IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	No. 72829, 75911

PETITION FOR REVIEW

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PETITION FOR REVIEW

COMES NOW Appellant ALFRED C. HARVEY, by and through Chief Deputy Public Defender SHARON G. DICKINSON, and timely petitions, pursuant to NRAP 40B(c), this Honorable Court for a review of the Order Denying Rehearing, from the Court of Appeals, issued in this case on 11/21/19. This petition is filed within 18 days of the decision and is based on the following Memorandum of Points and Authorities and all papers and pleadings on file in this case.

Dated this 9 day of December, 2019.

Respectfully submitted,

DARIN F. IMLAY,
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Sharon G. Dickinson*
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MEMORANDUM OF POINTS AND AUTHORITIES

I. JURISDICTION

Court of Appeals (COA) issued an Order affirming Alfred Harvey's robbery conviction on 09/18/19. (Docket 19-38883). Alfred filed a Petition for Rehearing (Docket 19-41473) which COA denied on 11/21/19. (Docket 19-47639). Alfred now files this Petition for Review. See NRAP 40B(c).

II. QUESTIONS PRESENTED

1. Does a material variance exist when the Information alleges the defendant stole "miscellaneous clothing items" and no clothing items were taken?

2. Does NRS 175.101 allow a district court judge who did not hear the trial decide post-verdict motions when the trial judge is not disabled or absent from the judiciary district?

3. If the defendant finds a jury note showing undisclosed communications between the trial court and the deliberating jury, is the district court required to hold an evidentiary hearing and reconstruct the record?

III. FACTUAL BACKGROUND

Alfred was convicted of robbery as follows:

> ...on or about the 30th day of March, 2016...did willfully, unlawfully, and feloniously take personal property...:

> *miscellaneous clothing items*, from the person of Julian Munoz, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of Julian Munoz, with use of a deadly weapon, to-wit: a knife, defendant using force or fear to obtain or retain possession of the property, to prevent or overcome resistance to the taking of the property, and/or to facilitate escape.

I:184-85;II:252. (Emphasis added). Jury found Alfred guilty of robbery without use of a deadly weapon. II:282.

This is a shoplifting case. Juan Munoz, a security officer for TJ Max, watched Alfred on closed circuit television inside the store. IV:693-785. Munoz testified that Alfred erratically picked up items then put them down without looking at the price tags. IV:699-702. Munoz claimed he saw Alfred conceal three men's wallets inside his coat and a jar of women's face cream in his left pocket. IV:702-03;710-15;749.

Munoz stopped Alfred when he left the store, asking for the unpaid merchandise. IV:724;765. According to Munoz, Alfred "claimed that he had put the merchandise back down in the store, which is when I told him that I need the wallets out of his coat and [he] handed two of them to me." IV:725;765-66.

Alfred refused to go back inside with Munoz. IV;725;727;767;777-78. Munoz claimed Alfred then pulled out a knife. Munoz backed away, called 911, and watched Alfred walk to a U-Haul with his children and drive

off. IV:729;731;764;793-5. Another security officer testified that he never saw a knife. IV:793.

Tara Harvey, Alfred's wife, waited for Alfred and the kids in a U-Haul on the parking lot. Tara said after they were inside the store for twenty minutes, she saw men run after Alfred and take pictures. IV:882-911. Tara asked Alfred what was going on and he said the security officer thought he had done something, but he had not done anything wrong. IV:908-11. Tara never saw Alfred with a knife. IV:887.

Errol Appel, the husband of the TJ Max store manager, was waiting outside the store when the commotion occurred. IV:814-40. He followed the U-Haul in his car as it left the parking lot and called 911. IV:818-24. He saw a man stop the U-Haul on a school parking lot, get out of the driver's side, run towards the school, and then back to the U-Haul. IV:824.

Several police units responded to the 911 calls including air detail. IV:868. Officer Humphreys arrived at the school parking lot, detained Alfred, and searched his person and the U-Haul. IV:858-74. No knives were found at the scene, on Alfred's person, nor in the U-Haul. IV:857;861. He recovered Alfred's wallet and identification. IV:866. Items from the truck were impounded and identified in Exhibit 2 and 3. IV:862;852-53.

