

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jun 26 2018 09:42 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 MOTION SEEKING A REMAND TO
DISTRICT COURT 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 to allow Court to
remand his case to district court based on the reasons cited in Alfred's
Motion filed on 06/18/18. Alternatively, if Court denies his Motion filed

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on 06/18/18, Alfred asks to be allowed to file his Opening Brief 30 days from the Order of denial. This Motion is based on the attached Declaration, Exhibits, and on all documents on file in this case.

DATED this 25 day of June, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

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

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. The request for a stay or extension is based on information that was missing from the district court record.

3. During the appellate process, on 11/15/17, I 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." At the top of the note, was a typed response: "The Court is not at liberty to supplement the evidence." When I spoke to the trial attorneys, neither knew about the jury note and said the trial court never notified them of the note.

4. Shortly after discovering the note, Alfred hired another counsel. The Public Defender's Office was removed from his case but later re-assigned to handle his appeal on 02/21/18 when his other attorney withdrew. Because Alfred's trial counsel was out of the office on FMLA, I was unable to obtain her affidavit regarding the jury note until after 03/26/18. Trial Counsel indicated the trial court never told her or co-counsel about the jury note.

5. On 04/10/18, Alfred filed a motion in this Court, seeking a stay of appellate proceedings in the Nevada Supreme Court while he litigated a motion to reconstruct the record and a motion for a new trial in district court. He alternatively asked for an extension to file the Opening Brief.

6. On 04/20/18, this Court denied Alfred's request for a stay but granted an extension to allow Alfred time to litigate his motions in district court. Court directed the Opening Brief be filed today.

7. If the district court had allowed the trial judge decide Alfred's motions, the brief and appendix would likely have been completed today. However, in district court on 04/16/18 and 04/30/18, Alfred was denied the chance for the trial court to hear his motions. *Exhibit A*. At these hearing, the non-trial judge refused to set a hearing for the trial judge to decide the motions and he also denied an evidentiary hearing. The non-trial judge held the hearing on the motions himself and then prohibited Alfred from using, in his appeal, the information learned by the parties regarding the jury note. Alfred had obtained information through an investigator and filed declarations from jurors, the investigator, and trial attorneys. *Exhibit B*.

8. Because the district court refused to allow the trial judge to decide the trial matters, Alfred filed a motion with this Court asking his case

be remanded back to district court for a decision before the trial judge. The motion was filed on 06/18/18. State filed an Opposition on 06/20/18. Alfred filed a Reply on 06/22/18.

9. Alfred is waiting for this Court's decision.

10. As it stands, based on the non-trial judge's ruling, Alfred is required to pretend the record in this case contains no information as to what occurred with the jury note and may only acknowledge the note exists without referencing the juror's declarations, the investigator's declaration, and the trial attorney's affidavit. Alfred seeks to use the information he uncovered about the jury notes in his appeal. Thus, Alfred filed a motion with this Court seeking a ruling or remand back to district court for a hearing before the trial judge. *See Exhibit B – Motion without exhibits filed on 06/18/18.*

11. This motion is not made for the purpose of delay.

DATED this 25 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
(702) 455-4685

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 25 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 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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

April 16, 2018

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

April 16, 2018 8:00 AM All Pending Motions

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

COURT CLERK: Carol Donahoo

RECORDER: Gina Villani

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- DEFT.'S MOTION FOR NEW TRIAL PURSUANT TO NRS 176.515 BASED ON GROUNDS OF NEWLY DISCOVERED EVIDENCE AND MOTION FOR EVIDENTIARY HEARING AND DECISION BY TRIAL JUDGE . . . DEFT.'S MOTION TO RECONSTRUCT THE RECORDS AND MOTION ASKING TRIAL JUDGE TO MAKE A DECISION IN THIS MATTER

Brian Schwartz, Dep DA, present on behalf of the State; Sharon Dickinson, Chf Dep PD, and Jasmin Spell, Dep PD, present on behalf of Deft. Harvey, who is not present. Deft. is incarcerated in the Nevada Department of Corrections (NDC). Ms. Spells requested that the Deft.'s presence be WAIVED.

