

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA HONEA,

Appellant,

v.

STATE OF NEVADA,

Respondent.

Docket No. 76621

Electronically Filed
Mar 06 2020 02:36 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S APPENDIX

VOLUME XV

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By: /S/MONIQUE MCNEILL
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TRAN
CASE NO. C-15-309548-1
DEPT. NO. 25

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA,)	
)	
Plaintiff,)	REPORTER'S TRANSCRIPT
)	OF
vs.)	EVIDENTIARY HEARING
)	
JOSHUA HONEA,)	
)	
Defendant.)	
_____)	

BEFORE THE HONORABLE KATHLEEN DELANEY
DISTRICT COURT JUDGE

DATED: THURSDAY, NOVEMBER 21, 2019

REPORTED BY: SHARON HOWARD, C.C.R. NO. 745

1 APPEARANCES:

2 For the State:

STACEY KOLLINS, ESQ.

3 KRISTINA RHOADES, ESQ.

4
5 For the Defendant:

JONATHAN MACAUTHUR, ESQ.

6 MONIQUE MCNEILL, ESQ.

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1 LAS VEGAS, NEVADA; THURSDAY, NOVEMBER 21, 2019

2 P R O C E E D I N G S

3 * * * * *

4
5 THE COURT: Good morning.

6 Calling State of Nevada vs. Joshua Honea. It's
7 not quite 10:55. It's 10:52 on the clock. I can see in
8 the court room we'd originally scheduled this matter upon
9 request of counsel, Jonathan MacArthur to start at 10:15,
10 based on an appearance he needed to make that was already
11 scheduled in Department 23. We have not had any word when
12 he might finish down there and be able to come up here.
13 The court had an obligation that it thought it would be
14 able to meet around the lunch hour because of the original
15 time schedule to start the matter, and even with the push
16 back thought we could get a good chunk of time in this
17 morning and then be able to continue in the afternoon. Of
18 course, was willing to play it by ear to rearrange
19 something if we were close to finishing and needed to go
20 into the lunch hour in some way.

21 Given we haven't started at all, and it's
22 getting close to 11:00, I am concerned and I didn't really
23 want to do this where we take just one witness then trail
24 it out and take a lunch break. So our alternatives are to
25 start at 11:00-ish and then -- the estimate I think right

1 now -- here comes Mr. MacArthur.

2 Come in Mr. MacArthur. Literally 2 minutes ago I
3 called the matter because -- and Ms. McNeill indicated she
4 would stand in. I had a very brief conference for
5 scheduling purposes in chambers with Ms. Kollins and Ms.
6 McNeill, just because we weren't sure when you might be
7 able to complete your duties down in Department 23 and we
8 knew Department 23 had started their calendar late --

9 MR. MACAUTHUR: They did.

10 THE COURT: -- and knew this was circumstances
11 beyond your control, of course. But we were getting
12 worried about how we were going to start, when we might
13 finish, and would it make sense to start now and take the
14 lunch break and come back. Start now, go all the way
15 through. Or actually ask folks to take a lunch break now
16 and return at 1:00 and be able to start and finish all in
17 one fell swoop. My preference, in all candor, so I
18 wouldn't have to adjust the schedule that I'd originally
19 had for today, would be that we bring the jurors in, speak
20 with them about delays that were occurring that the court
21 will take responsibility for so that neither party is
22 blamed for that. Ms. Kollins in chambers expressed some
23 concerns it's a State subpoena and not getting started
24 that this might enure to the negative consequence from
25 their perspective to the State. So my thought was bring

1 them in, explain that there were circumstances beyond the
2 court's control why we couldn't start now, or earlier than
3 now, and that ultimately we would reassume at 1:00 and
4 then start at 1:00 and finish whenever.

5 Ms. Kollins had estimated maybe we could be 3 hours,
6 give or take, on how many witnesses. What do you think
7 Mr. MacArthur, as far as your preparation for today, how
8 much time do you think you would need.

9 MR. MACAUTHUR: I was also thinking 3 hours or
10 less. Let me just say that this is the most important
11 case I have going and whatever accommodations are
12 necessary I won't be anywhere else.

13 THE COURT: Ms. Kollins was given a trial free
14 day by Judge Kephart so she could be here all day. I
15 don't know what Ms. Rhoades' schedule is. Ms. McNeill, I
16 know you are scheduled to give testimony. You know, like
17 I said, it's 11:00. We could start at 11:00, 12:00. 1:00.
18 2:00 and power through to 2:00 and be done, or we can
19 break now, bring them in to help them understand why the
20 court takes responsibility for it, come back at 1:00 and
21 start at 1:00 and go until we conclude. I'm open to
22 either suggestion, in all candor.

23 MR. MACAUTHUR: So am I.

24 THE COURT: Ms. Kollins.

25 MS. KOLLINS: I don't know what the court had

1 planned, so with deference to that, my preference would be
2 to start now. I still have trial preparation. I don't
3 really want to be here till 5:00 or 6:00.

4 THE COURT: Understood.

5 Mr. MacArthur.

6 MR. MACAUTHUR: That's fine.

7 THE COURT: All right. So we will -- does
8 anybody need to do anything before we bring the jurors in
9 and start at 11:00. Does anybody need to use the
10 restroom.

11 MS. MCNEILL: I need to use the restroom.

12 MR. MACAUTHUR: I'll make representations while
13 you're gone.

14 I don't know if this was discussed before I arrived.
15 Stop me if it has.

16 THE COURT: Nothing has been discussed. We had
17 2 seconds of scheduling.

18 MR. MACAUTHUR: Okay. Because Ms. McNeill is
19 testifying today, she is a witness. However, this creates
20 an odd circumstance. Typically witnesses are also not
21 able to advocate for defendants, or in this case
22 appellant. What's important here is that the appeal that
23 was drafted for Mr. Honea was drafted by Ms. McNeill. The
24 motion for new trial that relates to this evidentiary
25 hearing, two years after the fact, was written by Ms.

1 McNeill. It's not that I'm incapable. I'm going to be
2 doing the questioning. But, even though Ms. McNeill no
3 longer works in my firm, this is very much still our case.
4 Mr. Honea's family asked if she would continue to work on
5 it. She assured them she would. And she fully intends
6 to.

7 As long as we don't have a problem where Ms.
8 McNeill's not allowed to be at counsel table or we're not
9 allowed to confer about, hey, what questions should we
10 ask, or what do we remember about this incident, then I
11 have no objection. However, in the trial I do remember
12 that when passions were high there was one point where Ms.
13 Kollins had said, hey, they put themselves in a position
14 to be witnesses, she can no longer be and advocate and the
15 court did not rule in the State's favor on that and that's
16 fine. But I don't want to have a problem moving forward
17 where I consult Monique or she's sitting at counsel table
18 and then there's an objection because she was available as
19 a witness today and now she's no longer an advocate. So I
20 want to put that out first. This is her material work and
21 she's still counsel of record.

22 THE COURT: So here's an interesting think I
23 guess I need to share with you try to understand this.
24 Ms. McNeill, can I ask you to go into the anti-room and
25 we're talking about you and I need to have a conversation

1 before you come back in.

2 So two things, Mr. MacArthur. On the last hearing
3 date when you were not present and Ms. McNeill stood in
4 for you, Ms. Kollins had raised the issue that she thought
5 Ms. McNeill was no longer on the case and that's not
6 necessarily they were tied together but that is why she
7 would then be able to give witness testimony. That we
8 just understood she was no longer on the case. I
9 understood Ms. McNeill to confirm that and that she was
10 only going to be here today as a witness. That was last
11 time we were together in court. This morning, when we
12 were having the scheduling conversation in the office,
13 when I said, you know, about not sure when you were going
14 to get there and whether we should postpone this until the
15 afternoon, she said words to me in front of Ms. Kollins to
16 the affect of I'm just a witness. I don't have anything
17 -- because it was in context of me asking how long the
18 hearing might take. Like, were we talking an hour, 2
19 hours, 3 hours, what was the estimate. She said, I'm just
20 a witness today. I haven't prepped anything. So I don't
21 know. So those two comments are -- don't square up, in my
22 opinion, with what you're saying.

23 Now, do I have heartburn with Ms. McNeill giving
24 witness testimony and remaining as an attorney on the
25 case. Certainly, as all attorneys, and we've been

1 well-trained in our ethics, it's odd at best. It's not
2 ideal. But this is such a limited component of what it is
3 that Ms. McNeill knows that if she's still an attorney on
4 the case I think we need to have that record made. And if
5 she's still an attorney on the case, I think she can give
6 limited witness testimony and she remains an attorney on
7 the case. It's just her representations last time we were
8 in court and this morning I believed were inconsistent
9 with that.

10 Hold on. Ms. Kollins, what would you like to say.

11 MS. KOLLINS: Essentially, I don't think we have
12 a dog in this fight. And I don't think there is any
13 ethical obligation for her to remain on the case, as I
14 know the canons. That's certainly, you know, between her
15 and Mr. MacArthur. She's provided an affidavit, if we
16 have any questions further from that, you know, we'll
17 certainly bring them up and have her sworn. I haven't
18 determined that yet. It's, kind of, based on what the
19 jurors give, I guess. So that's where I'm at.

20 THE COURT: You mean not to call her as a
21 witness.

22 MS. KOLLINS: She said -- she told me in person
23 she preferred a subpoena. Mr. MacArthur directed her to
24 give an affidavit and not testify. She has a subpoena.
25 She has an affidavit. She understands she can be called

1 today.

2 THE COURT: Let me ask you something. Are you
3 talking about a new affidavit or the one that was attached
4 to the motion.

5 MS. KOLLINS: This is a new -- wait. This is
6 one attached to the motion.

7 THE COURT: I haven't seen a new one.

8 MR. MACAUTHUR: No. There's not a new one.

9 THE COURT: So yeah. She had a prior affidavit.
10 She can -- so is she on the case or not on the case.

11 MR. MACAUTHUR: She is. I'll make these
12 representations so the court understands the timeline.

13 I made a court appearance where we set the date.
14 During that the court ordered me, I would like to have as
15 much information as possible about how Ms. McNeill
16 identified that Brett Jankiewicz' sister, Taylor
17 Jankiewicz, a friend of Morgan, et cetera. I took that
18 message back to Ms. McNeill. Bear in mind that Ms.
19 McNeill had left the firm. She's now a sole-entity. We
20 still have a couple of cases in common that we're
21 cooperating, but we're not taking news cases together.

22 At any rate, when I told her that, she said, somewhat
23 frustratingly, did any of you actually read my
24 declaration. I'm like, I'm just telling what you the
25 judge said. She said, well, it explains in detail exactly

1 how I did that. I don't know how I'm supposed to
2 supplement. I said, I understand, but it's due by
3 tonight. So if there's anything additional, please draft
4 it. She then sent an e-mail, I believe, to Ms. Kollins
5 and everybody else saying, hey, I'm going to send you my
6 same declaration again. I'll be available as a witness in
7 the event that, you know, I'm needed. But this is really
8 all I have to say.

9 The next thing that happens is the next court date.
10 At that court date Ms. McNeill's here, and I'm not. The
11 family approached her about continuing on as counsel, I
12 believe that day. She was here with them. They saw her
13 in the hallway. She said, of course, she would.

14 She originally was under the impression that because
15 Mr. Honea was my client and we hasn't really thoroughly
16 discussed it since she parted with the firm, she didn't
17 want to make any promises or assertions without talking to
18 me first. But when she did talk to me I expressed that it
19 was always my assumption that she was counsel in this case
20 until the wheels fell off. That we're not going to leave
21 Josh with half of his counsel. So, I said what was said
22 in court and she conveyed exactly to me what the court
23 conveyed, and I said, well, that might leave them with the
24 impression you're no longer counsel and that you're only a
25 witness. And so in preparation for this hearing she

1 agreed with me one hundred percent that because she had
2 drafted the motions and essentially had educated me as to
3 the issues -- I'm kind of -- we're both in-court capable,
4 but I tend to be the in court guy, and she tends to be the
5 motion writer when there's any -- when those things don't
6 overlap.

7 So she made it clear that she had asserted to the
8 family or reassured them that she remained counsel. And I
9 said, well, I think it's important that we make a record
10 because I don't want the State to be able to say, hey,
11 this is a surprise to us. All of a sudden you've been
12 present for witness testimony and you still expect to
13 advocate. So walking in, I have no doubts that Ms.
14 McNeill knows exactly what I'm talk about. I think that
15 the court should be able to assure itself of her
16 understanding without me having to say a word to her. You
17 just call her back in and ask her what promises she made
18 to the family, what discussions she had with me yesterday.
19 I sit quiet. And I think she repeats exactly what I told
20 you.

21 THE COURT: Other than it's inconsistent with
22 what she just said this morning.

23 MR. MACAUTHUR: I don't know why that would
24 happen. I don't know why say'd say that.

25 THE COURT: Elvis, can you bring in Ms. McNeill,

1 please. Come on up. You can be there at counsel table.

2 I'm just trying to clarify a couple of pieces of
3 confusion. We're all smart people. We can all have
4 communications. Then we can realize, oops, we're saying
5 different things. Mr. MacArthur said I can ask you a
6 question and he can sit there silent to see what the
7 answer was.

8 When Mr. MacArthur came in to make representations,
9 as you went to the restroom, he made representations that
10 you were still on the case and that he wanted to make sure
11 there weren't going to be objections or concerns. That
12 although you may give witness testimony that you were
13 still counsel on the case. I said, I don't understand now
14 what you're telling me because when we were in court last
15 time you indicated you were not still on the case -- I
16 thought -- and this morning, just now when we were talking
17 about the scheduling piece, you indicated you were just
18 here to give witness testimony and you couldn't estimate
19 the time frame because you hadn't prepared anything and
20 you weren't integral -- my words, not yours -- integral to
21 today's proceedings.

22 But from Mr. MacArthur's representations it sounds
23 like you are integral to today's proceeding. That you
24 would be co-counsel together at the table doing today's
25 proceedings, and that you are still on the case.

1 So, can you help us clarify the confusion.

2 MS. MCNEILL: I don't know why I'm in this case.

3 THE COURT: I don't either.

4 MS. MCNEILL: Well, Mr. MacArthur and I are not
5 working together. So that being the case I indicated I
6 wouldn't be assisting with this hearing. He has since
7 told me that he believes that because I authored the
8 motion and the appellate brief that I likely have
9 responsibilities to Mr. Honea and to the case because of
10 that. I somewhat agree with that. I know that Mr. Honea
11 would like me to stay on the case.

12 So as the court is aware I take my responsibilities
13 to my clients seriously. So I further indicated to him
14 that as far as today's hearing, I'm not doing any
15 questioning. He's prepared to do that. I'm just here.
16 And I indicated that I think that my role as a witness is
17 really just the same as if, as a lawyer, I made
18 representations as an officer of the court, I have the
19 same duties to be honest under oath. So I don't think
20 that puts me in a position adverse to Mr. Honea, which was
21 his concern, but as a witness in the case. If there were
22 a retrial, I wouldn't be able to assist on that. That
23 wasn't my understanding.

24 I know that he -- Mr. Honea would like me to stay on
25 the case. I will not be assisting in this hearing as

1 counsel.

2 THE COURT: So this may be an unfair question to
3 ask now because maybe you haven't decided, but as you
4 stand here right now, are you on the case or are you off
5 the case.

6 Ms. MCNEILL: I guess I'll say I'm on the case
7 because I know that's what Mr. Honea would request.

8 THE COURT: So I don't have heartburn -- I said
9 that before you came back in the room, and I'll say it
10 again to you now, that you would give representations as a
11 witness in this case based upon, you know, the information
12 related to Juror No. 3, the Facebook page, the friends
13 situation. Yes, we had your affidavit at the time, but
14 there may have been some misunderstanding cause I don't
15 recall indicating that I was mandating that you be a
16 witness. I have your affidavit.