At trial, Munoz testified he observed Alfred take the items from the store, as depicted in Exhibit 2: picture of a Tommy Hilfiger wallet, two fragrances, and cream. IV:737. However, he also said he only saw Alfred conceal three wallets and a face cream. IV:749;767. Munoz never testified that Alfred took clothing items and no clothing items were recovered.

During direct appeal, upon finding undisclosed written communications between the trial court and the deliberating jury in court file, Alfred filed a motion for a new trial/evidentiary hearing and a motion to reconstruct the record. He requested his motions be heard by the trial judge, Judge Bixler. His motions were denied by Judge Smith, a judge who did not hear the trial.

IV. REASONS REVIEW IS WARRANTED

A. Issue I, subsection B (1): material variance between allegations and evidence presented.

Court should hear this petition because COA's decision on Issue I, Subsection B(1) conflicts with prior decisions of the Nevada Supreme Court and United States Supreme Court: *Stirone v. United States*, 361 U.S. 212, 217 (1960) and *Jezdik v. State*, 121 Nev. 129, 140-41 (2005). NRAP 40(a)B(2). It also gives Court the opportunity to clarify *State v. Jones*, 96 Nev. 71, 74 (1980).

In the Opening Brief, in Issue I (B) (1), Alfred argued evidence was insufficient to convict him of robbery because he was charged with taking "miscellaneous clothing items" and no clothing was taken.

COA addressed this as a variance and "notice" issue rather than as a variance and sufficiency of the evidence issue. Order:4-5.

When reviewing a sufficiency of the evidence/variance issue, Court determines if the variance between the evidence presented and the allegations is material. A variance is material if the defendant is not: (1) definitely informed of the charges, and (2) protected against double jeopardy. *State v. Jones*, 96 Nev. 71, 74 (1980)(variance not fatal when State pled the incorrect name of buyer of narcotics).[1] The failure to prove factual allegations in an Indictment/Information that describe the specific manner in which the crime was committed is a fatal variance. *Butler v. State*, A19A1056, 2019 WL 5540941, at *4 (Ga. Ct. App. Oct. 28, 2019).

Here, we know the variance between the pleadings and proof was material because the court refused to amend the Information before trial. Court denied State's motion to amend the charges, saying:

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[1] *Jones* is a split decision. The *Jones* majority purported to be looking for a material variance between the pleadings and the evidence, but its analysis instead focused on notice requirements. The *Jones* minority correctly concentrated on the variance between the evidence and the Information and voted to reverse the conviction.

> ...defense has prepared based upon notice pleading that the Defendant committed the act of robbery...by stealing clothing items...[but] from the review of the information, there weren't any clothing items stolen, which is their whole defense...-because the State screwed this up and mistakenly alleged something that the facts don't support... – you can't do that hours from trial. III:508-09.

Thus, trial court acknowledged problems with the proof and pleadings before the trial began, made a finding that the facts did not support a conviction for "miscellaneous clothing items," and found a material variance between what was going to be proven at trial and the words in the pleadings. Court gave State the option to amend the Information and continue the trial or to proceed on the Information as pled. III:513.

State withdrew its request to amend the Information and decided to prove Alfred stole "miscellaneous clothing items." III:513-14. However, State only presented evidence that Munoz saw Alfred take three wallets and face cream; and, two fragrances were found inside U-Haul. IV:737;749;767.

When State presents evidence that is in variance with the charges then it fails to prove the crime beyond a reasonable doubt. *Jezdik at* 140–41(reversal of one count due to variance - defendant was charged with making three purchases at three stores but evidence showed one receipt was from a store not listed and on a different date); *Hayes v. State*, 65 So. 3d 486, 490–92 (Ala. Crim. App. 2010)(material variance occurred when

robbery victim identified the stolen property but that property was not listed in Indictment).

Likewise, in *Stirone v. United States*, 362 U.S. 212, 217 (1960), Court found error based on factual allegations presented that were not listed within the Indictment. In *Stirone*, the Indictment alleged the defendant violated the Hobbs Act by transporting sand across state lines. During the trial, the government presented testimony regarding the sand and how concrete made with the sand provided future interference with steel shipments in interstate commerce. Trial court instructed jury on both theories. United States Supreme Court reversed the conviction finding a significant variance between the pleadings and the evidence, noting allegations and proof must match.