This is the time set for hearing on the above-named motions; Mr. Schwartz advised that the State has not had an opportunity to respond to the motions but will get their Oppositions filed today. With regard to the trial judge hearing the motions, the State submits.

Ms. Spells advised that the Defense is requesting that this Court set this matter at a time when Judge Bixler would be available to hear it; she understands that Judge Bixler is a Senior Judge but he is the Judge who presided over the trial. This case was heavily litigated; the matter was originally assigned

PRINT DATE: 04/24/2018

Page 1 of 2

Minutes Date: April 16, 2018

to Judge Miley, who heard and decided most of the motions. The matter was then sent to Overflow, picked up by this Department, and heard by Judge Bixler. The issue that the parties are dealing with occurred during the trial and that is why they believe Judge Bixler should be the one to decide it because he is the one who is most familiar with the facts and circumstances of the underlying issue.

Court noted that the newly discovered evidence is the note from the Jury, which reads as follows: "Can we have elaboration on the definition, by means of force or violence or fear of injury." To which the Court responded, "The Court is not at liberty to supplement the evidence." Defense claims that they never saw the question and were not consulted on a possible answer to the question.

Colloquy as to whether or not the Court is at liberty to supplement the Jury Instructions; Ms. Spells believes there are numerous arguments she could make in support of the Jury's question but she would like an opportunity to see the State's Oppositions and respond before this Court makes a final determination. COURT ORDERED, Motions CONTINUED.

NDC

CONTINUED TO: 04/30/18 8:00 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

April 30, 2018

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

April 30, 2018 8:00 AM All Pending Motions

HEARD BY: Smith, Douglas E.

COURTROOM: RJC Courtroom 11B

COURT CLERK: Carol Donahoo

RECORDER: Gina Villani

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- DEFT.'S MOTION FOR NEW TRIAL PURSUANT TO NRS 176.515 BASED ON GROUNDS OF NEWLY DISCOVERED EVIDENCE AND MOTION FOR EVIDENTIARY HEARING AND DECISION BY TRIAL JUDGE . . . DEFT.'S MOTION TO RECONSTRUCT THE RECORDS AND MOTION ASKING TRIAL JUDGE TO MAKE A DECISION IN THIS MATTER

Brian Schwartz, Dep DA, present on behalf of the State; Sharon Dickinson, Chf Dep PD, and Jasmin Spells, 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 hearing on Deft.'s Motion for New Trial and Motion to Reconstruct the Record. Upon Court's inquiry, Ms. Spells advised that the newly the newly discovered evidence is the note from the Jury that was marked as an exhibit. Counsel found the note during the appellate process and the parties were not notified at the time the Jury was deliberating that there was a question. The noted said, "Can we have elaboration on the definition, by means of force or violence or fear of injury," which is one of the elements of a robbery charge. At the top of the note the Court's response was as follows: "The Court is not at liberty to supplement the evidence."

Ms. Dickinson advised that in the note, the Jury was asking for a legal definition but the response had to do with evidence so that is not what they were asking for. Ms. Dickinson believes the Court should have brought the trial attorneys back into court to look at the instruction, formulate an answer, and

decide what to do; she discussed NRS 175.451, *Gonzales v. State*, and *Jeffries v. State*. When the parties were last present, the Court indicated that Judge Bixler did not remember this case so Defense Counsel spoke with a few of the Jurors; Supplemental Points and Authorities were submitted. The Jurors remember giving the note and one of the Jurors made comments about the response given by the Court's Marshal, which brings up further concern because the trial attorneys were not made aware of any of this because none of it is a part of the record. Therefore, Ms. Dickinson believes an Evidentiary Hearing is necessary to ascertain why the procedures were not correctly followed and what happened with the note.

Colloquy; the Court believes that "The Court is not at liberty to supplement the evidence" is the appropriate response to the question and that it is not new evidence; the appropriate evidence and arguments were presented at the time of trial, there is no new evidence. Although a mistake may have occurred, what difference would it have made because if the trial attorneys would have been brought back into court, the response the Court gave would have been the response of the trial attorneys.