17 You know, I am still trying to, sort of, digest the
18 fact that the appellate court sent this back for this
19 purpose and how it is that we are to do this. Because, in
20 all candor, when they indicate in their order of limited
21 remand that they somehow could not determine whether or
22 not I have used my discretion on whether or not there had
23 been prejudicial juror misconduct. We have affidavits.
24 We have pleadings. I wrote my own order. We had the
25 lengthy argument. So I don't understand what the issue

1 is. But they sent it back for an evidentiary hearing. So
2 when we had the status check about the evidentiary hearing
3 my feeling was, let's get whomever here you think or need
4 or want as counsel to flesh this out. You know, I didn't
5 mandate any particular entity. Mr. MacArthur indicated
6 some people he wanted to call. Ms. Kollins offered to
7 issue the subpoenas to make sure that people got her out
8 of concern that if the State didn't issue them maybe
9 people wouldn't come. I think it all, kind of, narrowed
10 down to -- and we talked about it would be those jurors
11 who are identified in the pleadings -- in the briefing --
12 I'm sorry -- in the motion and the declarations. So even
13 though we didn't have a declaration from Juror No. -- I
14 want to be precise on these numbers while making this
15 record -- Juror No. 4, Ms. Monson, that she was going to
16 be subpoenaed. The other jurors that were subpoenaed were
17 the ones who had declarations or had spoken to counsel and
18 -- so here we are.

19 Ms. Kollins, you stood up.

20 MS. KOLLINS: I wanted to make a suggestion
21 about the perimeters of the hearing. Based on my reading
22 of the case law, based on my reading of Miasta and Myer
23 and NRS 50.0652, I concur with the court. I thought we
24 had an adequate record last time. Perhaps things weren't
25 supplemented such that the Supreme Court had all the

1 affidavits and had everything to review in combination
2 with the court's order, but I would ask this court limit
3 this hearing pursuant to Miasta and Myer. We are -- I
4 don't think anything in the order that came down in this
5 court requires us to go into anything that transpired
6 during deliberation. I think that's inappropriate, by
7 statute and by case law, inappropriate.

8 I have issued subpoenas for everyone that the court
9 just reiterated for the record. We were incapable of
10 locating Morgan Savage, at Mr. MacArthur's request. She
11 has a case in warrant right now. For the record, my
12 investigator reached out to Metro, the detective that was
13 originally assigned to this case, and reached out to
14 someone else -- the name is slipping me right now -- but
15 -- I'm sorry -- Ms. Savage's mother has not had contact
16 with her since June or July, so we don't have her today.

17 THE COURT: Mr. MacAuthur -- one last thing
18 about witnesses, then I want to hear Mr. MacAuthur's
19 response to the sort of tenor of or parameters of the
20 hearing. Tobi Caperon, if I'm pronouncing the name
21 correctly -- the investigator, my understanding, also not
22 a witness today.

23 MR. MACAUTHUR: Correct.

24 MS. KOLLINS: She was subpoenaed. She has
25 failed to respond to our subpoena. Our investigator has

1 called the law office of Mr. Claus, where she works,
2 multiple times. Even had her call again this morning.
3 Someone answered the phone. Said Tobi was unavailable.
4 Tobi was out of town. Tobi was unavailable.

5 I issued the subpoenas a month ago, so she has failed
6 to respond to our subpoena. I think there is information
7 that she might have that I would certainly like in the
8 record, but I can't speculate about that right now. Just
9 so the Supreme Court knows that she failed to comply with
10 the subpoena issued by the State for this hearing.

11 MR. MACAUTHUR: Two things on that, Judge.

12 First, at that time last hearing where I was
13 present when we were defining the witnesses the State had
14 expressed an interest in speaking to Tobi Caperon. I made
15 some representations about contact with Morgan Savage and
16 how we learned about Taylor Jankiewicz. The court issued
17 at that time -- looking at the transcript -- that Tobi
18 Caperon would not be a witness.

19 Now, to the extent the State issued a subpoena, I'm
20 not really familiar with that.

21 THE COURT: Hold on. Let's -- let's hold on. I
22 don't want this record to be unclear. There are
23 representations when they get made they don't match my
24 recollection. That doesn't mean they're wrong, but if
25 they don't match my recollection I would have to

1 respectfully make that record.

2 I have zero recollection of when we had the status
3 check indicating any particular witnesses I did or did not
4 want. My recollection was that I indicated that I was
5 still, again, I'll say it again, trying to digest exactly
6 what the Supreme Court was asking us to do here and what
7 those circumstances would be and we talked about the
8 people who had given declarations or what not. I didn't
9 drive the train as to who was going be called at as a
10 witness. Counsel drove the train as to who was going to
11 be called as a witness. If there was an argument over it
12 and I was asked to make a call and I made a call, I don't
13 recollect it. I don't recall in any way saying Ms.
14 McNeill has to be a witness. Tobi Caperon cannot be a
15 witness. Like, I have no recollection of those
16 conversations at all.

17 So either tell me in the transcript where that is or
18 be more precise in your language, Mr. MacAuthur. You're
19 saying these things definitively, and I don't have any
20 recollection of that.

21 MR. MACAUTHUR: I believe that everything I'm
22 about to say can be borne out in the transcript.

23 My recollection is that the court asked us what
24 witnesses would be needed. Everybody agreed that Blaire
25 Savko -- I should know the juror number, but --

1 THE COURT: I'll give you Juror 7.

2 MR. MACAUTHUR: -- everybody agreed that Juror
3 No. 7 was appropriate. Everybody agreed that Makinster --
4 Juror No. 11 was appropriate. Everyone agreed that Rago
5 and Jankiewicz -- Jurors number 1 and 3 -- were
6 appropriate.

7 I then brought up Ms. Monson. The State objected
8 saying we don't have an affidavit from Ms. Monson. Then I
9 said I thought there was one. I went back through the
10 electronic file, told the court I didn't find one, but was
11 wondering why am I relying on her representations. Then I
12 saw inside of my affidavit included as an exhibit to the
13 motion for new trial my recollections of the conversation
14 with Ms. Monson. I then reminded the court that I'd
15 argued what Ms. Monson said in front of the Supreme Court.
16 It's part of their record. The court then said it was
17 appropriate that she come as well. The State then said I
18 would like to have Tobi Caperon as a witness. I didn't
19 have an objection to it, but I said in the interest of
20 time if this is to the issue of how we identified Taylor
21 Jankiewicz as a percipient witness that she wasn't part of
22 that. That Ms. McNeill did that. And then because we
23 didn't want to have direct contact, we set Tobi Caperon to
24 see if she could verify, and we did not get additional
25 information. All Tobi Caperon did was through proprietary

1 investigative techniques -- I think is what they call them
2 -- she established that Brett Aaron Jankiewicz and Taylor
3 Jankiewicz were brother and sister, and they had a mother
4 in common and a common address at some point in the past.

5 When I said that, the court then said, well, it
6 doesn't appear as though we need Ms. Caperon. That was
7 not an order. That was just my understanding based on the
8 discussion. And I think that's exactly what it ways in
9 the transcript.

10 THE COURT: I think Ms. McNeill is going to
11 testify. I hay have said that. Two minutes ago you just
12 said, I said we don't need that person. If it's in the
13 context -- if the State issued the subpoena, the State
14 issued the subpoena, you all were welcomed to issue
15 subpoenas to whomever you wanted to.

16 MR. MACAUTHUR: I don't have an objection to the
17 State's subpoena.

18 THE COURT: I didn't preclude anybody.

19 I want to be precise about the fact that when
20 you're talking about things that the court said, it sounds
21 like you're saying the court ordered things. I didn't
22 order those things, and I want to be clear.

23 MR. MACAUTHUR: To be fair, Judge, the court's
24 words carry a lot of weight with attorneys because you're
25 the highest ranked person in the room. I think what you

1 said was, well, it sounds like we don't need her. I then
2 probably gestured, then no further discussion.

3 I didn't take it as an order. I didn't take it as a
4 limitation. I was merely saying to the extent the
5 subpoena was not responded to -- I didn't even know she
6 was going to be a witness. I haven't had any contact with
7 Tobi Caperon since that.

8 THE COURT: Let's move on to the other point
9 that Ms. Kollins made about the scope of the inquiry of
10 these witnesses.

11 Did you have any response to that. Basically Ms.
12 Kollins is saying we don't talk about deliberations.

13 MR. MACAUTHUR: Yes. Here's my objection to
14 that.

15 I understand the holding of Myers. However,
16 there was a dissent in Myers, I believe by Supreme Court
17 Justice Agustie (ph) -- if it wasn't Agustie then it was
18 the other Chief Supreme Court Justice at the time. But
19 the point was is that the Chief Justice, in dissent, said
20 that the harm of intrinsic versus extrinsic juror
21 misconduct is the same, and that they should be treated
22 the same. I realize that's the minority opinion. It was
23 5, 4. However, I also argued that. I didn't get any
24 feedback on it, but I also argued that before the Supreme
25 Court, and I was hoping they'd make a bright line rule in

1 accordance.

2 What I see instead is they sent an order back
3 down to your Honor, which specifically says that not only
4 are we trying to find out whether there was juror
5 misconduct, but also to make a determination whether there
6 was prejudice. The only way that we can determine if
7 there was prejudice is if we ask the jurors who testify,
8 okay, this thing you heard or that you saw, how did it
9 effect you. If they say no it didn't, then there's no
10 prejudice. If they say, well, it made me think this thing
11 and I did this other thing, technically that would be the
12 juror's thought process, but it's the only way to
13 establish prejudice. So given that this was sent back and
14 the court has already expressed that it's a little
15 befuddled as to how it didn't somehow satisfy all the
16 factors to begin with, I would ask the court take a broad
17 view of the information available. Everybody at the
18 Supreme Court is well-versed on what information is
19 relevant and what information isn't. The same way I can
20 make an argument to the court and the court doesn't have
21 to take into account. There is information included in
22 this evidentiary hearing that the Supreme Court say, hey,
23 this isn't what we were talking about and act
24 accordingly.

25 I would hate to have this second opportunity at an

1 evidentiary hearing I think should have happened 2 years
2 ago when things were fresh and still miss the mark because
3 we don't answer the question of how -- if there was
4 prejudice, how did it occur.

5 THE COURT: We're going to go ahead and proceed.
6 I'm going allow questioning that relates to the
7 information these jurors had, the impact it had on them,
8 and how it may have impacted how they conducted their
9 business.

10 In my order -- so to the extent that that overlaps
11 with some deliberations, I guess the way we explain it to
12 the State and confirm an agreement with Mr. MacArthur,
13 that whatever happens in this hearing happens in this
14 hearing is going be in the record. At the end of the day,
15 I'm going to be issuing the written order, and I'm going
16 to be making a determination on whether or not I think
17 this information is appropriate to be considered or not to
18 be considered in what my outcome is.

19 In my original order I declined to consider and I
20 struck the declaration of Jurors 7 and 11 because when you
21 look at their declarations they say specifically, only
22 during deliberation these things occurred. So I did not
23 feel, based on Myer and the case law we have, that it
24 would be appropriate to inquire in that regard.

25 We've now been sent back an order that says that we

1 need to conduct an evidentiary hearing. It does indicate
2 that the purpose of the review of the record will be to
3 determine whether or not I abused my discretion, which, of
4 course, depending on the outcome of the order may or may
5 not be a further moot point. And ultimately if it does go
6 back up with an order indicating still a denial of the
7 motion, that the prejudicial juror misconduct, if it
8 occurred, did not occur. And to some degree, obviously,
9 it will have to be up to the court to decide what is
10 appropriate to consider, issue its order, whatever that
11 outcome is, however it goes back up to the appellate court
12 who has otherwise retained jurisdiction of the appeal for
13 them to determine what needs to be determined.

14 I think we have to have the discussion of the whole
15 scope so that it's in the record and not run the risk that
16 somehow we didn't do enough, or as Mr. MacAuthur put it,
17 miss the mark.

18 We'll get started. Does either counsel wish to make
19 any -- I'm sort of viewing this as, yes, it's an
20 evidentiary hearing, but do we conduct this like I would
21 conduct any evidentiary hearing, which is there's a
22 motion. There's a request for relief. There's an
23 opposition thereto. And ultimately the parties will have
24 an opportunity to indicate what they believe the evidence
25 showed or didn't show as far as the outcome.

1 So I'll give the opportunity for counsel to make
2 closing remarks if they wish or we can just take the
3 testimony. The court is well-versed in what each sides
4 arguments are, I believe. But I don't know what's going
5 to come out in testimony. I don't know if it's going to
6 be different in any way from the declarations and
7 therefore counsel would like that opportunity.

8 MS. KOLLINS: The State doesn't need an opening,
9 your Honor. I would remind the court that Mr. Rago
10 retained counsel. Lance Coburn wanted to make a
11 telephonic appearance with the court today. If we could
12 take that first because he is in Spain. They are 9 hours
13 ahead.

14 THE COURT: We can do that. Can we start with
15 Mr. Rago. Was there any particular order, Mr. MacArthur,
16 that you wanted to examine these witnesses.

17 MR. MACAUTHUR: No. Whatever is most
18 efficient.

19 THE COURT: Let's bring in Mr. Rago, Elvis.

20 Mr. Rago, come up to the witness stand. My
21 clerk will swear you in. Then I have some preliminary
22 remarks for you.

23 THE WITNESS: Okay.

24 THE COURT: Be seated.

25 THE CLERK: Do you solemnly swear the testimony

1 you are about to give in this action shall be the truth,
2 the whole truth, and nothing but the truth, so help you
3 God.

4 THE WITNESS: Yes.

5 THE CLERK: Be seated. State and spell your
6 name for the record.

7 THE WITNESS: Francis Anthony Rago,
8 F-r-a-n-c-i-s, A-n-t-h-o-n-y, R-a-g-o.

9 MR. MACAUTHUR: We're missing a --

10 THE COURT: Hang on a second. I know what we're
11 doing.

12 MR. MACAUTHUR: Okay.

13 THE COURT: Have a seat, Mr. Rago.

14 The folks that are observers, they are welcomed
15 into the courtroom now. I don't want the witnesses in the
16 courtroom. Based on Mr. MacAuthur's discussions with Ms.
17 McNeill he's asking for perhaps an exception to be made
18 because she's counsel and may or may not be giving
19 testimony today, but the observers can be present in the
20 room.

21 Mr. Honea is present in the room. I just didn't
22 bring them in. I just wanted to have the witness in the
23 room and take care of the witness first. We're getting
24 started with the hearing. We apologize for the delays.

25 Mr. Rago, I do want you to understand we're very

1 apologetic for the delay in the start today. I'll explain
2 this to each of the jurors here to give testimony. There
3 were some court impediments to having everybody present
4 and being able to proceed. And then I have been in
5 discussion with counsel for an extended period of time
6 before we got started. So, thank you for your patience.
7 We are going to get started.

8 Elvis, maybe you can tell the remaining witnesses out
9 there that the hearing has now begun, and we do intend to
10 go through until conclusion. We appreciate their patience
11 and to stay close by.

12 Mr. Rago, we started with you because we were
13 informed by counsel for the State that you had retained
14 counsel for purposes of being here today. And that your
15 counsel is actually not present in the jurisdiction so
16 could not be present physically but he is possibly
17 available by telephonic conference. Can you confirm you
18 retained counsel for purposes of today.