Contrary to the holdings of *Jezdik* and *Stirone*, COA concluded that what items taken was of "little importance." Order:6. However, the "unlawful taking of personal property" is a material element of the crime of robbery, NRS 200.380, and the items taken describe the manner in which the crime was committed. Thus, if the alleged property described in the Information is not taken then the crime of robbery does not occur.

Also, a material variance exists because double jeopardy does not protect Alfred since he was only convicted of taking clothing items. Thus, State is free to charge him with taking wallets and face cream.

B. Issue V and VII: motion for a new trial/evidentiary hearing and motion to reconstruct the record.

Review is warranted because Issues V and VIII contain issues of "first impression of general statewide significance" and public importance; and, because COA's opinion is contrary to *Gonzalez v. State*, 366 P.3d 680 (2015). NRAP 40B (a). As a matter of first impression, Court must apply statutory construction analysis to NRS 175.101 and develop a structure for district courts to follow in future instances when undisclosed communications between the trial court and the deliberating jury are discovered during the appellate process.

1. Undisclosed communications between the deliberating jury and the trial judge.

During the appellate process, Alfred found a note in the district court trial exhibits that had been sent by the jury foreman to the court, asking: "Can we have elaboration on the definition by means of force or violence or fear of injury?" V:1021a. The trial court responded: "The Court is not at liberty to supplement the evidence." V:1021a. Trial court never told Alfred's attorneys or the prosecutors about the jury note. VIII:1481-85.

Upon finding the note, Alfred filed two motions: (1) motion for a new trial based on newly discovered evidence, requesting an evidentiary; and (2) motion to reconstruct.[2] VI:1022-1117; VIII:1464-1554. He asked that the trial court, Senior Judge Bixler, decide his motions. Judge Bixler sat in Judge's Smith's courtroom and had heard Alfred's trial while Judge Smith was away. Judge Bixler communicated with the jury during deliberations without informing Alfred. Judge Smith denied Alfred's motions.[3]

On appeal, COA found: (1) NRS 175.101 allowed any judge in the district court to decide Alfred's motions (Order:19-20); (2) the trial court's error in not informing the parties of the jury note was harmless (Order:16-17); (3) the trial judge did not abuse his discretion by not answering the jury's question (Order:17-18); and (4) Judge Smith did not abuse his discretion by denying Alfred's motion for a new trial. (Order:20-22). COA did not decide if Judge Smith abused his discretion by not granting Alfred's

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[2] State opposed both motions: VI:1555-1563(reconstruct); VI:1118-1356(new trial). Harvey filed replies and a supplemental motion: VIII:1564-1645 (reply to reconstruct); VIII:1646-1665 (supplement to reconstruct); VII:1357-1444 (reply to new trial); VII:1445-1463 (supplement to new trial).

[3] Hearings: VI:1683-881; VI:1689-99;*Minutes*-1679-82; Order at 1666-68.

NRAP 10(c) motion to reconstruct the record or in denying an evidentiary hearing.

2. NRS 175.101: depends on what the meaning of "if" is.

NRS 175.101 explains when another judge may decide a trial court's post-verdict motions when the trial judge is disabled:

> If by reason of absence from the judicial district, death, sickness or other disability **the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilty** or guilty but mentally ill, any other judge regularly sitting in or assigned to the court may perform those duties, but if such other judge is satisfied that he or she cannot perform those duties because he or she did not preside at the trial or for any other reason, the judge may in his or her discretion grant a new trial.

NRS 175.101(emphasis added).

Alfred argued that Judge Bixler should decide his motions because he was available. Judge Bixler was not dead, ill, or under a disability that prohibited him from handling court duties. Moreover, NRS 175.101 gave Alfred the right to have his motions decided by the trial judge rather than by a non-trial judge. *See Whitlock v. Salmon*, 104 Nev. 24, 26 (1988)(statutes confer a substantive right). Therefore, allowing a non-trial judge to decide a motion pursuant to NRS 176.515 or NRAP 10(c) when the trial judge was available to hear the matter violated his right to due process.