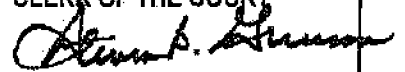
Ms. Spells advised that the note is not evidence but a clarification on what the law is. The Jury is the trier of fact and the Court informs the Jury on what the law is. Ms. Spells believes that the Jury was confused as to what the law was. If Defense counsel would have had the opportunity, they would have objected to the Court's response to the note, directed the Jurors to the appropriate Jury Instruction, or proffered new ones. Court noted that the Jury Instructions cannot be supplemented once the Jury begins their deliberations. COURT ORDERED, the Motion is DENIED.

Ms. Spells advised that there is an additional argument; Defense counsel believes there was possible misconduct because the Deft. was aware that there was a holdout Juror prior to the Jury coming back with a verdict. Additionally, in speaking with some of the Jurors, they indicated that there were additional conversations between the Jurors and the Court's Marshal about procedural aspects and he may have provided them with his cell phone number. Defense Counsel was not made aware of the conversations; they should have been done in writing or placed on the record, neither occurred and the cell phone issue also needs to be explored. Therefore, Ms. Spells is requesting that the Court set an Evidentiary Hearing. COURT FURTHER ORDERED, the prior ruling STANDS, the Motion is DENIED. State to prepare Findings of Fact and Conclusions of Law consistent with their Opposition.

With regard to the Motion to Reconstruct the Records, Ms. Dickinson advised that Defense Counsel needs to have the record reconstructed to determine how the note ended up in the District Court's evidence vault; there is nothing in the record which explains that; colloquy. COURT ORDERED, Ms. Dickinson is free to file a reconstruction; however, her request to use the Declarations from the Jurors is DENIED. State to prepare the Order.

NDC

EXHIBIT B



1 **ORDR**

2 Judge Douglas E. Smith
3 Eighth Judicial District Court
4 Department VIII
5 Regional Justice Center
6 200 Lewis Avenue
7 Las Vegas, Nevada 89155
8 (702)671-4338

DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,
9 Plaintiff,

10 -vs-

11 ALFRED HARVEY,
12 #7013098

13 Defendant.

CASE NO: C-16-314260-1

DEPT NO: VIII

14 **ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL AND**
15 **DEFENDANT'S MOTION TO RECONSTRUCT THE RECORD**

16 DATE OF HEARING: April 30, 2018
17 TIME OF HEARING: 8:00 A.M.

18 THIS MATTER, having come on for hearing before the above entitled Court on the
19 30th day of April, 2018, the Defendant not being present, represented by JASMIN SPELLS
20 and SHARON DICKINSON, Deputy Public Defenders, the Plaintiff being represented by
21 STEVEN B. WOLFSON, District Attorney, through BRYAN SCHWARTZ, Deputy District
22 Attorney, and the Court having heard the arguments of counsel and good cause appearing
23 therefor,

24 THIS COURT FOUND the allegations presented by Defendant did not constitute new
25 "evidence," the Court having found that Judge Bixler does not recall the jury question.

26 THIS COURT HAVING FURTHER FOUND that in response to the discovered jury
27 question, Judge Bixler did not remember whether or not the question was presented to
28 attorneys.

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DOUGLAS E. SMITH
DISTRICT JUDGE

DEPARTMENT EIGHT
LAS VEGAS NV 89155

1 THIS COURT HAVING FURTHER FOUND that even if the question was presented
2 to the attorneys, the question held the notation "The Court is not at liberty to supplement the
3 evidence" would have been the proper and legal response to respond to the jury inquiry,
4 attached as Exhibit A.