19 THE WITNESS: Yeah. I got subpoenaed.
20 Obviously, not knowing what it was about, I called an
21 attorney.

22 THE COURT: We'll go ahead and get your attorney
23 on the phone. Then I'll explain to your attorney what
24 it's about. I would have thought the attorney would have
25 been able to discern that from the record, but to the

1 extent he did not have an opportunity to take that look
2 we'll explain to him what the circumstances are.

3 You have the phone number, Ms. Kollins.

4 MS. KOLLINS: I do.

5 THE COURT: If my clerk is right and there's a
6 problem, he'll have to call us. Are you able to text
7 him.

8 MS. KOLLINS: I just did. I said we're calling
9 you.

10 THE COURT: Tell him to call in chambers and she
11 can transfer it, if you don't mind, please.

12 MS. KOLLINS: Apparently Mr. Coburn and Mr. Rago
13 had a conversation where he doesn't need his counsel to be
14 present on the phone.

15 Is that correct, Mr. Rago.

16 THE WITNESS: Right.

17 MS. KOLLINS: That's new information to me.

18 THE COURT: It's new information to me too. I'm
19 sorry. I thought you needed me to have him on the
20 phone.

21 THE WITNESS: No. I obviously retained counsel.
22 I didn't know what this was about.

23 THE COURT: You do now what this is about.

24 THE WITNESS: I do.

25 THE COURT: Okay. Great. Mr. MacAuthur,

1 questions for Mr. Rago.

2 MR. MACAUTHUR: Thank you, Judge.

3 DIRECT EXAMINATION

4 BY MR. MACAUTHUR:

5 Q. Good morning, Mr. Rago.

6 A. Hello.

7 Q. It's been a couple of years, correct?

8 A. Yes.

9 Q. You and I have spoke zero times in that
10 interim; is that correct?

11 A. Correct.

12 Q. I guess first I would like to ask you, do you
13 remember the case, the events, the timeline, et cetera?

14 A. I mean, I don't -- the big details, yeah, but
15 not the intricate stuff.

16 Q. You do recall you were a juror?

17 A. Correct.

18 Q. You do recall you deliberated with your fellow
19 jurors and arrived at a unanimous verdict?

20 A. Yes.

21 Q. That verdict was guilty on I believe Count 39
22 and not guilty on all other counts?

23 A. Yes.

24 Q. Do you recall you and I almost always had to
25 go to the bathroom at the same time?

1 A. Yes.

2 Q. At any rate, Mr. Rago, is it true that at some
3 point, either during or prior to jury deliberations, that
4 you consulted media sources on how they were covering this
5 trial?

6 A. The second day of trial I believe there was an
7 article that showed up on my Facebook stream. I clicked
8 it. I realized I shouldn't be reading it. I closed it.

9 Judge Delaney, I believe even mentioned the article
10 the next day, that's when I told someone at recess, I
11 said, oh, I clicked on that article.

12 Q. Okay. Now, you recall that there were a lot
13 of times where the attorneys would get into just about
14 everything, right, and the jury would be ushered out?

15 MS. KOLLINS: Objection, leading, relevance.

16 THE COURT: Sustained.

17 MR. MACAUTHUR: I didn't get the answer before
18 the court ruled. I can say why that question is there.

19 THE COURT: Sustained.

20 MR. MACAUTHUR: Okay. Understood.

21 BY MR. MACAUTHUR:

22 Q. Do you recall leaving with your other jurors
23 many times during many days of trial?

24 A. Vaguely, yes.

25 Q. Do you recall that the Judge would read what

1 we call an admonishment before you left every single
2 time?

3 A. Yes.

4 Q. Do you recall that in that admonishment one of
5 the terms was do not consult outside sources, such as
6 media. Don't conduct your own investigation. Things like
7 that.

8 A. Yes.

9 Q. So to be fair, you did understand her when she
10 said that?

11 A. I did.

12 Q. Now, is it, in fact, true that you also
13 advised your other fellow jurors during deliberations that
14 you had read this article?

15 A. I don't remember saying that in deliberation.
16 I remember saying it on recess to another juror, that I,
17 whoops, I clicked on that article in reference to Judge
18 Delaney mentioning the article that day.

19 Q. Outside, did you recognize any of the fellow
20 jurors?

21 A. Yes.

22 Q. I don't know if you know them by name, but you
23 did recognize them as your fellow jurors?

24 A. I recognized them from that, yes.

25 Q. If we had been told that you presented the

1 article during jury deliberations, but then thought better
2 of it before anybody read that article, does that refresh
3 your recollection as to whether that occurred?

4 MS. KOLLINS: Objection, hearsay, argumentative.
5 He can ask him what he remembers. He can't discuss what
6 other jurors have allegedly said in phraseology. This is
7 supposed to be a fact-finding mission here, not putting
8 words in Mr. Rago's mouth.

9 MR. MACAUTHUR: Your Honor, I'm not asking him
10 to give a hearsay response.

11 MS. KOLLINS: He's asking him to adopt Mr.
12 MacAuthur's --

13 MR. MACAUTHUR: May I ask it during my --

14 THE COURT: Okay, listen, the two of you. I'm
15 not having this during this hearing. Not one time. Don't
16 talk to each other. Talk to the court. I'm done. We're
17 not doing this.

18 I don't prefer speaking objections. I can make
19 rulings, and I can make my determinations. If I call for
20 you to give me a speaking objection, give one. If I
21 don't, don't. I will rule when I rule.

22 Ms. Kollins, I allowed you to give a speaking
23 objection. Mr. MacAuthur, you can complete your response,
24 if you wish.

25 MR. MACAUTHUR: Thank you.

1 It's not objectionable as to hearsay. I'm not
2 asking him to say what anybody else said to him. I'm
3 asking him, as a premise, if this is information we
4 received, is that in your recollection true. That's
5 essentially what I've asked him.

6 THE COURT: Ms. Kollins, anything further.

7 MS. KOLLINS: I believe his question was, if
8 another juror said, which is an outside statement offered
9 for the truth. It's in his statement. He's not asking
10 Mr. Rago to relay hearsay, but it's based on hearsay
11 information.

12 THE COURT: I'm going to sustain the objection,
13 but I'm going to allow you to rephrase, Mr. MacAuthur. As
14 Ms. Kollins correctly pointed out, as you are trying to
15 do, I don't subscribe differently, this is just a fact
16 finding objective to understand what occurred and what
17 didn't.

18 This witness has testified he does not recall
19 discussing it during jury deliberations. You may rephrase
20 the question to understand further what it is he recalls
21 or doesn't recall.

22 BY MR. MACAUTHUR:

23 Q. Just to be clear and removing the premise, do
24 you recall whether you had a copy of the article with you
25 in deliberation that you offered to show to other jurors

1 but then did not do so having thought better of it?

2 A. No.

3 Q. Is your, no, no I didn't do that, or, no, I
4 don't recall?

5 A. No. I did not do that.

6 Q. So if another juror testified that you did,
7 they would be mistaken?

8 A. Yes.

9 MS. KOLLINS: Same objection.

10 MR. MACAUTHUR: He said they would be
11 mistaken.

12 THE COURT: I heard the answer. It's not your
13 fault, Mr. Rago. Generally, if there is an objection,
14 it's up to the witness -- and the court should have
15 clarified this earlier -- to wait to answer until I rule
16 on the objection.

17 The objection is sustained. You knew what the
18 objection was, Mr. MacAuthur. Rephrase the question. The
19 way it's phrased is not proper. We have the answer, so
20 move on.

21 BY MR. MACAUTHUR:

22 Q. Mr. Rago, do you recall Juror No. 3, Brett
23 Aaron Jankiewicz from the trial?

24 A. Yes.

25 Q. He sat to your left, two seats over?

1 A. Okay. If he was 3, I was 1. I'm assuming
2 yes.

3 Q. Did you also recall Katheryn Wong who sat to
4 your left. An Asian woman?

5 A. Vaguely. I really don't remember.

6 Q. Do you recall whether you had occasion to have
7 lunch with Mr. Jankiewicz every day in the last week of
8 the trial?

9 I think it was a 3-week-long trial. I'll focus on
10 the last week. Do you recall being lunch partners with
11 him during that last week?

12 A. I recall going to lunch with everybody.

13 Q. Specifically, do you recall that he was a
14 constant fixture of lunches with you on the last week?

15 A. It's possible, yeah.

16 Q. Okay. And the court had admonished you not to
17 discuss the facts of the case with anyone before it was
18 submitted to you for deliberation; is that correct?

19 A. Yes.

20 Q. Didn't you, in fact, discuss facts as you
21 heard them and reflect on the events of the day with
22 Mr. Jankiewicz over lunch?

23 MS. KOLLINS: Objection, foundation.

24 THE COURT: Overruled. He may answer.

25 THE WITNESS: No, I don't remember speaking

1 about the case. Only in deliberations.

2 BY MR. MACAUTHUR:

3 Q. Okay.

4 Mr. Rago, do you recall which juror or jurors you
5 told that you had read the article?

6 A. I don't. We were on recess. Everybody was
7 out there. It was just small talk. I didn't target
8 anyone to say, hey, I red the article. I knew I shouldn't
9 have done that. I said, oh, oops. I read -- I clicked on
10 the link.

11 Q. All right. After deliberations began, when
12 the case was given to the jury then you were allowed to
13 discuss it in your sequestered room, did you have occasion
14 to exchange telephone numbers with certain jurors?

15 A. Yeah.

16 Q. In fact, did you not speak with some of the
17 jurors in the first weekend, after deliberation began?

18 More specific, you guys go home on Friday. You
19 come back in on Monday, say 9:00 a.m. -- hypothetically.
20 I don't remember what time you started. But is it, in
21 fact true, that you had occasion to speak with one or more
22 jurors over the weekend by cell phone?

23 A. I don't recall doing that.

24 Q. I get that you don't recall. Is it possible
25 that you did?

1 MS. KOLLINS: Objection, speculation.

2 THE WITNESS: I don't remember calling any
3 jurors.

4 THE COURT: Again, in order for the record to be
5 more clear, when you hear counsel say objection, you must
6 not speak until I rule on the objection and direct you to
7 answer.

8 I'm going to ask, just briefly, can I ask the
9 witness, can you step down and go follow the marshal and
10 he'll take you to the anti-room. I want to have a
11 conversation with counsel. You're right there. I don't
12 know that I can do it at the bench without you overhearing
13 it.

14 Two concerns I have, Mr. MacAuthur, about this line
15 of questioning and then a prior line of questioning.

16 I didn't say anything before because I was doubting
17 myself as far as my recollection. I didn't remember, in
18 reviewing everything coming in for today's hearing,
19 anybody indicating that he actually had a physical copy of
20 the article in the jury room. I had a recollection of one
21 or more jurors declarations indicating he referenced it,
22 but not that he had the copy. So I didn't have too much
23 grief over that. And he indicated this did not occur
24 anyway.

25 But now you're asking about something I don't

1 remember coming up in the motion at all, which is cell
2 phone exchanges and communications over the weekend. I
3 have zero information in the motion related to that. I
4 could not have conducted an evidentiary hearing on that.
5 So how are we not going into a territory that is
6 completely inappropriate for this hearing and likely,
7 potentially, leading to more difficulties in the final
8 hour.

9 MR. MACAUTHUR: As you've asked me two
10 questions, I'll answer them in the order you gave.

11 The reference or should I say the citation -- I'm
12 referring to Leslie McKinster's declaration. I will read
13 entires 3 and 4. She said, that during deliberations
14 Juror No. 1, Francis Rago, made a statement that the State
15 did not do its job. Did not present evidence to indict,
16 but he'd read a newspaper article with a headline about
17 the DA getting a bomb dropped on them. This is important
18 because it indicates that this is during deliberations.

19 Additionally --

20 THE COURT: The point isn't that it was not
21 discussed in deliberation based on these jurors'
22 statements, he indicates he did not do that. My point was
23 you asked him, did you bring an article in, and then
24 thinking better of showing it to people. That's very
25 different.

1 MR. MACAUTHUR: Your Honor, I said there were
2 two lines.

3 The second line is that Juror No. 1, also offered to
4 show the jurors the article, but then changed his mind.
5 And so in considering these are chronological, in 3, it's
6 during deliberation, he said "X", including an article.
7 Then in 4, he offered to show the article to everyone
8 else. That suggests he had access to the article and
9 offered to show it to other people during deliberation.

10 THE COURT: Again, I'm just asking you to be
11 more precise in your words. Those things can be
12 interpreted as either, he had the article somewhere else.
13 You all want to see it, I'll bring it in. Or I have it
14 with me. And you asked a very specific question, either
15 way it cuts either way. You want to get the answer. I
16 don't know how he's hearing your question. But when you
17 are asking a question based on facts that aren't
18 necessarily clear, that's an issue.

19 Let's move forward to the other issue.

20 MR. MACAUTHUR: The second issue was that -- and
21 I fail to remember which juror. If it's important, I'll
22 find it before proceeding. But we were given the
23 impression that the cabal of Juror No. 1 and Juror No. 3,
24 Brett Jankiewicz, at some point, took a position we need
25 to convict him of something. I think that might be

1 Monson, but I don't remember specifically.

2 THE COURT: It's in multiple declarations.

3 MR. MACAUTHUR: This is the part of the
4 prejudice element, we need to convict him of something.
5 The natural question would be, why, why did he say that,
6 if you know. Did he convey to you why you needed to
7 convict him of something.

8 THE COURT: Where did the information come from
9 that there was phone numbers exchanged and communications
10 over the weekend. I don't remember seeing that in
11 anything that I reviewed.

12 MR. MACAUTHUR: That is not a -- just so I'm
13 clear. That was not a direct statement made by anyone.
14 However, the context is that in talking to other jurors
15 they -- more than one said that I got the feeling that
16 when we came back things had shifted. It was almost like
17 all of the guys knew something that we didn't.

18 THE COURT: I saw that in the declaration. So
19 I'm trying to find out if the reason for that is he had
20 contact with other jurors over the weekend.

21 THE COURT: What is your basis for asking the
22 question very specifically that they exchanged phone
23 numbers, and they talked to each other during the
24 weekend.

25 MR. MACAUTHUR: Other jurors told me that during

1 the course of the three --

2 THE COURT: Hold on, Ms. Kollins. Let him
3 finish with the record.

4 MR. MACAUTHUR: Other jurors told me that over
5 the course of the 3-week trial that many of them exchanged
6 phone numbers, and they were speaking socially on a
7 regular basis because they had shared the same
8 experience.

9 One of those same jurors said that when we came back
10 after the weekend, it felt like things had shifted and all
11 of the guys seemed to be on the same side. I don't know
12 if they talked to each other over the weekend. Well, that
13 makes me wants to ask, hey, did you talk to other jurors
14 over the weekend. That's the reason I asked that
15 question. No one specifically said that it occurred, but
16 I was given the penumbra of this is how it may have
17 occurred by another juror.

18 THE COURT: Ms. Kollins.

19 MS. KOLLINS: I just think the vagueness of some
20 jurors said that they exchanged phone numbers and we don't
21 have that in any motion and so now we're just going to use
22 it to get on a train that this juror did something wrong.
23 It's no where in any of these documents. It's beyond the
24 scope of what the Nevada Supreme Court already reviewed.

25 MR. MACAUTHUR: Ms. Savko's declaration, entry

1 number 2, during juror deliberation Jurors 1, Francis
2 Rago, and 3, Brett Aaron Jankiewicz made comments about
3 the Defendant needed to be convicted of something. That's
4 where I drew that from.

5 MS. KOLLINS: Well --

6 THE COURT: Go ahead.

7 MS. KOLLINS: So those are statements that were
8 either made by one or both in agreement during
9 deliberation. That's part of the deliberation process. I
10 don't know how you extrapolate a weekend phone call from
11 that information. I understand what Mr. MacAuthur wants
12 to thinks it says, but I don't think it says that.