Using statutory construction analysis, COA interpreted one word in NRS 175.101 – "if." COA concluded "if" in NRS 175.101 meant "inclusively 'if', not exclusively 'only if.'" Order:20. Accordingly, COA decided the word "if" in NRS 175.101 allowed any judge to decide Alfred's motions. Additionally, without determining if NRS 175.101 created a substantive right for the defendant to have the trial judge decide his motion for a new trial or NRAP 10(c) motion, COA held that the judiciary had the inherent authority to decide its own docket. Order:20.

Court reviews questions of statutory interpretation de novo. If the plain meaning of the words in the statute are clear, the Court will not go beyond the statute to determine legislative intent. *McNeill v. State*, 132 Nev. 551, 555 (2016); *DeStefano v. Berkus*, 121 Nev. 627, 630 (2005); *Nay v. State,* 123 Nev. 326, 331 (2007). When a statute's language is plain and unambiguous, Court may not look beyond the statute for a different meaning. *McNeill* at 555.

When a sentence begins with the word "if", the word "if" must be read in context with the remaining words in the sentence because it expresses a condition – it is a conditional clause. *Bagnall v. Bagnall*, 148 Tex. 423, 426 (1949). The word "if" means "in the event that…allowing that…on the condition that..." https://www.merriam-

webster.com/dictionary/if. Thus, the word "if" is an introductory word expressing a condition that must be read with the following phrases or words in the sentence rather than analyzed in isolation.

Here, the word "if" is followed by a series of statements.[4] "When several nouns or verbs or adjectives or adverbs – any words – are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p. 195. This canon of statutory construction is called "'noscitur a sociis' [which] means that a word is known by the company it keeps." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 US 687, 693 (1995). Using this canon, a review of the beginning of the first sentence of NRS 175.101 shows that the similar meaning of the words "by reason of absence from the judicial district, death, sickness or other disability..." is that the predicate for allowing a non-trial judge to decide post-verdict matters is that the trial judge is unavailable due to a physical condition – a disability.

Also, by beginning with the word "if" followed by a series of statements, Legislature limited the ability of a non-trial judge to decide a

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[4] "If by reason of absence from the judicial district, death, sickness or other disability..."

trial judge's post-verdict motions. By expressing specific conditions, Legislature showed an intent to limit conditions to the ones listed or to a physical disability. "'[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). Thus, here, the only time a non-trial judge may make a decision on a case after verdict is if the trial judge is physically not available "by reason of absence from the judicial district, death, sickness or other disability…". This means, the court's docket is not a reason for refusing to allow a defendant to have his post-verdict motions decided by the trial judge.

Additionally, words in a statute must be construed as a whole so "not be read in a way that would render words or phrases superfluous or make a provision nugatory." *Mangarella v. State*, 117 Nev. 130, 133 (2001) *quoting Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502 (1990). By interpreting "if" to allow any judge to decide after verdict motions, COA rendered the entire sentence useless because it did not matter if a judge was available or not available.

The Legislature tells us the reason for this restriction in the last portion of NRS 175.101: "but if such other judge is satisfied that he or she cannot perform those duties because he or she did not preside at the trial or

for any other reason, the judge may in his or her discretion grant a new trial." By indicating that a non-trial judge may grant a new trial if he determines he is unable to perform the duties of the trial judge, Legislature gave a defendant the right to have someone familiar with his trial, like the trial judge, decide his post-verdict motions. "The judge who presided at trial is obviously the best qualified to determine the validity of the new trial motion and it makes no sense to have another judge hear it." *Abbott v. Mandiola*, 82 Cal. Rptr. 2d 808, 809 (1999). Thus, the last portion of NRS 175.101 gives a defendant a due process right to have his motions decided by his trial judge who is familiar with the facts and knows what the case is about.

Here, Judge Smith had no knowledge of the facts of the trial or about the jury note and response. There is no evidence that Judge Smith read the trial transcripts prior to deciding the motion for a new trial and NRAP 10(c) motion. Therefore, Judge Smith was unable to perform the duties of the trial judge and therefore should have granted the motion for a new trial or allowed Judge Bixler to preside over the motions.

COA also concluded that under the court's inherent authority, the judiciary may administer its own affairs – meaning, Judge Smith could hear all motions rather than Judge Bixler. However, COA appeared to come to

this conclusion by believing the case was assigned to a different judge. It was not reassigned.