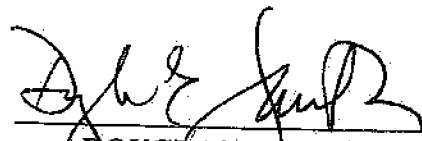
5 THIS COURT HAVING FURTHER FOUND that the Defendant failed to show that a
6 different outcome would have been probable;

7 IT IS HEREBY ORDERED that the Defendant's Motion for New Trial shall be and it
8 is Denied.

9 THIS COURT HAVING FOUND that the Defendant failed to show that it was
10 necessary to reconstruct the record, and that it would be unfair to allow the Defendant to
11 reconstruct the record using the juror affidavits;

12 IT IS HEREBY ORDERED that the Defendant's Motion to Reconstruct the Record
13 shall be and it is Denied.

14 DATED this 4th day of May 2018.


15
16 

17 DOUGLAS E. SMITH
18 DISTRICT COURT JUDGE

19
20 CERTIFICATE OF SERVICE

21 I hereby certify that on the 4th day of May 2018, a copy of this Order was
22 electronically served to all registered parties in the Eighth Judicial District Court
23 Electronic Filing Program and/or placed in the attorney's folder maintained by the
24 Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid,
by United States mail to the proper parties or per the attached list as follows:

25 Bryan Schwartz, bryan.schwartz@clarkcountynv.gov
26 DA motions, Motions@clarkcountynv.gov
27 Jasmin Spells, lillyjd@clarkcountynv.gov
28 Sharon Dickinson, dickinsg@clarkcountynv.gov


Jill Jacoby, Judicial Executive Assistant

The Court is not at liberty to supplement the evidence.

Can we have
abduction on the
definition, by
means of force or
violence or fear of
injury.

Michelle Moline

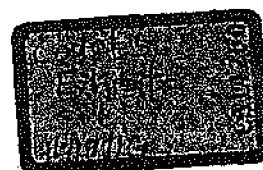


EXHIBIT C

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY,)	
Appellant,)	
)	Case No. 73829
vs.)	Electronically Filed
THE STATE OF NEVADA,)	Jun 18 2018 10:31 a.m.
Respondent.)	Elizabeth A. Brown
)	Clerk of Supreme Court

**APPELLANT'S MOTION SEEKING AN ORDER ALLOWING
RECONSTRUCTION OF THE RECORD AND REMAND BACK TO
DISTRICT COURT FOR AN EVIDENTIARY HEARING; OR AN
ORDER ALLOWING USE OF 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 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 to issue an order allowing Alfred to use in his appeal the declarations and affidavits he obtained from jurors, the investigator, and trial attorneys which were included in his motion to reconstruct the record. This Motion is based on Points and Authorities, Exhibits, Affidavits, Declaration, and documents on file in this case.

DATED this 15th of June, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER
By /s/ Sharon G. Dickinson
SHARON G. DICKINSON, #3710

POINTS AND AUTHORITIES

I. FACTS

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. None of the trial attorneys knew anything about the note.¹ The jury note said: “Can we have elaboration on the definition by means of force or violence or fear of injury. Michelle Moline.” At the top of the note, was a typed response: “The Court is not at liberty to supplement the evidence.”

On April 5, 2018, Alfred filed a Motion to Reconstruct the Record, asking the trial court to make a record explaining how the jury note became a court exhibit for the trial. *Ex A.* State filed an Opposition. *Ex B.* Alfred filed a Reply on April 23, 2018. *Ex C.* Because his trial was heard by Judge Bixler, who is a senior judge, Alfred asked that Judge Bixler decide his motions. Thereafter, on April 27, 2018, Alfred filed a Supplemental to his Reply. *Ex D.*

In his Supplemental Motion, Alfred included Declarations from three jurors and his investigator. *Ex D.* He obtained these declarations through

¹ Subsequent to Appellate Counsel finding the note, Alfred hired another attorney who later withdrew from his appeal. His current appellate attorney was not reassigned until 03/05/18 and his trial attorney was out of the office until 03/26/18. *See Exh A (Exh F within).* For these reasons, there was a delay in filing the motion to correct the record.

his investigator who attempted to contact the jurors to learn about the jury note.