13 MR. MACAUTHUR: I found another entry. Sorry.

14 THE COURT: Is it the same entry I already
15 acknowledged I know was in there about comments being that
16 they said they needed to convict someone, or is it
17 something more specific.

18 MR. MACAUTHUR: No. From Ms. McNeill's
19 declaration, line 15. I learned from speaking to jurors
20 that Juror No. 5, Steven Hankins, came back to deliberate
21 after the weekend and it seemed as if something had
22 happened because he suddenly had a change of mind. Mr.
23 Hankins is refusing to speak to counsel. Putting that
24 together with the other line I put, that he needed to be
25 convicted of something, I think this is a fair question.

1 He said that he doesn't remember.

2 THE COURT: Mr. MacAuthur, I don't have a
3 problem with you asking questions of this witness of
4 things he did or did not do as he may testify about
5 talking to jurors in deliberations outside of
6 deliberations otherwise, but I cannot and will not allow
7 you to pose a question to a juror that is based on facts
8 that are not in this case in this motion.

9 You are supposing things.

10 MR. MACAUTHUR: It is in the motion.

11 THE COURT: It's not in the motion. There is
12 zero in the motion that says anything about people
13 exchanging telephone numbers, talking to each other over
14 the weekend during deliberations, zero. There is
15 speculation from these jurors about what they thought was
16 different. So I don'ts have a problem with you asking
17 questions about did you have discussions with them, any
18 other ways in which he might have introduced this evidence
19 that is indicated that he did, but I cannot -- this
20 hearing is an evidentiary hearing based on the motion and
21 the opposition and what we had to understand from those
22 and ultimately the testimony that will flesh that out. If
23 I open the door now to you going into a bunch of
24 presupposed facts that don't exist in this record and it
25 goes down a line of questioning, it is going to make this

1 far more muddy than it already is. I'm not allowing it.
2 No.

3 You may ask more questioning of him on what he
4 did or didn't do. Stop premising your questions with, if
5 all of these things happened, then did this happen. Just
6 ask the man the questions. You are bringing in facts that
7 are not in evidence.

8 MR. MACAUTHUR: All right. I will accept the
9 court's ruling. I disagree. But you're the one in
10 charge, so I'll ask it the way you want it asked.

11 THE COURT: Let's see how it goes. Bring
12 Mr. Rago back to the stand, please.

13 Thank you, Mr. Rago, for stepping out for a moment.
14 I'm going to put you on the stand. I've had a discussion
15 with counsel about the further questioning. As soon as
16 you retake the stand, you may take your seat.

17 Can I just ask you to acknowledge, for the record,
18 that even though we had a brief break and were not with
19 us, you understand you're still under oath.

20 THE WITNESS: Yes.

21 THE COURT: Mr. MacAuthur, you may resume when
22 you are ready.

23 BY MR. MACAUTHUR:

24 Q. Mr. Rago, I think the last question I asked
25 you is did you have occasion to speak with one or more

1 jurors over the weekend. You said you did not remember.

2 A. No.

3 Q. Specifically do you remember Juror No. 5,
4 Steven Hankins -- I believe he's the black male on the
5 jury?

6 A. Vaguely.

7 Q. Do you recall whether you had his cell phone
8 number in particular?

9 A. I did not.

10 MS. KOLLINS: I'm sorry, for the record --

11 MR. MACAUTHUR: He did not.

12 MS. KOLLINS: He did not have it or didn't
13 remember.

14 MR. MACAUTHUR: He said he did not have it.

15 MS. KOLLINS: Okay.

16 BY MR. MACAUTHUR:

17 Q. Mr. Rago, with regard to the media source that
18 you consulted, how many did you consult?

19 A. That article showed up on my Facebook stream.
20 I didn't seek that article out. I'm not consulting media.
21 I knew it was wrong when I did it. I shut it down. I
22 didn't do anything further.

23 Q. Is that the only article you consulted?

24 A. Yes.

25 Q. You said that you told other jurors about it,

1 but your recollection is that that happened during trial
2 like in the hallway?

3 A. Yes.

4 Q. Not during deliberation?

5 A. Correct.

6 MR. MACAUTHUR: Court's indulgence.

7 THE COURT: Yes.

8 MR. MACAUTHUR: No further questions.

9 THE COURT: Thank you.

10 Ms. Kollins, any questions for Mr. Rago.

11 MS. KOLLINS: I do. May I approach your
12 clerk.

13 THE COURT: Of course.

14 MS. KOLLINS: May I approach Mr. Rago.

15 THE COURT: You may.

16 CROSS-EXAMINATION

17 BY MS. KOLLINS:

18 Q. How are you?

19 A. Good.

20 Q. I'm showing you what's been marked for
21 purposes of verification for this hearing, State's
22 Proposed Exhibit 1. We've had discussions about an
23 article that -- I guess Mr. MacAuthur's words were
24 consulted, but your words it just kind of popped up on
25 your Facebook feed, right?

1 A. Correct.

2 Q. Does what's depicted in State's 1, does that
3 appear to be the article?

4 A. I remember the title was drops a bombshell on
5 State's case or something like that.

6 Q. Did you read the whole contents of the
7 article?

8 A. No, I clicked on it, you know, the title. I
9 just clicked on it. As it popped up, I shut it down.

10 Q. As it popped up it has a photograph of the
11 Defendant that was in trial?

12 A. I don't remember that being the photograph.

13 Q. Did you read the entire contents of the
14 article?

15 A. I don't remember reading the contents, no.

16 Q. When -- I would move for admission of Exhibit
17 1, please.

18 THE COURT: Any objection.

19 MR. MACAUTHUR: No, Judge.

20 THE COURT: State's Proposed Exhibit 1 will be
21 admitted. I will note, for the record, that it was
22 included in the motion that's at issue for this hearing as
23 an attachment. I believe Exhibit B to the declaration of
24 Mr. MacAuthur. So it's also in the record.

25 MS. KOLLINS: I'm trying to consolidate

1 everything.

2 THE COURT: It's an evidentiary hearing, and I'd
3 much rather have the evidence coming in independently, so
4 to speak, for this hearing. If we have other ways to do
5 that, that's fine. I just wanted to note that it is also
6 in the record.

7 BY MS. KOLLINS:

8 Q. Mr. Rago, as this article came out about the
9 second day of trial; is that correct?

10 A. Yes.

11 Q. When Mr. MacAuthur asked you, did you share
12 that article with the jurors in the hallway, what was the
13 nature of the conversation you had about that article?

14 A. Judge Delaney had mentioned the article, I
15 believe that day in trial on recess. I was like, whoops,
16 I clicked that article. I just mentioned it just like
17 that. That was it.

18 Q. Did you discuss the contents of the article?
19 Did you discuss any of the quotes of the defense attorney
20 that were contained in the article?

21 A. I don't remember doing that.

22 Q. Did you keep that or hit it as a favorite in
23 your Facebook feed and then do anything with it during
24 deliberations?

25 A. No.

1 Q. Did you open it during deliberations?

2 A. No.

3 Q. Did you offer to share it with anyone during
4 deliberations?

5 A. No.

6 Q. We have some statements that are inputted to
7 you and I want to ask you about those. Okay?

8 A. Okay.

9 Q. During deliberations did you make comments to
10 the effect that the Defendant had to go down for
11 something?

12 A. No. I don't remember saying those words.

13 Q. Did you make comments to the effect that
14 myself, Ms. Kollins and Ms. Rhoades failed to do our jobs
15 so it was incumbent upon you and your fellow jurors to do
16 our jobs for us?

17 A. No.

18 MS. KOLLINS: One second, Mr. Rago.

19 BY MS. KOLLINS:

20 Q. At any point, at any point, either the day
21 that article came out, the day that article came out
22 through the course of the 3 weeks we were here or during
23 the 3 or 4 days of deliberation process, did you offer to
24 share that article with anyone?

25 A. No.

1 MS. KOLLINS: I have nothing else.

2 THE COURT: Mr. MacAuthur, anything further.

3 MR. MACAUTHUR: No, your Honor.

4 THE COURT: Mr. Rago, I really do appreciate
5 your time again. I'm sorry that maybe communications
6 could have been better from the court's perspective as to
7 what the purpose was for bring you all back here today.
8 Our appellate court did indicate we should have had
9 evidentiary hearing related to some concerns that were
10 expressed in a motion that was made to the court. And so
11 that's what we're trying to do. Thank you again for your
12 time today.

13 THE WITNESS: Okay.

14 THE COURT: If you'll make sure you don't
15 discuss it with anyone still outside, because they still
16 have to be called as a witness.

17 THE WITNESS: Okay.

18 THE COURT: You are excused at this time. Thank
19 you.

20 Who is next.

21 MR. MACAUTHUR: Brett Aaron Jankiewicz.

22 THE COURT: Mr. Jankiewicz, come forward and
23 raise your right hand.

24 THE CLERK: You do solemnly swear the testimony
25 you are about to give in this action shall be the truth,

1 the whole truth, and nothing but the truth, so help you
2 God.

3 THE WITNESS: I do.

4 THE CLERK: Be seated. State and spell your
5 name for the record.

6 THE WITNESS: Brett Aaron Jankiewicz, Brett
7 Aaron Jankiewicz.

8 THE COURT: Do you have an understanding of why
9 you were subpoenaed to come here today.

10 THE WITNESS: No.

11 THE COURT: So, in hindsight, perhaps the court
12 could have helped folks understand subsequent to the trial
13 in this case there was a motion made that was brought to
14 the court's attention. The court made a rulings on that
15 motion without conducting an evidentiary hearing related
16 to that motion, and as the matter has been up on appeal in
17 this case, the Supreme Court indicated that it would have
18 needed us to have conducted an evidentiary hearing that we
19 did not conduct. It relates to some concerns with regard
20 to jury conduct. So we are now conducting that hearing.

21 So it's a little unusual circumstance. We appreciate
22 your response to the subpoena. I'll turn it over now to
23 counsel to ask you some questions.

24 THE WITNESS: Okay.

25 THE COURT: Mr. MacAuthur, when you are ready.

1 MR. MACAUTHUR: Thank you, Judge.

2 DIRECT EXAMINATION

3 BY MR. MACAUTHUR:

4 Q. Good morning, Mr. Jankiewicz.

5 A. Good morning.

6 Q. Do you remember this case?

7 A. Briefly.

8 Q. You were a juror in the trial of Joshua
9 Honea?

10 A. Yes, sir.

11 Q. When you deliberated the jury returned a
12 verdict of guilty on Count 39 and not guilty on all
13 others. Do you recall that?

14 A. I don't remember which count it was, but I do
15 remember coming to the conclusion of it, yes.

16 Q. Understood. All right. Did you recognize any
17 of your fellow jurors outside?

18 A. Yeah.

19 Q. In particular, did you recognize Juror 1, Mr.
20 Rago -- Tony Rago?

21 A. Yeah.

22 Q. Thinking back to the trial, two Decembers
23 back, do you recall whether you were lunch partners with
24 Mr. Rago consistently during the last week?

25 A. I don't recall that.

1 Q. Do you recall whether or not you exchanged
2 cell phone numbers with Mr. Rago?

3 A. Yes, we did.

4 Q. Do you recall whether or not you spoke with
5 Mr. Rago -- just to not be confusing. At some point the
6 case was given to you to deliberate, correct?

7 A. Yes.

8 Q. Remember there being a weekend after you
9 started deliberating, a weekend in between when you
10 started and when you rendered a verdict?

11 A. Can you rephrase that.

12 Q. Okay. So at some point the Judge read jury
13 instructions. We argued in front of you. And then you
14 guys were allowed to finally deliberate about the case,
15 right?

16 A. Yeah.

17 Q. Do you recall that that deliberation was
18 interrupted by a weekend?

19 A. I don't remember that, no.

20 Q. Given that you don't remember it, I'm not sure
21 if my next question will make any sense to you, but do you
22 recall having spoken with Mr. Rago over that weekend?

23 A. I do not.

24 Q. You don't recall or --

25 A. I don't recall, no.

1 Q. Is it possible you may have?

2 MS. KOLLINS: Objection, speculation.

3 THE COURT: Sustained.

4 MR. MACAUTHUR: Understood.

5 THE COURT: Perhaps the focus of the question
6 could be outside the deliberations without being tied to
7 that time frame, just to be clear.

8 MR. MACAUTHUR: Understood.

9 BY MR. MACAUTHUR:

10 Q. Do you recall discussing the facts and events
11 of the case with Mr. Rago outside of deliberations in the
12 special deliberation room?

13 A. I don't recall that.

14 Q. Do you recall Juror No. 5, Steven Hankins, I
15 think he would have been the only black male juror?

16 A. Yeah. Yeah. I no what you're talking
17 about.

18 Q. Did you have his cell phone number?

19 A. I did not.

20 Q. Mr. Jankiewicz, were you aware at any point of
21 Juror No. 1, Tony Rago, having consulted a newspaper
22 article about the case titled something like Teen Drops a
23 Bomb on State's case?

24 A. I remember hearing something about it, but I
25 didn't know who it was tied to.

1 Q. Do you remember how you heard about it?

2 A. Waiting out there to be called in, someone
3 said something about it.

4 Q. So this -- would this have been before or
5 during deliberation?

6 A. I don't remember that. I don't remember.

7 Q. But you feel like it was in the hallway?

8 A. Yeah. Yes.

9 Q. Mr. Jankiewicz, you, in fact, have a sister
10 named Taylor Ann Jankiewicz; is that correct?

11 A. Taylor what?

12 Q. I might have the middle name wrong. Sorry,
13 Taylor Page. I apologize.

14 A. Yes, I do have a sister named that.

15 Q. Younger sister? Older sister?

16 A. She's younger.

17 Q. I don't intend to do an inappropriate deep
18 dive. Has Taylor had some substance abuse issues in the
19 past?

20 A. Yes.

21 Q. Do you maintain a close relationship with your
22 sister?

23 A. No.

24 Q. Thinking back -- I'm not asking you about now.
25 I'm referencing the time frame of approximately when the

1 trial occurred, fair?

2 A. Yes.

3 Q. Do you know whether Taylor was -- well, was
4 she struggling with a substance abuse issue at that
5 time?

6 MS. KOLLINS: Objection.

7 MR. MACAUTHUR: Basis.

8 MS. KOLLINS: Relevance.

9 THE COURT: Can I ask you, Mr. Jankiewicz, I
10 apologize for the inconvenience. It's easier to have a
11 conversation with counsel with them standing there and you
12 being there. Would you mind stepping down and following
13 the marshal and stepping outside the courtroom for a
14 second. You'll go into an anti-room, and we'll bring you
15 back in.

16 The objection is overruled because I do recognize
17 that in the communications about Taylor and how she may
18 have known Morgan it was referenced that they met on the
19 streets. I understand that to be the genesis of this
20 questioning, so I believe there is foundation for the
21 question in the circumstances. I understand Ms. Kollins'
22 concern about relevancy to it, but, again, I know this
23 seems like we're having a battle, Mr. MacAuthur. I don't
24 feel we need to be having a battle. I think you can just
25 go and ask these questions, but you're so intent on

1 setting up foundation for the questions that I think
2 you're sometimes either shortening the scope of the
3 question unnecessarily, or you're creating some confusion
4 to the question. I don't have a problem. I'm going to
5 overrule. You can ask this and you can lead to where you
6 need to go, but I don't know there is going to be any
7 objection if you just get to the heart of the matter
8 either.