While the court has the inherent authority to govern its own procedures, *Whitlock* noted that the Legislature may establish some rules. *Whitlock at* 211-12. Here, NRS 175.101 does not encroach on judicial prerogatives, does not violate the court's inherent authority, but confers a substantive right to the defendant.

3. No evidentiary hearing and no reconstruction equals error.

By denying Alfred's motion for an evidentiary hearing and reconstruction of the record, Judge Smith precluded Alfred from obtaining facts to allow him to effectively litigate his motion for a new trial.

There were two court hearings on the motions. At the first hearing, Judge Smith said he spoke to Judge Bixler, and Judge Bixler did not remember the note. Upon learning this information, Alfred obtained and submitted declarations from three jurors about the jury note.[5] VII:1462-65;VIII:1664.

At the second hearing, Judge Smith denied Alfred's motion to reconstruct the record, denied his request for an evidentiary hearing, denied

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[5] Juror Change: VII:1452-53;VIII:1653-54; Juror Wortham-Thomas: VII:1455-56;VIII:1656-57; Jury foreperson, Michelle Moline: VII:1458-60;VIII:1659-61.

his request for a hearing before the trial judge, and prohibited Alfred from using the information he learned from the jurors. VIII:1689-98. Judge Smith 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.

VIII:1698; Order at VIII:1666-68.

COA did not decide whether Judge Smith abused his discretion in refusing to allow an evidentiary hearing and/or to reconstruct the record. By ignoring this step in the process, COA failed to understand the importance of an evidentiary hearing and reconstruction of the record. By obtaining testimony from the Marshall during an evidentiary hearing, Alfred could learn what the Marshall did with the note, what he said to the jury, the time it took for the court to answer, any conversations the Marshall had with Judge Bixler, and why the parties were not called when the jury sent the note. He could also determine whether the Marshall's ex parte communicates with the deliberating jury was misconduct. *Lamb v. State*, 127 Nev. 26 (2011).

Furthermore, in reconstructing the record, court should have allowed Alfred to use the declarations from the jurors to show the timeline of events and what occurred with the Marshall and jury.

"This court has long recognized a petitioner's right to a post-conviction evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." *Mann v. State*, 118 Nev. 351, 354 (2002). Here, by prohibiting reconstruction and an evidentiary hearing, Judge Smith denied Alfred information he needed for his motion for a new trial.

4. Motion for a new trial.

(a) Undisclosed communications and nonresponse.

COA found that Judge Bixler's error in not informing the parties of the jury note violated due process but was harmless; and, that he did not abuse his discretion by not answering the jury's question because the jury was already instructed on the elements of robbery. Order:16-18.

Under NRS 175.415, court must bring jury to the courtroom and respond to the jury's question. In accord with this, the United States Supreme Court said jury notes should be ""answered in open court and ... petitioner's counsel should [be] given an opportunity to be heard before the

trial judge respond[s]." *United States v. Barragan-Devis*, 133 F.3d 1287, 1289 (9th Cir. 1998) *citing Rogers v. United States,* 422 U.S. 35, 39 (1975).

Also, NRS 178.388(1) provides a defendant with the right to be present at every critical stage of the trial – including the discussion of jury notes. *United States v. Martinez,* 850 F.3d 1097, 1100 (2017); *Manning v. State*, 131 Nev. 206, 211 (2015). Finally, the Sixth Amendment provides effective assistance of counsel at all stages of the trial to include when the court receives jury notes. *Martinez. at* 1102. Thus, more than due process was violated and COA erred in not addressing each violation.

(b) Error not harmless.

COA held that trial court's mistake in not informing the parties and its non-answer to jury was harmless because the jury was already instructed on the use of force in Jury Instruction 11 and it was unlikely the court would have given a different response. Order:17-18.

To determine if harmful or prejudicial error occurred, court looks at "the nature of the information conveyed to the jury, in addition to the manner in which it was conveyed" and the length of time it took for the jury to render a verdict after receiving the information. *Martinez at 1101 citing Rogers* at 40. Court follows a three-part test, looking at:

> (1) "the probable effect of the message actually sent"; (2) "the likelihood that the court would have sent a different message

> had it consulted with appellants beforehand"; and (3) "whether any changes in the message that appellants might have obtained would have affected the verdict in any way."

