the jury... *Id.* at 1019.

10 However, the *Manning* Court found the error harmless beyond a reasonable doubt
11 because the trial court did not give the jury any legal instructions and merely excused
12 them for the day, telling them to return the next day for further deliberations. The
13 *Manning* Court found the trial court did not abuse its discretion in denying the motion for
14 a new trial.

15 Based on the above, the jury note found in the District Court's Evidence Vault
16 falls within the definition of newly discovered evidence under NRS 176.515(3) and Trial
17 Counsel is allowed the opportunity to craft response in accordance with holding in
18 *Manning*.

19
20 **D. Material to movants defense.**

21 The jury note was material because the question focused on the crux of Alfred
22 Harvey's defense.

23
24 Defense Counsel argued to the jury in closing:

25 ...there was no fear, no force, or no violence. Kind of rewind, go back to
26 the interaction between Mr. Munoz and Mr. Harvey, and we hear that Mr.
27 Munoz asked Mr. Harvey for the wallets. He freely gave them back. He's
28 not screaming at him. He's not pushing him. He's not throwing those

1 wallets at him. He just gave him the wallets back. Mr. Munoz testified
2 there's no yelling, there's no body contact, there's no force or fear of
3 violence in that interaction. He says at that point Mr. Harvey refuses to
4 turn back to the store...at the end of the day, he's thief, not a violent
5 robber...And I submit to you that here Mr. Harvey is not guilty of robbery
6 with use of a deadly weapon but he's also not guilty of robbery because he
7 didn't use force or violence here. He stole items and refused to come back
8 into the store. Mr. Harvey is also not guilty of robbery.

9 Exhibit G at 50-52.

10 The jury note focused on the defense by asking the court to elaborate on the
11 definition of the words "by means of force or violence or fear of injury" – the same
12 argument Alfred Harvey's attorney made in closing. Exhibit C. Accordingly, the jury
13 note was material and important to Alfred Harvey's defense because Defense Counsel
14 argued Alfred did not have a knife and did not use force, violence or fear of injury.

15 E. Could not be found with reasonable diligence.

16 Trial court's decision to not inform the trial attorneys about the note is not a
17 common practice in the courts. Because of this uncommon occurrence along with Jury
18 Instruction 23 that told the jury the court would supplement the law if they were
19 confused, the trial attorneys had no reason to search for a jury note.

20 The jury note was found with reasonable diligence after verdict. Court exhibits
21 are placed in the District Court evidence vault after trial. Trial Counsel does not have
22 direct access to documents placed in the evidence in the vault. Trial Counsel had no
23 reason to know trial court communicated with jury during deliberations.

1 F. Not cumulative

2 The trial court not discussing the jury note with the trial attorneys is not
3 cumulative of other issues at trial.

4 G. Would have rendered a different result probable.

5
6 The Legislature enacted NRS 175.451 to allow the jury to receive additional
7 information on the law if confused. Accordingly, in *Gonzales v. State*, 366 P.3d 680, 682
8 (Nev. 2015), the Nevada Supreme Court held: [W]here a jury's question during
9 deliberations suggests confusion or lack of understanding of a significant element of the
10 applicable law, the court has a duty to give additional instructions on the law to
11 adequately clarify the jury's doubt or confusion." However, no error occurs if the
12 Defense does not provide the court with proffered instructions to clarify the jury's doubt
13 or confusion. *Jeffries v. State*, 397 P.3d 21, 28 (Nev. 2017), *reh'g denied* (Sept. 29, 2017)
14
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16 Here, as addressed below, a different result would have occurred if Defense
17 Counsel had been allowed to submit input on the jury note as allowed by Jury Instruction
18 23, NRS 175.451, *Gonzales*, and *Jeffries*.

19
20 Initially, Defense Counsel would have objected to the response the trial gave as
21 being nonresponsive to the question and confusing. Exhibit E. The jury clearly asked for
22 clarification of the law and the court's response indicated it would not supplement the
23 evidence.
24

25 Defense Counsel would have asked the trial court give an answer because Jury
26 Instruction 23 told the jury the court would respond to a question on the law. Jury
27 Instruction 23 directed the jury as follows:
28

1 If, during your deliberation, you should desire to be further informed on
2 any point of the law...you must reduce your request to writing, signed by
3 the foreperson. The officer will then return you to court where the
4 information sought will be given to you in the presence of, and after notice
5 to, the district attorney and the Defendant and his counsel. Exhibit H.

6 NRS 175.451 required the trial court to discuss the note with the parties.

7 Had trial counsel been advised by the court of the jury note, she would have asked
8 the court to direct the jury to review jury instructions 6, 11 and 12. Exhibit E and H.
9 Jury instructions 6 and 11 told the jury that force or fear "must be used to either: (1)
10 obtain or retain possession of taken property, (2) prevent or overcome resistance to the
11 taking of property, or (3) to facilitate escape with the property." Jury instruction 12
12 further directed the jury that in order for there to be a robbery, "the taking must be
13 accomplished by force or intimidation." By pointing to these instructions, the trial court
14 would help the jury focus on examples of force and fear and how/when force or fear was
15 used if at all.
16