9 MR. MACAUTHUR: I'll try to do that, Judge.

10 THE COURT: Ms. Kollins, anything further for
11 the record.

12 MS. KOLLINS: If we may just have some
13 foundation for that time frame as well.

14 THE COURT: Again, I know you're not asking for
15 the answer, but I'll answer initially. The discussion was
16 that the profile -- I'm trying to -- this is out of Ms.
17 McNeill's declaration. It's an indication of a Facebook
18 page, common pictures. Then there was a reference a
19 little bit later that indicated they had met on the
20 streets, but now I'm trying to find where that indication
21 exists. That was the -- met on the street corner. And
22 there was some indication that --

23 MS. KOLLINS: Maybe I wasn't clear. I
24 apologize. I understand where he's going with it, but some
25 foundation about her drug issues.

1 THE COURT: That's what I thought I was
2 answering. Because we knew where Morgan had come from at
3 the time we did the warrant to bring her in for the
4 testimony and she was living on the streets and there was
5 a reference to them meeting on the street corner, maybe I
6 extrapolated that into that discussion.

7 Go ahead and make your proffer. I'm also going to
8 ask you to make a proffer, Mr. MacAuthur, of what
9 subsequent questions in this line you're going to ask to
10 get to where we need to go.

11 MR. MACAUTHUR: I don't expect that -- well,
12 maybe I shouldn't expect --

13 THE COURT: Proffer on the drug use. Just
14 because they met on the street corner.

15 MR. MACAUTHUR: No. Morgan Savage advised us
16 that the way she'd come to know Taylor Jankiewicz was that
17 Taylor Ann Jankiewicz apparently got into the passenger
18 side seat of Morgan Savage's father's car. The State will
19 recall that she was living, sort of, in the car, which was
20 inside an alleyway between a couple of apartment places
21 and both parties had tried to find her there,
22 unsuccessfully, before she went into custody on the
23 material witness warrant.

24 At any rate, Morgan -- and, by the way, I want the
25 record to reflect that Ms. McNeill and I don't remember

1 this the same way. But my recollection was that the two
2 made a friendship based on that contact and that Morgan
3 did not specifically recall all the details that she gave
4 to Taylor Ann Jankiewicz about the case, but she did
5 recall talking to her about it.

6 Given that part of the State's objection has been
7 there is no inappropriate relationship when people just
8 know each other on Facebook, we have been countering by
9 saying, no, it's not just I knew this person on Facebook.
10 That they were friends in the real world. And the way
11 that they met is that they both apparently have a heroin
12 problem and so in order to give that legitimacy I wanted
13 to provide foundation through Mr. Jankiewicz himself that,
14 yes, that's my sister. Yes, she has a drug problem. And
15 my next question will be do you know if in the summer of
16 2017 she was homeless in the area of East Charleston and
17 Torrey Pines. I don't know if he's going to say he knows
18 that or not.

19 THE COURT: Let me -- Ms. Kollins, don't lose
20 your thought.

21 I found a paragraph in Mr. MacAuthur's declaration
22 not Ms. McNeill's declaration, which also talks about the
23 Facebook page. In paragraph 12, it says, that in-person
24 contact with Morgan Savage on December 22nd, 2017 revealed
25 that she had become friends with Taylor Jankiewicz after

1 meeting her on the street near Charleston Boulevard and
2 Torrey Pines some months prior to trial. Further, that
3 Savage has started a new Facebook page upon her release
4 from custody on the material witness warrant and was aware
5 that Taylor was an acknowledged friend on that new page.

6 That's the sum total of the information that I saw in
7 the declaration about that.

8 Go ahead, Ms. Kollins.

9 MS. KOLLINS: That's fine. I'll withdraw it.

10 THE COURT: Are you sure you don't want to make
11 a record.

12 MS. KOLLINS: All of Morgan Savage's information
13 is hearsay for purposes of this hearing, so we're kind of
14 polluting the Supreme Court with this record. What is
15 important is what did that -- what influence did that have
16 on this juror and how did that prejudice Mr. Honea. So I
17 just wanted to wrap that long conversation up with that.

18 THE COURT: I agree with your assessment, that's
19 why I asked Mr. MacAuthur to make the proffer. I think if
20 this witness knows, even what he knows, would eventually
21 reveal the hearsay based on how he knows it or doesn't
22 know it.

23 Again, the line of questioning you indicated you
24 wanted to ask to get to the heart of the question I don't
25 have a problem with it, but let's just pick it up and get

1 there. The objection is overruled. Again, let's just get
2 to the heart of the information.

3 Elvis, we're ready for Mr. Jankiewicz. Come back up
4 and take the stand. I appreciate your patience while I
5 discussed matters with counsel.

6 I'll ask you to have a seat. Can you acknowledge for
7 the record you understand even though we had a short
8 recess with you outside the courtroom, you are still under
9 oath.

10 THE WITNESS: Yes.

11 THE COURT: Thank you.

12 Mr. MacAuthur, the objection posed before we excused
13 Mr. Jankiewicz is overruled. You may have the witness
14 answer or reask the question.

15 BY MR. MACAUTHUR:

16 Q. Just to restart. Is it true that your sister,
17 Taylor, had a problem with heroin in the year of 2017?

18 A. I was not aware of that, no.

19 Q. Do you know where your sister was living the
20 year of 2017?

21 A. I do not.

22 Q. Do you know if she may have been transient in
23 the area of East Charleston and Torrey Pines in the summer
24 of 2017?

25 A. I have no idea.

1 MS. KOLLINS: Objection, speculation.

2 MR. MACAUTHUR: Only if he knows.

3 THE COURT: Overruled.

4 I'm going to start doing this with each witness out
5 of the gate. If one of the counsel would object to the
6 question -- you may not remember during trial, but we'd
7 ask the witness wait until the court rules on the
8 objection.

9 I'm overruling the objection. I don't think the
10 question is speculation. I think you answered, no. Maybe
11 we need to clarify for the record.

12 MR. MACAUTHUR: He said, no. He didn't know.

13 Is that correct, you didn't know if she was living in
14 that vicinity at that time.

15 THE WITNESS: I haven't even been in contact
16 with my sister for over 5 years.

17 BY MR. MACAUTHUR:

18 Q. Do you know if your sister maintains contact
19 with your parents?

20 A. I have no idea.

21 MR. MACAUTHUR: No further questions for Mr.
22 Jankiewicz.

23 THE COURT: Thank you.

24 Ms. Kollins.

25 MS. KOLLINS: Couple of brief questions.

CROSS-EXAMINATION

BY MS. KOLLINS:

Q. Thank you. Sorry about the inconvenience. No contact with your sister for 5 years?

A. None.

Q. So do you have any awareness of her social circles or any of her friends?

A. No.

Q. Do you have any specific knowledge that she may have been a Facebook friend of the victim in this case?

A. No. I'm not even Facebook friends with her.

MS. KOLLINS: Nothing further, your Honor.

THE COURT: Anything further, Mr. MacAuthur.

MR. MACAUTHUR: No, Judge.

THE COURT: All right. Mr. Jankiewicz, thank you for your time. You are excused now. You don't have to stay, but as you're on your way out make sure you don't speak with any of the other witnesses.

THE WITNESS: Do I go to someone for the parking validation.

MS. KOLLINS: If you go to the third floor, victim witness, they'll be able to validate your parking.

THE COURT: When you come off those elevators on

1 the third floor, take a right, and it's right there on the
2 right hand side.

3 MS. KOLLINS: Around in a horseshoe, where the
4 jury service is.

5 THE COURT: Thank you so much again for your
6 time.

7 Which is next.

8 MR. MACAUTHUR: Juror 4, Sharon Monson.

9 THE COURT: Elvis, Juror Sharon Monson. Come
10 forward and be sworn.

11 THE CLERK: You do solemnly swear the testimony
12 you are about to give in this action shall be the truth,
13 the whole truth, and nothing but the truth, so help you
14 God.

15 THE WITNESS: Yes.

16 THE CLERK: Please state and spell your name for
17 the record.

18 THE WITNESS: Sharon Monson, S-h-a-r-o-n,
19 M-o-n-s-o-n.

20 THE COURT: Have a seat. Thank you. Do you
21 understand why you were subpoenaed to come here today.

22 THE WITNESS: Kind of sort of.

23 THE COURT: What's your understanding.

24 THE WITNESS: I'm thinking it was because I know
25 when you sit on a jury you are not supposed to discuss

1 things outside of the courtroom, and things like that, and
2 that was done.

3 THE COURT: So what's happening here today --
4 thank you so much for responding to the subpoena. The
5 State issued the subpoena, but, of course it's at the
6 court's mandate that this occur because the matter of the
7 trial is up on appeal and there is an issue that was
8 raised related to the jurors' conduct in the case. And
9 the appellate Court determined that for a limited purpose
10 the case should come back to this court to have a hearing,
11 an evidentiary hearing, on those issues. So that is why
12 you were subpoenaed.

13 Counsel are going to ask you some questions. Just
14 answer the questions to the best of your ability. Should
15 counsel ask a question and the other counsel pose an
16 objection, please, wait to answer until the court has
17 ruled on that objection.

18 THE WITNESS: Okay.

19 THE COURT: Mr. MacAuthur, whenever you are
20 ready.

21 MR. MACAUTHUR: Thank you, Judge.

22 DIRECT EXAMINATION

23 BY MR. MACAUTHUR:

24 Q. Good afternoon, Ms. Monson.

25 A. Good morning. Afternoon, right.

1 Q. Thank you for being here. I'm sure you were
2 surprised 2 years later to be back involved in the same
3 case.

4 A. Yep.

5 Q. I'll try not to waste your time.

6 Did you recognize some of your fellow jurors from
7 this case outside?

8 A. Yes, I did.

9 Q. Do you recall being a juror that deliberated
10 in this case?

11 A. Yes.

12 Q. Do you recall the jury returned a verdict of
13 one guilty count on Count 39 and not guilty on all other
14 counts?

15 A. Yes.

16 Q. One more thing. Do you recall having been
17 contacted by Ms. McNeill around Christmas -- sorry. Do
18 you recall having been contacted by me around Christmas
19 time of 2017?

20 A. I do.

21 Q. Do you recall me asking for facts and things
22 that happened in the -- related to jury deliberation and
23 the verdict?

24 A. I believe so, yeah.

25 Q. Do you recall -- your very first statement as

1 to why you thought you might be here, because there was an
2 admonishment that no discussion should happen outside of
3 deliberation, but that it had happened.

4 Would you mind sharing the details of that with us,
5 please.

6 A. Um, you know, when we were sitting in the
7 hallways waiting for court to start, there were a couple
8 of the jurors discussing, you know, we read something in
9 the newspaper. I just overheard that. It was never
10 directed toward me. Just discussing that, that they read
11 an article in the paper about the case.

12 Q. To the best of your recollection, do you
13 remember what juror that may have been?

14 A. I don't know the names. It was the first guy
15 that was brought in today.

16 Q. So the very first person who came in, yay
17 tall, gray hair?

18 A. Glasses, yeah.

19 Q. Okay. Were there any other discussions that
20 you were aware of?

21 A. No. That's all I recall. I was just waiting
22 in the hallways.

23 Q. Ms. Monson, do you recall who -- I think
24 you've identified the person we're calling as Juror No. 1,
25 Tony Rago?

1 A. Okay.

2 Q. Do you recall who it was that Mr. Rago may
3 have been talking to?

4 A. The second guy that just left -- before -- the
5 second gentleman.

6 Q. He walked out. Shorter than Mr. Rago.
7 Younger, a five-o'clock shadow?

8 A. Yes.

9 Q. We're calling him Juror No. 3, or
10 Mr. Jankiewicz?

11 A. Okay.

12 Q. Do you recall whether Mr. Rago and Mr.
13 Jankiewicz were frequently social or in each other's
14 company a lot?

15 A. Yeah.

16 Q. How were you able to observe that?

17 A. Well, again, you see the people in the
18 hallways talking. A few of us would gather for lunch.
19 I've had lunch with them as well. There would be 5 or 6
20 of us, we'd go for lunch together. Those two gentlemen
21 were included and a few others. But nothing was ever
22 discussed at the lunch things. They were strictly more
23 just a social thing.

24 Q. If you could -- I realize it's been 2 years.
25 How often do you think you saw Mr. Rago and Mr. Jankiewicz

1 go to lunch together?

2 A. Okay. Pretty often. I'm -- I can't say a
3 hundred percent, but I'm pretty sure it was probably
4 daily.

5 Q. Okay. Now, do you recall whether during jury
6 deliberation Mr. Rago -- court's indulgence.

7 Do you recall whether Mr. Rago presented the
8 article? I'm not -- do you remember -- do you recall
9 whether or not he presented an article for anyone in jury
10 deliberation?

11 A. He discussed it, and he tried to literally
12 present it, I believe, on his phone. But I think it was
13 pretty much discarded, shut down.

14 Q. As best you can recall, what prevented him
15 from successfully being able to share it?

16 A. People saying, you can't do that.

17 Q. Your recollection is that he attempted to
18 share it, but somebody else shut him down?

19 A. Right. He was at that end of the deliberation
20 table, I was at this end. So from what I saw, I didn't
21 see it. I didn't see him show anybody. That's all I
22 know.

23 Q. You are testify to what you heard him say and
24 what other people didn't respond?

25 A. Right.

1 Q. Understood.

2 Do you recall at some point whether or not either
3 Mr. Rago or Mr. Jankiewicz said that Josh should go down
4 for something?

5 A. Yes.

6 Q. Could you provide us some context? Like, when
7 would that have been said in deliberations?

8 A. Really, like --

9 Q. If you know.

10 A. I don't know what you mean by when he might
11 have said that. We were there for -- I don't even
12 remember how many hours.

13 I think either it was probably towards the end.
14 You know what I mean. Because it wasn't an immediate.
15 Everybody was, you know, throwing guilty, guilty, guilty,
16 you know. So we were discussing it, and it was more
17 towards the end of the deliberation or second half
18 maybe.

19 Q. And, if you remember, what -- I mean, did that
20 have any meaningful effect on you, in them having said
21 that?

22 A. I don't think that had any effect on me.

23 Q. That particular instance?

24 A. Right.

25 I don't think they influenced me in any way, if

1 that's what you're leading to. It was my own personal
2 decision to --

3 Q. Do you remember whether it was Mr. Rago or
4 Mr. Jankiewicz, neither, or both, that said that Josh
5 needed to go down for something?

6 A. I want to say it was Mr. -- what did you call
7 him?

8 Q. Jankiewicz, the second one. The shorter
9 one?

10 A. I want to say it's him.

11 Q. As far as you can recall, did he remain
12 committed to that position after he said that?

13 A. Absolutely.

14 Q. You say absolutely with emphasis.

15 A. He repeated it. It's not something he just
16 said once and let go. You know, he repeatedly said that.
17 So that was his strong feelings whether or not he was
18 trying to persuade other people, you know, convince them
19 that was the route to go. But that's why I say that
20 because he repeated it.

21 Q. Did -- do you recall Mr. Jankiewicz stating
22 what that something needed to be found guilty of was?

23 A. Just -- I can't say for sure. I really can't
24 remember that.

25 Q. Understood.

1 Do you recall if he gave a reason why Josh needed
2 to be convicted of something?

3 A. Because of the history of the case, of Josh
4 with -- I can't remember her name.

5 Q. Morgan Savage?

6 A. Yeah. Sorry.

7 Just because of the history they had together. He
8 just, I think, thought that it was wrong and --
9 deliberate, I guess. You know, not that -- like it was
10 planned, you know. This whole, everything, the whole
11 relationship and so forth, that Josh, you know, knew
12 better and he still did it.