Juror Change said someone told her that the jury foreperson, Michelle Moline telephoned the Marshall during the first day of deliberations regarding a procedural issue. During the second day of jury deliberations, the Marshall entered the jury room, closed the door, and asked if the person with a procedure issue wanted to talk to the judge then the judge would talk to them. However, no one spoke with the Judge. She remembered someone telling her that the jury foreperson contacted the Marshall during the second day of deliberations also. Juror Change remembered a question being asked about a definition but did not remember if it was in written form. However, they received an answer within 5-10 minutes of asking the question. *Exh D*.

Juror Wortham-Thomas remembered a note being given to the Marshall on the second day of jury deliberations. *Exh D*.

Jury foreperson, Michelle Moline said that on the second day of jury deliberations, she wrote a note for the Marshall to give to the judge. She identified the handwritten note which was later made a court exhibit as the note she wrote. Ms. Moline indicated the Marshall returned with a response about an hour later. The Marshall told the jury that they could not elaborate

and told them this was asked and answered. Shortly after receiving the Marshall's response, the jury returned with a verdict. *Exh D.*

There were two district court hearings involving Alfred's motions for a new trial and motion to reconstruct the record. At the first hearing, on April 16, 2018, the non-trial judge indicated he spoke to the trial judge, Judge Bixler, and Judge Bixler did not remember the jury note which was part of the district court record. The court continued the hearing to allow the State to file an Opposition and give the Defense a chance to respond. *Exh E.*

On April 30, 2018, the non-trial judge denied Alfred's motion to reconstruct the record and his motion for a new trial and declined to allow the trial judge to rule on Alfred's motions. In making his rulings, the non-trial judge prohibited Alfred from using the information he learned from the three jurors. *Exh F.* The non-trial judge said:

No, because I don't think that's fair to go back and say this happened and ask for specific times and stuff. I just don't think that's fair to either - - to justice.

Should that question have been asked? Yeah, it should have.

Did some telephone - cell numbers be given? Yes, I'm sure that happened because all of the marshals have to get their telephone numbers to call jurors in case they don't show up.

I don't see a need to reconstruct it and that motions denied.
Exh F.

On May 4, 2018, the non-trial judge filed an order denying Alfred's motion to reconstruct the record. *Exhibit G*. In his order, the non-trial judge said:

This Court having found that the Defendant failed to show that it was necessary to reconstruct the record, and that it would be unfair to allow the Defendant to reconstruct the record using the juror affidavits. *Exh G*.

In this motion, Alfred asks that his case be remanded to district court for an evidentiary hearing with the trial judge, Judge Bixler, and let Judge Bixler decide his motions.

Alternatively, Alfred seeks relief from this Court to allow him to use the information he uncovered about the jury note as facts occurring at his trial. Alfred needs to incorporate these facts in his brief for the issue being raised that he was denied due process because he was not informed about the note and not allowed to suggest a response. State has not disputed the facts. He also seeks to use the investigator and trial attorney's affidavits or declarations.

II. RECONSTRUCTION OR CLARIFICATION OF THE RECORD.

NRAP 10 states in pertinent part:

(a) The Trial Court Record. The trial court record consists of the papers and exhibits filed in the district court, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk.

...

(b) The Record on Appeal.

(1) The Appendix. For the purposes of appeal, the parties shall submit to the clerk of the Supreme Court copies of the portions of the trial court record to be used on appeal...

...
(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.

Because Alfred seeks to correct or reconstruct the trial record, he is required to go before the trial judge. NRAP 10(c). The trial in this case was handled by a senior judge, Judge Bixler, who would be the person under NRAP 10(c) with the responsibility to correct or modify the trial record. In this instance, even though Alfred asked the non-trial judge to allow the trial judge to decide the motions he filed, the non-trial judge declined his request saying Judge Bixler did not remember. Judge Bixler's alleged lack of memory may mean he was never notified about the note – which presents another serious issue.

