

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

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ALFRED C. HARVEY,	)	Electronically Filed
	)	Jun 22 2018 10:48 a.m.
Appellant,	)	Elizabeth A. Brown
	)	Clerk of Supreme Court
vs.	)	Case No. 72829
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

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**APPELLANT’S REPLY MOTION**  
**SEEKING ORDER ALLOWING RECONSTRUCTION OF THE**  
**RECORD AND REMAND BACK TO DISTRICT COURT FOR AN**  
**EVIDENTIARY HEARING; OR AN ORDER ALLOWING HIM TO**  
**USE THE AFFIDAVITS AND DECLARATIONS PRESENTED TO**  
**THE DISTRICT COURT FROM THE JURORS, THE**  
**INVESTIGATORS, AND HIS TRIAL ATTORNEYS.**

Comes Now Appellant ALFRED C. HARVEY, by and through Chief Deputy Public Defender SHARON G. DICKINSON, and pursuant to NRAP 10(c) and NRAP 27 files this Reply to State’s Opposition. Alfred asks this Court to remand his case back to district court for an evidentiary hearing before his trial judge, Judge Bixler. Alternatively, he asks this court issue an order allowing Alfred to use in his appeal the declarations and affidavits he obtained from jurors, the investigator, and his trial attorneys which were included in his motion to reconstruct the record filed in district

court. This Motion is based on Points and Authorities, Exhibits, Affidavits, Declaration, and documents on file in this case.

DATED this 22 day of June, 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

## POINTS AND AUTHORITIES

NRAP 10(c) allows for reconstruction, clarification, correction, or modification of a trial court record to reflect what “truly” occurred. Additional documents may be added if the trial court record is incorrect or inadequate. *See Lopez v. State*, 105 Nev. 68, 769 P.2d 1276 (1989) (reconstruction of trial testimony); *Philips v. State*, 105 Nev. 631, 782 P.2d 381 (1989)(statement regarding race of jurors); *Quangbengboune v. State*, 220 P.3d 1122 (Nev. 2009)(new translation of trial testimony). Thus State’s assertion that NRAP 10(c) and legal authorities do not support Alfred’s request to reconstruct the trial record to include the trial attorney’s affidavits and jurors’ and the investigator’s statements is incorrect.<sup>1</sup> Oppo:1;3-4.

State asks this Court to interpret NRAP 10(c) to mean *any judge* in the district court may decide a NRAP 10(c) motion to reconstruct, clarify, correct, or modify a trial court record. Oppo:2. State contends that even if the trial judge is available to make a ruling, Alfred is only entitled to a decision from a judge in the same district court – not the trial judge. Oppo:2.

However, the plain meaning of the words in NRAP 10(c) and the purpose behind the rule indicate otherwise. “[R]ules of statutory construction apply to court rules.” *Weddell v. Stewart*, 127 Nev. 645, 651

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<sup>1</sup> State also argues Alfred is trying to change the record. OPPO:2. However, NRAP 10(c) allows the record to be changed to “*truly disclose what occurred in district court.*”

(2011). Court rules, like statutes, must be given their plain meaning and construed as a whole. *Mangarella v. State*, 117 Nev. 130, 133 (2001). Court may not look beyond the statute for a different meaning if language is plain and unambiguous. *McNeill v. State*, 375 P.3d 1022, 1025 (Nev. 2016).

NRAP 10(c) states:

(c) Correction or Modification of the Record. *If any difference arises about 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 record conformed accordingly.* Questions as to the form and content of the appellate court record shall be presented to the Clerk. (Emphasis added)

State contends the words “*that court*” in NRAP 10(c) mean *any district court*. Oppo:2. However, in legal writings, the word “court” is used interchangeably with the word “judge.” *Howard v. State*, 83 Nev. 53, 56 (1967); EDCR 5.102. Therefore, “*that court*” means “that judge,” the who heard the hearing or trial.

This interpretation of NRAP 10(c) comports with its purpose. The purpose of NRAP 10 is to correct, reconstruct, clarify, or modify the *trial court record* to conform to what “*truly...occurred in the district court.*” The best person to determine if there is a *difference* between what the trial court record says and what “*truly...occurred*” is the judge who handled the district court trial or hearing. Accordingly, when NRAP 10 (c) indicates the

*difference in the record “shall be submitted to and settled by that court and the record conformed accordingly,” the words “that court” mean the judge who previously handled the hearing or trial.*

Not only does the plain meaning of the words in NRAP 10(c) lead to this conclusion, the words not used support this meaning. “[E]xpressio unius est exclusio alterius,’ expression of one thing is the exclusion of another.” *State v. Javier C.*, 289 P.3d 1194, 1197 (Nev. 2012) *citing Cramer v. State, DMV*, 240 P.3d 8, 12 (Nev. 2010). NRAP 10(c) does not say a different district court may decide if the record needs to be corrected. NRAP 10(c) does not say the district court record may be corrected, reconstructed, clarified, or modified by “any court” or by “any district court” – it simply says say “*by that court.*” Accordingly, Alfred must go to the same district court trial judge, Judge Bixler, rather than to any judge as State contends.

Because Alfred followed the rules of NRAP 10 and asked for “*that court*” to decide his motion, the non-trial judge’s decision to deny his request means he must now ask this Court for reconstruction or a remand. In a similar situation during an appeal, this Court remanded the case back to district court to hold an evidentiary hearing and to provide the Appellant with the requested information denied by the district court. *Afzali v. State*,

326 P.3d 1, 1–4 (Nev. 2014). Accordingly, Alfred asks this Court to remand his case back to district court to Judge Bixler for a decision on his motion to reconstruct and to hold an evidentiary hearing.

State’s blatant failure to address Nevada’s controlling authority as cited by Alfred in his motion, is a concession of error. *Polk v. State*, 126 Nev. 180, 182 (2010). Instead, State cites *U.S. v. Elizalde-Adame*, 262 F.3d 637, 640 (7<sup>th</sup>. Cir. 2001) and *United States v. Walker*, 601 F.2d 1051, 1054 (9<sup>th</sup> Cir. 1979), arguing Fed. R. 10(e) does not support Alfred’s claim. Both federal cases are distinguishable. In *Elizalde-Adame*, defendant failed to reserve her right to appeal a motion to suppress. In *Walker*, government sought to add facts that occurred after the appeal was initiated. In contrast, here, there is a jury note that is part of district court record but the record is barren of what the court did about the note. Thus, nothing is being added, the record is being clarified or reconstructed to show what occurred.

In *Preciado v. State*, 318 P.3d 176 (Nev. 2018) and *Daniels v. State*, 119 Nev. 498 (2003) the omission of bench conferences was not harmful because there was sufficient argument on the record for court to use when evaluating the issues raised on appeal. Here, the record is silent as to what occurred with the jury note, precluding Alfred from obtaining meaningful review on this issue.

State's suggestion that Alfred may only use a motion for a new trial as a remedy would mean that NRAP 10(c) has no power to allow the district court to reconstruct an unclear record.

Because the non-trial judge in this matter refused to allow the trial judge to make a decision and refused to allow an evidentiary hearing, here, as in *Afzali*, Alfred was prohibited from obtaining the information he needed for his issue on appeal involving the jury note and remand is necessary. Alternatively, this Court may add to the record the declarations and affidavits from jurors, the trial attorneys, and investigator.

DATED this 22 day of June, 2018.

PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

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

## **CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 22 day of June, 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 C. HARVEY  
NDOC No. 1174900  
c/o Southern Desert Correction Center  
P.O. Box 208  
Indian Springs, NV 89070

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