13 Q. That was Mr. Jankiewicz' feelings?

14 A. Yeah.

15 MR. MACAUTHUR: No further questions for Ms.
16 Monson.

17 THE COURT: Ms. Kollins.

18 MS. KOLLINS: Just a couple.

19 CROSS-EXAMINATION

20 BY MS. KOLLINS:

21 Q. How are you?

22 A. Good. Thank you.

23 Q. You spoke to Mr. MacAuthur, it looks like
24 December 26th, after the trial?

25 A. Shortly after the trial. I don't know the

1 date.

2 Q. I'm just taking this from an affidavit Mr.
3 MacAuthur drafted. So that's where my questions are
4 coming from, okay.

5 The newspaper article, you never read it or saw it,
6 correct?

7 A. Correct.

8 Q. Mr. Rago didn't personally show that to you or
9 go through its contents with you?

10 A. No.

11 Q. Mr. MacAuthur indicated that you did not
12 recall which juror had said Josh had to go down for
13 something. So today you said it was Mr. Jankiewicz. Did
14 more than one juror say that or -- I'm just a little
15 confused is all.

16 A. The two were sitting together at the table,
17 and I -- maybe -- I don't know. Everything was just
18 blurry. But now -- I mean, I can picture them sitting
19 next to each other, and I've never tried to picture it
20 before. And Mr. Jankiewicz -- whatever -- being pretty
21 adamant and I was surprised because -- not that we
22 discussed it during the -- what do you recall it -- the
23 case and when it was -- when he was talking to the other
24 guy -- I'm sorry.

25 Q. We're talking about Jankiewicz during

1 deliberation, right?

2 A. Right. During deliberations and in the hall,
3 he seemed to be kind of a quiet guy, I guess, and then
4 when he was kind of -- it was kind of like this. I think
5 he should, something, he should be, you know, go down for
6 something.

7 Q. Contextually, this is a conversation between
8 all the jurors, right?

9 A. During deliberation, yes.

10 Q. So this isn't any one bullying their way
11 through deliberations. This is someone who's giving an
12 opinion.

13 A. That's my opinion of it, yeah.

14 Q. That they were giving an opinion?

15 A. Right.

16 Q. It was just part of the process of people
17 exchanging information?

18 A. That's my opinion of it, yes.

19 Q. So it didn't -- did it have any negative
20 influence on you, or did it seem to upset anyone?

21 A. It upset me. It was hard for me, only because
22 I have a son the same age. And I wanted to make sure that
23 everybody was doing it for the right reason and not
24 because somebody was saying, I think, you know, we should
25 charge him with something.

1 Q. Okay. I understand that the nature of the
2 case is upsetting. I'm sure. You know, you have a son.
3 I'm sure jurors had daughters similar to the age of Ms.
4 Savage. So on both sides it is troubling.

5 But my question is, was any of the commentary or
6 exchanges made during deliberation upsetting?

7 I understand the facts are upsetting.

8 A. Right.

9 Q. Did, he should go down for this, that didn't
10 cause to make a decision, right?

11 A. No, it did not. It didn't cause me to make a
12 decision. It was the hardest thing I've ever had to do in
13 my life.

14 Q. Earlier you said it didn't influence you.

15 A. No. He did not influence me at all.

16 Q. You said it was your personal decision,
17 right?

18 A. Yes.

19 MS. KOLLINS: Thank you, ma'am.

20 THE COURT: Mr. MacAuthur, anything further for
21 Ms. Monson.

22 MR. MACAUTHUR: Yes. Court's indulgence.

23 THE COURT: Okay.

24 REDIRECT EXAMINATION

25 BY MR. MACAUTHUR:

1 Q. Ms. Monson, it strikes me as a strange
2 statement, the way you expressed it, that Mr. Jankiewicz
3 thought that Josh should go down for something. Something
4 being less specific then he needs to go down for this
5 particular crime.

6 Just being charged with something, I think. Not to
7 let him go with not guilty all across the board.

8 Q. Did it appear to you that it was important
9 what that something was, or more or less anything is
10 fine?

11 MS. KOLLINS: I'm going to object to the
12 phraseology of the question.

13 THE COURT: Overruled on this one. Again, Mr.
14 MacAuthur, the question should be directed to the witness
15 as to what she knows not your impressions on anything with
16 regard to the testimony.

17 MR. MACAUTHUR: Understood.

18 BY MR. MACAUTHUR:

19 Q. Let me get us back there.

20 Jankiewicz said repeatedly that Josh needed to be
21 convicted of something?

22 A. Uh-huh.

23 Q. This was surprising to you because he was a
24 quiet fellow?

25 A. Right.

1 Q. And that suddenly he asserted himself, late in
2 the proceedings, saying, he needed to be convicted of
3 something?

4 A. Right.

5 Q. You testified that he should not be given a
6 not guilty all the way down the board?

7 A. Right.

8 Q. Did he -- this is where we left off. Did he
9 attach that something to a particular crime, or was it
10 like anything will do?

11 A. I don't recall it being attached to any
12 particular crime. More like, anything would do. That was
13 my impression. Everybody interprets things differently.

14 Q. Understood.

15 MR. MACAUTHUR: No further questions.

16 THE COURT: Ms. Kollins.

17 RE CROSS-EXAMINATION

18 BY MS. KOLLINS:

19 Q. Ma'am, your verdict was unanimous as to the
20 one count, correct?

21 A. Yes.

22 MS. KOLLINS: Nothing further.

23 THE COURT: Thank you for your time of day. I
24 just apologize for the late start.

25 Please, you are discharged. You don't have to stay.

1 Please make sure you don't discuss what occurred in here
2 with anyone else out there.

3 THE WITNESS: No problem.

4 THE COURT: We've been going in the order in
5 which they were jurors, so Leslie McKinister.

6 Come in and raise your right hand.

7 THE CLERK: You do solemnly swear the testimony
8 you are about to give in this action shall be the truth,
9 the whole truth, and nothing but the truth, so help you
10 God.

11 THE WITNESS: I do.

12 THE CLERK: State and spell your name for the
13 record.

14 THE WITNESS: Leslie Makinster, L-e-s-l-i-e,
15 M-a-k-i-n-s-t-e-r.

16 THE COURT: Ms. Makinster, do you have an
17 understanding of why you were subpoenaed to come here
18 today.

19 THE WITNESS: Yes.

20 THE COURT: What's that understanding.

21 THE WITNESS: I did sign -- well, I don't know
22 what the paperwork was.

23 THE COURT: A declaration.

24 THE WITNESS: Yeah. Okay. Yes. And what it
25 was that during deliberation and what we spoke about.

1 THE COURT: We just want to know if you
2 understood why you're here today.

3 THE WITNESS: Yes.

4 THE COURT: You think it's with regard to take
5 declaration you gave.

6 THE WITNESS: Yes.

7 THE COURT: In some respects it is. Let me just
8 orient you with what we're doing here today.

9 So after you gave that declaration, there was a
10 motion made to the court to consider some outcomes related
11 to what was put before the court. I'm not going to go
12 into the details. That doesn't matter. But the court
13 made a ruling. The court did not conduct an evidentiary
14 hearing, like it is doing now, but it made a ruling on the
15 information it had available to it at the time.

16 The matter of the entire case has since been appealed
17 and the appellate Court indicated they would like us to
18 have the evidentiary hearing that we did not have then and
19 that is what we're doing now. So it is related to that
20 information. Counsel are going to direct some questions
21 to you. You just answer them, of course, to the best of
22 your ability.

23 I would ask you that if counsel poses a question and
24 the other counsel objects to the question, if you would,
25 please, wait before you answer to let me rule on that

1 objection. Just like you might remember from the trial.
2 Other than that, we'll have them asking some questions and
3 that's it. Okay.

4 THE WITNESS: Okay.

5 THE COURT: Mr. MacAuthur.

6 MR. MACAUTHUR: Thank you, Judge.

7 DIRECT EXAMINATION

8 BY MR. MACAUTHUR:

9 Q. Good afternoon, Ms. Makinster.

10 A. Good afternoon.

11 Q. Does it feel weird to be back after 2 years?

12 A. Yes. Especially here.

13 Q. I get it. This shouldn't take too long.

14 Thank you for being here.

15 Do you recall having been a juror in the State's
16 case against Joshua Honea two years ago?

17 A. Yes.

18 Q. Do you remember deliberating with your fellow
19 jurors?

20 A. Yes.

21 Q. Do you remember that the jury returned a
22 verdict of guilty on one count, Count 39, and acquitted
23 him on all the other counts?

24 A. Yes.

25 Q. Do you recall whether after deliberations

1 began, right, counsel made their arguments and then the
2 Judge --- well, the Judge probably read instructions, we
3 did the arguments, then the case was given to you as a
4 group?

5 A. Yes.

6 Q. Remember whether there was a weekend in
7 between your deliberations?

8 A. Yes.

9 Q. Thinking back, during deliberations, do you
10 recall whether Juror No. 1, Tony Rago, presented a
11 newspapers article to anyone?

12 A. During deliberation?

13 Q. Yes.

14 A. Yes.

15 Q. You seem confident about that. How do you
16 remember that that happened in deliberation?

17 A. Okay. So he was sitting right cross from me.
18 I was like one of the last jurors to vote guilty because I
19 didn't see all the - you know, the evidence that was given
20 to jurors. It was going around the table, and I was one
21 of the last ones to see the evidence. So I was just
22 waiting until I looked through all of the paperwork to
23 look at it. So he was sitting right across from me and we
24 talked about -- I just said, well, what happens if we say
25 not guilty or guilty, and he said, well, we have to do

1 something. We have to vote on something, because if we
2 let him go, he's going to turn around and sue the County
3 or whatever it is. And then he'll win a bunch of money
4 and stuff like that. So he goes, this case is really
5 important. And then he puts, like, this -- he typed in
6 like an e-mail address on some news article and he goes
7 this is proof how important this case is.

8 So he Googled something. And all I saw on the
9 phone -- because when he flashed it, was like Review
10 Journal or something like that.

11 Q. Okay. So Mr. Rago felt strongly that if
12 Mr. Honea was acquitted on all counts --

13 MS. KOLLINS: Objection.

14 THE COURT: Sustained. The witness can't tell
15 to what Mr. Rago felt or thought. Ms. Kollins stated her
16 basis. I don't want a speaking objection, but stated her
17 basis.

18 MR. MACAUTHUR: Understood.

19 THE COURT: Proceed.

20 BY MR. MACAUTHUR:

21 Q. Mr. Rago said in deliberation that the case
22 was important?

23 A. Right.

24 Q. And the reason that it was important was that
25 if Josh Honea was acquitted on all counts, he might sue

1 some governmental entity and get a lot of money?

2 A. Right.

3 Q. Your impression was that Mr. Rago didn't want
4 that to happen?

5 MS. KOLLINS: Objection.

6 THE COURT: Sustained.

7 MR. MACAUTHUR: Okay.

8 THE COURT: I appreciate you're asking her
9 impression, but it calls for speculation.

10 MR. MACAUTHUR: Understood. May I ask is that
11 how she took it.

12 THE COURT: Ask your next question. The
13 objection was sustained.

14 MR. MACAUTHUR: Understood.

15 BY MR. MACAUTHUR:

16 Q. Do you know whether or not -- you said he
17 offered to show the article to other jurors?

18 A. Right.

19 Q. Do you know whether any other jurors saw that
20 article?

21 A. We all said, no, no, no. Don't do it. Like,
22 you know, cause we were told not to look at articles. So
23 we told him right away, we're, like, turn your phone off.
24 Don't show it to us. Essentially, I was like I don't want
25 to take part in it. Like, don't show it to anybody.

1 And so he set the phone away, when everybody said,
2 you know, objected to him showing us the article. Because
3 we knew we could get in trouble for it.

4 Q. Do you recall whether any jurors around that
5 time in deliberation said that the Defendant needed to be
6 convicted of something?

7 A. Yes.

8 Q. Do you remember which juror or jurors were
9 pushing that narrative?

10 A. Well, it was --

11 MS. KOLLINS: Objection as to the
12 characterization "pushing narrative."

13 MR. MACAUTHUR: Do you know which jurors -- what
14 juror or jurors said that?

15 THE WITNESS: Well, I was sitting right in front
16 of Tony and -- I think it's Brett. Those are the people
17 that -- there was Kathy in between them, and then they
18 were right there. So it was mainly those two. Brett was
19 like -- I don't want to say -- you know what I mean.
20 Like, I don't know the correct words, what wording he
21 said, but he said he's guilty. He's not going to -- he
22 needs to be convicted of something. I think that's -- not
23 the complete words, you know, something along those
24 words.

25 BY MR. MACAUTHUR:

1 Q. Did he tie that something to a specific crime?
2 I mean, did he use a particular thing?

3 A. I also --

4 MS. KOLLINS: Objection, speculation, as to the
5 second part.

6 THE COURT: Overruled. Rephrase.

7 BY MR. MACAUTHUR:

8 Q. Did Mr. Jankiewicz say, for example, he needs
9 to be convicted of Count 11 because of these facts and
10 this evidence?

11 A. It wasn't exactly like which count. Tony was
12 more like you need to -- we need to convict him of the
13 sexual assault that happened in California, because that's
14 when he thinks that something happened, that time frame.
15 And when we convicted him of that time frame, it was to
16 show that we thought that something happened in that
17 California vacation.

18 Q. Okay. Now, with regard to Mr. Rago and Mr.
19 Jankiewicz, you said they were sitting across from you?

20 A. Yes.

21 Q. Do you recall whether they were frequently in
22 each other's company when you were not deliberating?

23 A. Oh, yeah. They were having lunch together.

24 Q. Do you know how often they were having lunch
25 together prior to deliberation?

1 A. I know the first two days they were having
2 lunch with us and then -- I don't know, the trial was 3
3 weeks. Then after that they started having more lunch
4 together.

5 Q. Okay. Do you recall another juror by the name
6 of Blaire Savko?

7 A. Yes.

8 Q. Did the two of you socialize during the
9 trial?

10 A. Yes.

11 Q. Thinking back to the deliberations, in the
12 context of Mr. Rago and Mr. Jankiewicz saying he needed to
13 be convicted of something, did that create a problem for
14 you and/or Ms. Savko?

15 MS. KOLLINS: Objection as to Ms. Savko.

16 THE COURT: You'll just testify as to your own
17 personal understanding.

18 THE WITNESS: Okay. Can you repeat the
19 question.

20 BY MR. MACAUTHUR:

21 Q. Did -- did the proposed verdict give you
22 misgivings or a bad feeling?

23 THE COURT: That wasn't your question. Is that
24 what you're supposing now.

25 MR. MACAUTHUR: What I'm trying to do is not

1 include Ms. Savko.

2 THE COURT: You can easily reask the question
3 and not include Ms. Savko. That's not the same question.
4 So are you changing the question or are you trying to
5 reask the same question.

6 MR. MACAUTHUR: I don't remember exactly how I
7 asked it.

8 THE COURT: Would it be difficult for the court
9 reporter to read back the question that involved the names
10 of both Ms. Makinster and Ms. Savko.

11 THE REPORTER: Thinking back to the
12 deliberations, in the context of Mr. Rago and Mr.
13 Jankiewicz saying he needed to be convicted of something,
14 did that create a problem for you and/or Ms. Savko.

15 THE WITNESS: Create a problem with me?

16 THE COURT: Do you need the reporter to read it
17 again?

18 Do you want him to reask the question.

19 THE WITNESS: Well, it was -- there is so much
20 to take in when you're deliberating, and this person's
21 life is at your hand -- in your hands. So, yes and no, I
22 guess. I mean, I just wanted to be thorough about the
23 evidence and everything else. So, I guess, yes. I guess
24 the question is, yes.