17 Trial Counsel would also have asked the court to supplement the jury instructions.
18 Counsel would have requested the trial court reconsider some of the defense proposed
19 instructions that were not used at trial. Exhibit I. The defense proposed instruction on
20 page 7 reminds the jury that the State has the burden of proof and again details the three
21 ways in which force or fear must be used for a robbery to be committed. The proposed
22 instruction on page 10 is a lesser instruction which informs the jury that if they are not
23 convinced beyond a reasonable doubt that a robbery occurred, then they may find the
24 defendant guilty of the lesser included offense of petit larceny. Exhibit E.
25
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1 Trial Counsel would have also requested the court give the jury the *Crane* jury
2 instruction, as submitted in the Defendant's Proposed Jury Instructions and Verdict Form,
3 which instructs the jury how to proceed when there are two reasonable interpretations,
4 one pointing to guilt and one not. *Crane v. State* 88 Nev. 684, 504 P.2d 12 (1972).
5 Exhibits E and J. Given the jury's question, its arguable the jury found two reasonable
6 interpretations of the facts of the case.
7

8 Additionally, Trial Counsel would have requested that the Court give the legal
9 definitions of force, fear and violence as defined in Black's Law Dictionary, as these
10 terms are legal terms, which are not defined by Nevada statutes. Exhibit E. Specifically
11 these definitions are:
12

- 13 • *Actual force*- force consisting in physical act, esp. a violent act
14 directed against a victim.
- 15 • *Fear*- the strong, negative feeling that a person experiences when
16 anticipating danger or harm.
- 17 • *Violence*- the use of physical force, usu. Accompanied by fury,
18 vehemence, or outrage; especially physical force unlawfully
19 exercised with the intent to harm.

20 Black's Law Dictionary (10th ed. 2014). These definitions directly answer the jury's
21 question and Jury instruction 23 allowed the court to inform the jury of these definitions.
22

23 Based on the above, if Defense Counsel had knowledge of the jury note and had
24 been allowed to submit requests on how the court should respond, it is probable the jury
25 would have found him not guilty. Further clarification on these words on retrial would
26 render a different result probable.
27
28

1 H. Does not contradict a witness or involve facts shown by the best evidence.

2 The jury not does not contradict or impeach a witness and does not involve facts
3 shown by the best evidence.

4 CONCLUSION

5
6 In view of the above, Alfred Harvey asks this court to hold an evidentiary hearing
7 and/or grant his motion for a new trial.

8
9 DATED this 3 day of April, 2018.

10 PHILIP J. KOHN
11 CLARK COUNTY PUBLIC DEFENDER

12 By: /s/ Sharon G. Dickinson
13 SHARON G. DICKINSON, #3710
14 Chief Deputy Public Defender

15 PHILIP J. KOHN
16 CLARK COUNTY PUBLIC DEFENDER

17 By: /s/ Jasmin D. Spells
18 JASMIN D. SPELLS, #11635
19 Chief Deputy Public Defender
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YOU WILL PLEASE TAKE NOTICE that the foregoing MOTION FOR NEW TRIAL PURSUANT TO NRS 176.515(3) BASED ON THE GROUNDS OF NEWLY DISCOVERED EVIDENCE will be heard on 16 day of April, 2018, at 8:00 AM in Department No. VIII District Court.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

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EXHIBIT I

DECLARATION OF SHARON G. DICKINSON

1. I am an attorney licensed to practice law in the State of Nevada; I am a deputy public defender assigned to handle the appeal of this matter; I am familiar with the procedural history of this case.

2. Our office filed the Notice of Appeal in this matter on April 10, 2017.

3. On November 15, 2017, while working on Alfred Harvey's appeal of this case, I found Court Exhibit 1 which is a note from the jury asking clarification of the definition of "by means of force or violence or fear of injury." Exhibit A. I did not find this document discussed in the trial transcripts.

4. On November 15, 2017, I contacted the trial attorney, Ms. Spells, and she told me she did not know about the jury note. Subsequently, her co-counsel, Ms. Jones agreed that she had never seen the jury note.

5. On November 15, 2017, another attorney filed a substitution of attorney motion with the Nevada Supreme Court; and, our office was removed from Alfred Harvey's appeal on December 4, 2017. On January 2, 2018, the new attorney filed a motion to withdraw. The Nevada Supreme Court granted his motion on January 25, 2018, and remanded the case to district court for appointment of counsel.

6. On or about February 14, 2018, the Clark County Public Defender's Office was reappointed. On March 5, 2018, I was reassigned to handle Albert Harvey's appeal,

7. Ms. Spells was on FMLA from mid-December until March 26, 2018. Therefore, I was unable to meet with her before that date. Ms. Spells met with me on March 30, 2018, and subsequently prepared an affidavit for the motions I wrote for filing in district court.

8. On April 3, 2018, I gave our secretary two motions to file in district court: (1) Motion to Reconstruct the Record and (2) Motion for a New Trial and Motion for Evidentiary Hearing and Motion to have Judge Bixler decide the motions. Our secretary filed the motions on April 5, 2018. We currently have a hearing date set for April 16, 2018.

9. Since the filing of the motions, the prosecutor contacted me about the possible need for a continuance. Because I am seeking an evidentiary hearing with Judge Bixler, who is a senior judge, I believe the April 16, 2018, hearing will need to be continued to fit his schedule.

10. It is important that I seek to reconstruct the record regarding the note from the jury so that I can thoroughly brief the issue on direct appeal. As it stands now, there is nothing in the record to indicate how the jury note was made Court Exhibit 1 and the trial attorneys indicate they were never told about the jury note by the trial court.

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I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 9th April, 2018,

By: /s/ Sharon G. Dickinson
SHARON G. DICKINSON