Allowing a non-trial judge to decide an NRAP 10 motion when the trial judge is available is contrary to the rule. Here, the non-trial judge provided no record as to what the trial judge did or did not remember. Moreover, due to his lack of understanding of the facts of the trial, the non-trial judge reached an incorrect decision on the merits of the motions,

A trial court has the authority to reconstruct off the record discussions or missing objections and arguments and to clarify the rulings in order to protect Alfred's right to due process on appeal and to ensure that he is given the correct standard of review on appeal. 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 by the trial court. 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 compose a statement regarding the race of the prospective jurors to support his *Batson* claim when the record did not include any reference to the race of the prospective jurors). Additionally, in *Quangbengboune v. State*, 220 P.3d 1122 (Nev. 2009), the Court held that the trial record could be modified or corrected when inaccuracies in the interpreter's translations of the defendant's testimony were verified during the appellate process. The *Quangbengboune* Court held that the defendant could bring a motion in district court pursuant to NRAP 10 (c) to correct the record. In view of this, NRAP 10(c) and legal authorities support Alfred's request to

reconstruct the trial record to include the jurors' and the investigator's statements. Thus, the non-trial judge's decision that it is unfair and unnecessary to reconstruct the record in this case is contrary to the law.

The result of the non-trial judge's decision means the trial record currently contains no information on Court Exhibit 1 – the note from the deliberating jury – or the process used to respond to the note. Alfred Harvey's trial attorneys had no knowledge of the jury note or the process undertaken that allowed someone to give a message to the deliberating jury. *See Exhibit A (Exhibits D and E within)*. Yet, we also know the truth of the matter is that the Marshall had interaction with the jury about the note because the jurors told us about the conversations. And we know the trial court never informed the attorneys.

The process of responding to jury notes as used by the trial court and the Marshal in this case conflicts with NRS 175.451. The Legislature enacted NRS 175.451 to allow the jury to receive additional information on the law if confused. Accordingly, in *Gonzales v. State*, 366 P.3d 680, 682 (Nev. 2015), the Nevada Supreme Court held: [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.” However, no error occurs if the Defense does not provide the court with proffered instructions to clarify the jury’s doubt or confusion. *Jeffries v. State*, 397 P.3d 21, 28 (Nev. 2017), *reh’g denied* (Sept. 29, 2017). Therefore, Alfred should have been informed of the note so he could proffer instructions.

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.

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.

If Alfred had been notified of the jury note by the trial court he would have proffered instructions. His trial attorney outlined what measures she

would have taken in her affidavit for the motion to reconstruct. Ms. Spells said:

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 responded that the evidence could not be supplemented...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.

Specifically, I would have requested that the Court direct the jury to jury instructions 6, 11, and 12...

I also would have also requested the Court supplement the jury instruction packet with the jury instructions...[that were proposed but not used at trial]...

I would have also requested the court give the jury the *Crane* jury instruction...

Additionally, I would have requested that the Court give the legal definitions of force, fear and violence as defined in Black's Law Dictionary...

See Exhibit A (Exhibit E filed within) for trial attorney's complete affidavit.

On appeal Alfred intends to argue that reversible error occurred by court instructing the jury without first obtaining his attorney's input. However, based on the non-trial judge's order, Alfred is prohibited from mentioning the information he obtained from the jurors. Also he did not obtain a ruling from the trial court on the instructions he indicated he would have offered if asked.

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 or at a minimum an evidentiary hearing. *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.

Here, however, Alfred was denied an evidentiary hearing to determine what the Marshall did about the jury note and what he said to the jury. The Marshall was not required to explain. Only the non-trial judge spoke to the trial judge. Thus, whatever happened behind the scenes involving the jury note is not being revealed to Alfred by the court.

The non-trial judge's decision to prohibit Alfred from using the facts he uncovered violates Alfred's rights on appeal because he is required to pretend he does not know what the jurors and his investigator said. In doing so, he will be saddled with a lower standard of review and this Court will

make a decision based on incorrect facts. The information Alfred uncovered is worthy of an evidentiary hearing before the trial judge, Judge Bixler.

III. CONCLUSION

In view of the above, Alfred Harvey 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 to 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 motions filed in district court.

DATED this 15th day of June, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Sharon G. Dickinson
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 15 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 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