25 BY MR. MACAUTHUR:

1 Q. Based on the insistence of jurors number --

2 MS. KOLLINS: Objection, as to
3 characterization.

4 THE COURT: Mr. MacAuthur, I'm going to sustain.
5 You don't need to editorialize. Please, just ask the
6 question.

7 BY MR. MACAUTHUR:

8 Q. Based on the statements and observable conduct
9 from Mr. Rago and Mr. Jankiewicz, did it appear to you or
10 seem to you like they knew something you didn't?

11 A. Oh, yes.

12 Q. Why did you feel that way?

13 A. Okay. So Brett and I were talking he said
14 that he knew someone that was -- didn't know Morgan at all
15 but knew someone --

16 Q. Brett didn't know or the person he knew?

17 A. He knew someone that knew Morgan. Didn't know
18 them personally, but knew something. So I kind of --
19 that's how I kind of interpreted why he was -- he didn't
20 really say much during deliberation. He was just sitting
21 back. And so every time I would ask a question he was
22 just kind of shaking his head and like looking at me like
23 I was dumb for asking these questions. But I do feel that
24 since he kind of knew somebody that was kind of close
25 to --

1 Q. Morgan.

2 A. -- Morgan that he kind of knew some
3 information. Then I knew Tony did, because I knew that he
4 told me in several times that he did look at the internet
5 or paper clippings or newspaper stuff.

6 Q. You said internet, paper clippings --
7 newspaper stuff. Did you get the impression that he had
8 looked at more than one article?

9 A. Yes.

10 Q. You seem certain about that. Why did you have
11 the implication that he consulted more than one thing?

12 A. I think like on the first day when we got
13 chosen as jurors, there were articles about Mr. Honea
14 getting arrested. So I think he said something about that
15 article, like a junior police officer, you know, like,
16 not -- yeah -- I don't know what they're called -- was
17 arrested or something like that. So that came up. And
18 then the whole article about the -- something about
19 bomb -- drops a bomb or something about that. And he
20 talked about it in lunch and during the deliberation.

21 Q. Now, when you say lunch, was it lunch during
22 deliberations or was it lunch before you guys started
23 deliberating?

24 A. Before.

25 Q. As best as you can tell, did he do that

1 outside of deliberations? Did he do that more than
2 once?

3 A. I think I just remembered those two
4 incidents.

5 Q. So one in a lunch before deliberation?

6 A. Actually two. Because of the one that says
7 the arrest, that article arrest. Then the second one
8 would be the bomb -- dropping the bomb, something about
9 that. And then during deliberation that article was
10 mentioned again. So I don't know if that's three.

11 Q. If I understand, you said there was an initial
12 article about an arrest he consulted?

13 A. Yes.

14 Q. And that was discussed over lunch?

15 A. That was when we are walking out after we were
16 in court.

17 THE COURT: Maybe the Court can clarify
18 something here.

19 Are you with knowledge that there were different
20 articles, or are you assuming there were different
21 articles? How do you know these articles -- this article
22 or articles weren't all one and the same.

23 THE WITNESS: I don't know if that is the case
24 because when we were leaving one time he mentioned an
25 article with me about someone getting -- the arrest, then

1 whatever the teenager -- I don't know what it was he said.
2 And that was early on in the trial. So within the first
3 week. I think it was like the second or third night.

4 THE COURT: What I'm trying to get at is the
5 only time you saw some aspect of the article, did you
6 indicate you saw what he tried to show you on the phone in
7 deliberations.

8 THE WITNESS: I didn't read the article. It did
9 show up --

10 THE COURT: You saw the headline.

11 THE WITNESS: The headline, yes.

12 THE COURT: Do you have any reason to know that
13 that article wasn't the same article from earlier.

14 THE WITNESS: I don't know that. It could be
15 the same article.

16 THE COURT: You don't know either way.

17 THE WITNESS: Yes.

18 BY MR. MACAUTHUR:

19 Q. To be clear. You don't know what he's looking
20 at when he's talking, fair?

21 A. Right.

22 Q. But he discusses an article with you early in
23 the trial walking out the door?

24 A. Right.

25 Q. He on a separate occasion discusses what you

1 thought was a second article over lunch?

2 A. Yes.

3 Q. This is also before deliberation?

4 A. Right.

5 Q. Then lastly, there's discussion of an article
6 which appears to be a repeat during deliberation?

7 A. Yes.

8 Q. Okay.

9 MR. MACAUTHUR: Court's indulgence.

10 THE COURT: Yes.

11 BY MR. MACAUTHUR:

12 Q. Ms. Makinster, thinking about the event we're
13 discussing with Mr. Rago and/or Mr. Jankiewicz, did their
14 conduct involving reading newspaper articles or
15 alternatively, I know someone who knows Morgan Savage, did
16 that put you in a position where you were pushed or
17 manipulated into making a verdict you didn't want to
18 make?

19 A. I guess, yes, it did have an influence in my
20 verdict, because I did -- I felt they did know more than I
21 did at that time.

22 Q. You felt like maybe that thing they knew was
23 true?

24 MS. KOLLINS: Objection, leading.

25 THE COURT: Sustained.

1 BY MR. MACAUTHUR:

2 Q. I don't mean to lead. Could you explain to
3 the court why them consulting -- I shouldn't say them.
4 Start over again.

5 Can you tell the court why Mr. Rago consulting one
6 or more articles and why Mr. Jankiewicz saying he knew
7 somebody who knew Morgan, why did they influence you in a
8 way that resulted in you making a verdict you didn't want
9 to make?

10 A. Well --

11 THE COURT: Hold on. That question is not
12 properly phrased.

13 MR. MACAUTHUR: That's what she said in her
14 previous answer.

15 THE COURT: That question is not properly
16 phrased, based on the witness' testimony.

17 You indicated that -- I wrote it down exactly.
18 It did have an influence in my verdict. How and what
19 way.

20 THE WITNESS: I felt that they were very sure of
21 themselves.

22 THE COURT: I'm not asking what you thought they
23 thought.

24 THE WITNESS: Oh, okay.

25 THE COURT: You also testified here that the

1 jurors deliberated. You've also testified here that you
2 were the last one to look at the evidence and that you
3 made a decision. When you indicate that it influenced
4 your verdict, did it change your verdict, did it not
5 change your verdict? What was your verdict? Was your
6 verdict your choice? This is what we're trying to
7 understand. Does that help you.

8 THE WITNESS: Yes, it does.

9 Okay. I was the last person to look at all the
10 evidence. And right from the beginning they were very
11 sure of their verdict, and so I started thinking to myself
12 why is everybody so sure of their verdict and I'm still
13 here, kind of, trying to process everything.

14 They were -- those two were guilty right away. They
15 were very sure of themselves so I kind of -- I guess I
16 didn't have the confidence, or I didn't -- you know, like,
17 why are they so sure, and why am I still kind of
18 doubting.

19 THE COURT: Fair enough. At some points a
20 verdict was reached.

21 THE WITNESS: Yes.

22 THE COURT: Was that your verdict.

23 THE WITNESS: Yes.

24 THE COURT: Mr. MacAuthur, you still have a
25 question. I'm sure Ms. Kollins will have questions.

1 BY MR. MACAUTHUR:

2 Q. The misgivings you just described, do you have
3 personal knowledge as to whether any other juror also
4 shared those misgivings with you?

5 MS. KOLLINS: Objection, relevance.

6 THE COURT: Overruled on that basis. However,
7 editorializing, again, the witness' testimony.

8 If you want to ask her what -- how many were one way,
9 how many were another. Did they change -- you can't get
10 into other people's heads, but you can ask her factual
11 questions about what occurred.

12 MR. MACAUTHUR: Understood.

13 BY MR. MACAUTHUR:

14 Q. The misgivings you just described, did anyone
15 else say they had those same misgivings. Did anybody say
16 that to you?

17 A. Yes.

18 MS. KOLLINS: Hearsay, your Honor.

19 MR. MACAUTHUR: I'm just asking who, not what
20 was said.

21 THE COURT: This will just be the way we'll do
22 this hearing. I'm going to ask you briefly if you don't
23 mind, Ms. Makinster, to step out of the courtroom so I can
24 have a discussion with counsel without you present.

25 The marshal will show you a room you can wait in.

1 THE WITNESS: Okay.

2 THE COURT: Technically asking her did somebody
3 say something to you would be hearsay. I think there's
4 other ways to get to this.

5 If you want to have impressions of what the verdict
6 was and perhaps from her impression influence of others, I
7 don't have a problem. My concern, Mr. MacAuthur, and I
8 keep suggesting it and I don't know how to otherwise say
9 it, you're editorializing. She did not use the word that
10 she had misgivings. It's how you're interpreting her
11 testimony. You cannot editorialize because you interpret
12 something a certain way and then repeat it back as if it's
13 something she said. It's not appropriate questions.

14 MR. MACAUTHUR: All right.

15 THE COURT: Ms. Kollins, I know you posed the
16 objection as hearsay. I'm going to sustain that basis,
17 but I think he can rephrase.

18 There is also information in the record that the
19 court considered then and has in front of it now that I
20 believe came from -- I don't know if it came from Ms.
21 Makinster. I think it came from Ms. Monson. The jurors
22 were originally 7 to 5, then eventually, obviously, got to
23 a verdict.

24 I don't have a problem generally with an
25 understanding if she thought from her perspective she

1 observed others feeling the way she felt, or -- I
2 understand you're going to ask questions about whether
3 this verdict was hers or not. I just want to get to the
4 heart of it, without editorializing and putting words in
5 people's mouths. That's -- we're very close to that
6 line.

7 Anything else, Ms. Kollins.

8 MS. KOLLINS: No, thank you.

9 THE COURT: Anything else, Mr. MacAuthur.

10 MR. MACAUTHUR: No, your Honor.

11 THE COURT: May we have the juror/witness back,
12 please.

13 Thank you, Ms. Makinster. I appreciate that so much.
14 Come up and retake your seat. We just had a brief break
15 with you. Can you state for the record you understand
16 you're still under oath.

17 THE WITNESS: Yes.

18 THE COURT: Mr. MacAuthur, any additional
19 questions.

20 By MR. MACAUTHUR:

21 Q. Ms. Makinster, based on the articles and the
22 reference of I know someone who knows Morgan Savage, did
23 you have misgivings about your verdict?

24 A. Can you -- I'm sorry. Can you define what
25 misgivings is.

1 Q. Sure. Maybe I shouldn't use my word. How
2 would you describe how you felt about those influences?

3 A. I guess like what I said before. I just felt
4 like I wasn't so sure about my verdict or guilty or not
5 guilty, so -- are you saying did other people influence
6 me?

7 Q. Well, I think I have asked that. Correct me if
8 I'm wrong.

9 You said that Mr. Rago, Juror No. 1 and Mr.
10 Jankiewicz, Juror No. 3, seemed so certain?

11 A. Yes, they were.

12 Q. You felt like they knew something you didn't
13 know?

14 A. Yes.

15 Q. You said that it had some kind of influence on
16 you, but I don't want to choose the word for you.

17 A. Right.

18 Q. How would you describe the influence that it
19 had?

20 A. I just felt like they -- well, Tony, having
21 looked at articles -- well, article, I just know one -- it
22 seems like he knew something more than I did. And Brett
23 was so sure of everything that he walked in there and, you
24 know, guilty right away. So I don't -- I'm sorry. I'm
25 not articulating what I'm trying to say.

1 Q. Did it seem like it was easier for them to
2 render a verdict because they knew something you didn't
3 know?

4 A. Yes.

5 MS. KOLLINS: Objection, speculation.

6 MR. MACAUTHUR: Did it seem, that's her
7 impression.

8 THE WITNESS: Sorry.

9 THE COURT: Sustained. You are asking her to
10 say what she thinks they thought. Just want to know what
11 her impressions are.

12 I know that seems like a fine line to walk, but there
13 is a distinction. And they've already testified. So
14 really it's her impressions that we need.

15 BY MR. MACAUTHUR:

16 Q. Did it bother you that it felt like they knew
17 something you didn't know?

18 A. Yes.

19 Q. Do you know if it bothered anyone else on the
20 jury that it seemed like they knew something you didn't
21 know?

22 A. I don't think so.

23 Q. Not to your knowledge. Got it.

24 Did thinking they knew something you didn't know
25 make you feel like you needed to vote guilty?

1 A. Um, no. No, in a sense that -- repeat the
2 question again. I'm sorry. I'm just so nervous. I don't
3 think I'm listening properly.

4 THE COURT: Ms. Makinster, I don't know how to
5 say this in any other way then to just say it. You're not
6 on trial here. We're just trying to understand what
7 happened to the best of recollection two years ago. We
8 just need the information. There are no right or wrong
9 answers. Just your honest answers.

10 The court reporter can read that back.

11 THE REPORTER: Did thinking they knew something
12 you didn't know make you feel like you needed to vote
13 guilty?

14 THE WITNESS: Okay, yes. I'm sorry. This is
15 asked before too. Yes, I do. I do think that they did
16 know something more than I did, more than what the
17 evidence was given to us.

18 Q. Did that make you feel like you needed to vote
19 guilty as well?

20 A. I voted guilty because I actually thought --
21 you know, I looked at the evidence, and what I was -- what
22 I got from the evidence, I really wasn't so sure at first
23 but when everybody was telling me what they thought, I
24 kind of went along with it -- the guilty verdict.

25 Does that make sense.

1 Q. It does.

2 A. Okay.

3 Q. And everybody telling you would include
4 Mr. Rago and Mr. Jankiewicz?

5 A. Yes.

6 Q. You said they were the first two guilties
7 right out of the gate?

8 A. Even Tony said there is nothing -- like he
9 threw his hands up. It's just a guilty verdict, or
10 something like that. Like it's just -- he's just guilty.
11 Something like that.

12 Q. Understood.

13 MR. MACAUTHUR: No further questions.

14 THE COURT: Thank you.

15 Ms. Kollins.

16 CROSS-EXAMINATION

17 BY MS. KOLLINS:

18 Q. Ms. Makinster, when is the last time before
19 today you spoke with Mr. MacAuthur?

20 A. Last night.

21 Q. Did you discuss what you would be testifying
22 to today?

23 A. No. He just told me --

24 Q. Please. You don't have any privilege with
25 him. He's not your lawyer.

1 A. He just told me that I'll be testifying today.
2 I'm not in trouble. I'm not in trial. That kind of
3 stuff. Then he said, do you remember the declaration that
4 you signed two years ago. Then I said, yes. He goes
5 that's what it is about, about the Supreme Court appeal.
6 That's about it.

7 Q. Did you talk about Mr. Rago and Mr.
8 Jankiewicz?

9 A. No.

10 Q. There was more than Mr. Rago and Mr.
11 Jankiewicz at the beginning of deliberations that were
12 voting guilty; is that right?

13 A. I'm sure. That's all I know. Because they
14 were sitting across from me, yeah.

15 Q. Somebody else said 7 for guilt 5 for not
16 guilty at the beginning. Does that --

17 A. Yes, towards the end of that night. Yes.

18 Q. You never read those articles?

19 A. The article -- no.

20 Q. Do you remember specifically Judge Delaney on
21 day 2 or 3 of jury selection talking about that specific
22 article and saying don't read it. It came out today or
23 came out yesterday, don't read it?

24 A. I don't remember that.

25 Q. But you never read the contents of that

1 article?

2 A. No.

3 Q. So you ultimately went through your own
4 deliberation process; is that right?

5 A. Yes.

6 Q. And you reviewed all the evidence. You said
7 you were the last one to go through all the paperwork?

8 A. Yes.

9 Q. Including the photographs and everything?

10 A. Uh-huh.

11 Q. Yes?

12 A. Yes.

13 Q. And ultimately you, as group of jurors,
14 concluded Count 39 was appropriate based on the California
15 trip; is that right?