Manning at 1019.

COA said the probable effect was nominal because the response contained no legal instructions. Order:16-17.

However, the question asked by the jury on the element of force for a robbery conviction is similar to the question in *Jeffries*. In *Jeffries*, the jury asked: "May we have more clarity/explanation on malice aforethought." Here, jury asked: "Can we have elaboration on the definition by means of force or violence or fear of injury?" V:1021a.

The *Jeffries* Court found the jury question showed the jury was confused and needed further clarification even though they had been correctly and adequately instructed. Likewise, here, by asking for "elaboration" on an element of the crime the jury indicated confusion on the law and needed further clarification.

In *Gonzalez v. State*, 366 P.3d 680, 683–84 (Nev. 2015), Court said when a "jury's question suggests confusion or a lack of understanding of a significant element of the applicable law," the trial court "has a duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion."

However, while citing *Jeffries* and *Gonzalez,* COA came to a contrary conclusion, holding: "the jury's question had already been answered in the original instructions..." Order:18. Thus, even though the question showed confusion as in *Jeffries* and *Gonzalez,* COA did not conclude the trial judge had a duty to give further instructions.

Furthermore, "a court's message to a deliberating jury inevitably influences the jury's analysis." *Martinez at* 1105. Here, the probable effect of the court's response was that it further confused the jury because the court did not answer the question but discussed evidence.

COA also concluded it was unlikely that the court would have sent a different message if it had talked to the parties. Order:17. However, we do not know how Judge Bixler would have reacted because Judge Smith decided Alfred's motions. In his motions, Alfred's attorney submitted a list of responses it would have argued if the trial court had notified her. See-VI:1483-85.

COA concluded it was unlikely a different verdict would have been rendered if a different message had been sent. Order:17. However, if Judge Bixler had agreed with Alfred then it is likely the jury would have returned a verdict for petit larceny because the evidence showed Alfred did not use force or violence of fear to retain or obtain the property.

Additionally, the error was not harmless because Alfred's defense was that he did not use force, thereby making court's response to this question critical to his defense. See V:961-62;967-69. Robbery is nothing more than a larceny with force. *Martinez v. State*, 114 Nev. 746, 748 (1998). Therefore, if the jury had received further instruction on force then it is unlikely that they would have returned a verdict of robbery.

5. Judge Smith erred by denying motion for a new trial.

COA ruled that Alfred failed to show a different result would have been probable at trial based on the jury note, the court's directive to the jury, and possible juror misconduct. COA said Alfred "only presented speculation..." Order:21.

As noted earlier, without an evidentiary hearing, Alfred's arguments are limited. Without a hearing with Judge Bixler, Alfred is unable to fully develop the record. But because Alfred's theory of defense centered on there being no force used to take or keep the property and the jury sought further guidance on the use of force for a robbery, it is more likely than not that a different verdict would have been rendered if the court had called the parties and allowed them to help fashion a response to the jury question.

Alfred presented more than a naked allegation of error occurring behind closed doors. He presented three declarations from jurors and found

a jury note in the district court evidence vault that was never shown to the parties. The secrecy surrounding what occurred in the back hallways of the courtroom during deliberations shows that an evidentiary hearing and reconstruction of the records was needed.

V. CONCLUSION

Court should grant review based on the above.

Respectfully submitted,

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CLARK COUNTY PUBLIC DEFENDER

By: */s/ Sharon G. Dickinson*
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CERTIFICATE OF COMPLIANCE

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

This petition for review has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this petition for review complies with the page or type-volume limitations of NRAP 40 because it is:

[x] Proportionately spaced, has a typeface of 14 points or more, and contains 4,657 words which does not exceed the 4,667 word limit.

DATED this 9 day of December, 2019.

Respectfully submitted,

DARIN F. IMLAY,
CLARK COUNTY PUBLIC DEFENDER

By: *__/s/ Sharon G. Dickinson__*
SHARON G. DICKINSON, #3710
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 9 day of December, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
ALEXANDER CHEN

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 Correctional Center
P.O. Box 208
Indian Springs, NV 89018

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