16 A. Yes.

17 MS. KOLLINS: All right. No more questions.

18 THE COURT: Mr. MacAuthur, anything further from
19 Ms. Makinster.

20 MR. MACAUTHUR: No, your Honor.

21 THE COURT: Ms. Makinster, thank you for your
22 time today. We appreciate this is not an easy thing to
23 do. We appreciate your time, and we apologize for getting
24 started later. We didn't anticipate it. Just some things
25 we had to work out before we got started.

1 THE WITNESS: Thank you.

2 THE COURT: You are excused. You don't need to
3 stay. As you leave, there are still some folks to
4 testify, make sure you don't discuss this with them now.

5 THE WITNESS: Thank you.

6 THE COURT: We are ready for Blaire Savko.

7 MR. MACAUTHUR: We are.

8 THE COURT: Elvis, Blaire Savko.

9 Take a seat. My clerk will swear you in.

10 THE CLERK: You do solemnly swear the testimony
11 you are about to give in this action shall be the truth,
12 the whole truth, and nothing but the truth so help you
13 God.

14 THE WITNESS: I do.

15 THE CLERK: State and spell your name for the
16 record.

17 THE WITNESS: Blaire Savko, B-l-a-i-r,
18 S-a-v-k-o.

19 THE COURT: Before we begin, you have an
20 understanding of why you're with us today.

21 THE WITNESS: Yes.

22 THE COURT: Were did you get that
23 understanding.

24 THE WITNESS: We talked afterwards.

25 THE COURT: Have you talked more recently to

1 someone.

2 THE WITNESS: From before, yes.

3 THE COURT: So that's what this is about. Let
4 me put it into some sort of orientation for you.

5 So subsequent to the results of the trial there was a
6 motion brought before the court that I had to consider
7 that related in some respects to jurors' conduct. I made
8 a ruling on that. The case, as a whole, has been appealed
9 to the Supreme Court, and the Supreme Court, in looking
10 over the record, indicated that the court -- felt that
11 this court should have rather then rule based on what was
12 presented alone in the paperwork should have had an
13 evidentiary hearing. They sent it back for us to do that.
14 That's what were're doing. That's why it's a couple of
15 years later. Sorry for the fact it's a couple of years
16 later.

17 We appreciate you responded to the subpoena and are
18 here with us today. Counsel are going to ask you some
19 questions. If one of the counsel should ask a question
20 that the other counsel should object to, if you'll just
21 wait to answer until I rule on the objection for the
22 record -- you might remember that from the trial.

23 And there are no right or wrong answers here.
24 There's nothing to be nervous about. It's strictly for us
25 to have a little better understanding of, you know,

1 information that was presented to us previously.

2 THE WITNESS: I apologize if I cough. I'm
3 getting over being sick.

4 THE COURT: There's water there if you need it.
5 Mr. MacAuthur, when you're ready.

6 MR. MACAUTHUR: Thank you, Judge.

7 DIRECT EXAMINATION

8 BY MR. MACAUTHUR:

9 Q. Good afternoon, Ms. Savko. Thank you for
10 being here all day.

11 A. No problem.

12 Q. I'm sure you remember we frequently started
13 late back in the day too?

14 A. Yeah.

15 Q. Texas, right?

16 A. Texas, yes.

17 Q. Do you remember this case?

18 A. Yes.

19 Q. Do you remember being a juror on it?

20 A. Yes.

21 Q. Do you remember that after deliberating with
22 your fellow jurors you returned a verdict of guilty on
23 Count 39 and not guilty on everything else?

24 A. Yes.

25 Q. Do you recall after you were instructed and

1 after you heard argument from both counsel when you
2 started deliberating?

3 A. What?

4 Q. Do you recall when you started deliberating?

5 A. Yes.

6 Q. Do you recall if there was a weekend
7 interruption?

8 A. Yes.

9 Q. Between the deliberation and when you
10 resumed?

11 A. Yes.

12 Q. First things first. Do you remember Juror No.
13 1, Tony Rago?

14 A. Yes.

15 Q. Do you remember if he had occasion during jury
16 deliberations to present some newspaper article?

17 A. It wasn't the actual article. He offered to
18 show us on his phone.

19 Q. Okay. Do you remember where you were when he
20 did that?

21 A. In the room when we were in there.

22 Q. Are you aware of him showing that to you or
23 anybody else before that moment?

24 A. No. I told him I didn't want to see
25 anything.

1 Q. Do you know if anybody else consulted the
2 article after you said no to it?

3 A. No, I don't know if anyone else did.

4 Q. Did you recall Juror No. 3, Brett Aaron
5 Jankiewicz?

6 A. Yes.

7 Q. Did you see Mr. Rago and Mr. Jankiewicz
8 together?

9 A. Yes.

10 Q. How often?

11 A. They would have lunch together a few times
12 during the week. Maybe more then that. I don't know. I
13 never ventured past across the street.

14 Q. Understood. If you can recall, if you can't
15 that's okay.

16 When they had lunch together did you see them in a
17 larger group of jurors or was it just the two of them?

18 A. Just them.

19 Q. Just those two?

20 A. Yes.

21 Q. Was that usually the case?

22 A. I have seen they went to lunch a few other
23 people in the beginning but towards the end it was just
24 them two.

25 Q. Understood.

1 Do you recall whether at any point it appeared to
2 you that Juror Rago, No. 1, or Juror Jankiewicz, No. 3,
3 knew something you didn't know?

4 MS. KOLLINS: Objection. Calls for
5 speculation.

6 MR. MACAUTHUR: Her impression.

7 THE COURT: Rephrase. Sustained, but
8 rephrase.

9 BY MR. MACAUTHUR:

10 Q. Thinking back to when the jury deliberation
11 started, do you remember how things looked as far as how
12 many people were voting guilty and how many were voting
13 not guilty?

14 A. Do I remember how it looked?

15 Q. Yeah. Do you have any idea what the split
16 was, or who was on the guilty side and who was on the not
17 guilty?

18 A. There was 5 of us that were on the not guilty
19 side when we got in there.

20 Q. Do you happen to remember who the strongest
21 voices for guilty may have been?

22 A. 1 and 3 were pretty --

23 Q. Gung-ho.

24 A. Yeah.

25 Q. That's Rago and Jankiewicz?

1 A. Yes.

2 Q. Did either of the men give you their rational
3 for why they were so confident? Did they share any
4 information with you on why they were so gung-ho?

5 A. No, they didn't say.

6 Q. We've used an example of Rago and Jankiewicz
7 were working together. Did you have somebody you clicked
8 up with and frequently went to lunch with?

9 A. Yeah.

10 Q. Do you remember who that -- what juror that
11 may have been?

12 A. About 4 or 5 of us that would go and have
13 lunch.

14 Q. If you remember?

15 A. Leslie, Marilou, Shay would be with us
16 sometimes too.

17 Q. Let me interrupt you. Was Shay, Ms. Monson,
18 the foreperson?

19 A. I thought Marylou was the foreperson.

20 Q. Sorry. Marylou foreperson. And you said
21 Shay, and that's Ms. Monson?

22 A. Yes.

23 Q. Who are the other names?

24 A. Kathy, I believe. I don't know her last
25 name.

1 Q. Would that have been the Asian woman?

2 A. Yes.

3 Q. Kathy Wong?

4 A. Yes.

5 Q. Juror No. 2.

6 Do you recall being contacted by either me or Ms.

7 McNeill in December 2017?

8 A. Yes.

9 Q. Remember answering of these same types of
10 questions for us?

11 A. Yes.

12 Q. Do you remember signing a declaration of what
13 you remembered or what you had to contribute?

14 A. Yes.

15 Q. Do you remember whether a juror or jurors said
16 that Josh needed to be convicted of something?

17 A. Yes.

18 Q. Do you know who said that?

19 A. 1 and 2 -- 1 and 3. Tony and -- I don't
20 remember what his name is.

21 Q. Male or female?

22 A. Male.

23 Q. Shorter or taller?

24 A. They are both tall.

25 Q. Did you see them outside today?

1 A. Yes.

2 Q. Might that have been Brett Jankiewicz?

3 A. Yes.

4 Q. So those two both said that Josh needed to be
5 convicted of something?

6 A. They said separate things but along the same
7 lines, yes.

8 Q. Did they tie that to a specific thing, or did
9 it seem like they had a particular thing in mind?

10 A. No. They just told us we needed to use common
11 sense.

12 Q. Do you know if Mr. Rago showed a newspaper
13 article or articles to anyone else?

14 A. No.

15 Q. You don't know?

16 A. I don't know if he did or not, no.

17 Q. Do you recall whether Mr. Jankiewicz ever said
18 something along the lines of he knew another person who
19 knew Morgan Savage?

20 A. I didn't finds out about that until the trial
21 was over. He told --

22 Q. Break that down.

23 MS. KOLLINS: I'm sorry. Let her finish her
24 response before you start asking another question.

25 THE COURT: Did you have more you wanted to add

1 to that. You said you found something out after the
2 fact.

3 MS. KOLLINS: She said she learned he told
4 someone -- then Mr. MacAuthur started asking his question.

5 THE WITNESS: I was going to elaborate more on
6 how I knew.

7 Leslie, after the trial was over --

8 MR. MACAUTHUR: Is this Ms. Makinster.

9 THE WITNESS: Yes.

10 She had told me that he told her he knew somebody.
11 This is was in the beginning when the whole trial started,
12 like before we even knew what was going on in here. He
13 didn't know why he was here. She said I don't know why I
14 am either, and it came up.

15 BY MR. MACAUTHUR:

16 Q. If I might. Are you talking about during jury
17 selection, like when we were figuring out who was going to
18 be over there?

19 A. Yes.

20 Q. That's when -- and this is hearsay. This is
21 something Me. Makinster told you?

22 A. Yes.

23 Q. But your impression was she said Brett knew
24 somebody who knew Morgan way early during jury
25 selection?

1 A. Yes.

2 Q. You didn't hear that from Mr. Jankiewicz
3 himself?

4 A. No.

5 Q. Understood.

6 And before today have you shared that information
7 with anyone?

8 A. Which information?

9 Q. What you just said about him apparently
10 knowing somebody who knew Morgan?

11 A. Have you told anybody?

12 Q. Yes.

13 A. Yes.

14 Q. Who have you told?

15 A. My significant other. I tell him
16 everything.

17 Q. I'll put it a different way. Have you told
18 anybody else in this room before today?

19 A. No.

20 Q. And first let me assure you you are not in
21 trouble. We're not here judging you at all.

22 When I contacted you back in December -- I'm sorry.
23 When Monique contacted you back in December of 2017, did
24 you remember that detail?

25 A. Yes.

1 Q. Did you tell that to her?

2 A. About Jankiewicz knowing somebody, yes. Did I
3 tell her. I don't remember if I did or not. My
4 impression is I did.

5 Q. Okay. I'm sure you would have been delighted
6 to know, one way or another. Okay.

7 Thinking back to the jury deliberations, the
8 verdict ultimately was guilty. And it was unanimous; is
9 that fair?

10 A. Yes.

11 Q. Did you have misgivings about the verdict?

12 A. Yes.

13 Q. Did you express those misgivings to any other
14 juror?

15 A. Afterwards, after a couple of days, after my
16 mind had time to wrap around all that happened, yes.

17 Q. First let me front load. I'm not going to ask
18 you about any misgivings that don't relate to Mr. Rago
19 and/or Mr. Jankiewicz, okay.

20 A. Okay.

21 Q. Did any of your misgivings result from their
22 actions, words, or conduct during the trial?

23 A. The way they made my mind feel towards it,
24 yes. My own personal -- I don't know. They made me feel
25 stupid, so after it was over I felt stupid for letting

1 them make me feel that way.

2 Q. Not to put words in your mouth. Your words
3 are important, not mine. Did you feel bullied?

4 MS. KOLLINS: Objection. Sorry. Withdrawn.

5 THE COURT: You may answer.

6 THE WITNESS: In a sense, yes.

7 BY MR. MACAUTHUR:

8 Q. Is there a better word than bullied?

9 A. I don't know if there is a better word than
10 bullied.

11 Q. I don't want you to feel you are under some
12 kind of time pressure. What we're here to find out is
13 whether or not anything they did influenced you to do
14 something different than what you otherwise would have
15 done.

16 I characterize bullied trying to find a word that
17 captures what you're talk about. Take an opportunity and
18 what might be the best word that conveys how you felt
19 their conduct influenced you while you were
20 deliberating?

21 A. Pressured, pushed into feeling the same way
22 that they felt.

23 Q. Okay. Do you know -- just so I'm clear on the
24 time line. Before the verdict is read, do you know if
25 there is any other juror that also has that same feeling

1 that you just expressed?

2 A. Afterwards or --

3 Q. Before the verdict was read.

4 A. Yes.

5 Q. Let me refresh your recollection.

6 Remember when you walked in and the verdict is
7 going to be read. Remember sitting over there, bottom
8 row, all the way to the left. After the verdict was read
9 and the clerk made it all the way to Count 39 with a lot
10 of not guilties, you knew that that guilty was coming,
11 correct?

12 A. Yes.

13 Q. Am I correct that you kept looking upward at
14 the top row when that was happening?

15 MS. KOLLINS: Objection, leading, relevance.
16 What does that have to do with what influenced her.

17 THE COURT: The witness is on the stand and I'm
18 not recalling this information having been provided
19 before. Is there a specific question you -- you were
20 orienting her in time as to a certain time frame in which
21 you were going to ask a question. Can you just do that.

22 MR. MACAUTHUR: Sure.

23 BY MR. MACAUTHUR:

24 Q. Now, Ms. Savko, I'm just asking a question
25 based on my impression.

1 It seemed like you were uncomfortable about
2 something when the verdict was being read?

3 A. Yes.

4 Q. Is that true?

5 A. Yes.

6 Q. Do you recall whether you looked repeatedly up
7 at the top row at someone else?

8 A. I can't tell you if I remember. My heart was
9 going pretty fast in that moment.

10 Q. Okay. Court's indulgence.

11 THE COURT: Yes.

12 MR. MACAUTHUR: No further questions.

13 THE COURT: Ms. Kollins, questions for Ms.
14 Savko.

15 CROSS-EXAMINATION

16 BY MS. KOLLINS:

17 Q. Ms. Savko, there was a split when all the
18 jurors got back to the deliberation room, right?

19 A. Yes.

20 Q. There were, from what we understand now, 7
21 guilty 5 not guilty?

22 A. Yes.

23 Q. So there were more people then just
24 Mr. Jankiewicz and Mr. Rago with the opinion that Josh
25 Honea was guilty?

1 A. Yes.

2 Q. Did you all talk about the evidence?

3 A. We did.

4 Q. Okay. Because we don't have a video camera
5 back there, we don't get to see what happens. We spoke to
6 Ms. Makinster and she mentioned reviewing, kind of
7 everybody was going in order reviewing all the admitted
8 evidence. Do you remember that?

9 A. Yes.

10 Q. Did you do that?

11 A. I went through some of it, yes.

12 Q. Did you talk about that with the other
13 jurors?

14 A. Yes.

15 Q. When you -- so that's everybody in the
16 conversation, not just Mr. Jankiewicz and Mr. Rago and
17 yourself, but everybody is in that conversation?

18 A. Yes.

19 Q. It's my understanding based on what I heard
20 today that when everybody returned a verdict on Count 39
21 that was related to the California trip; is that
22 correct?

23 A. Yes.

24 Q. Is that what you all ultimately decided on?

25 A. Yes.

1 Q. That was the basis of your verdict?

2 A. Yes.

3 Q. Okay.

4 You never looked at that article?

5 A. No.

6 Q. So you didn't know what was contained in it?

7 A. No.

8 Q. So that had no influence on any decision you
9 made because you didn't see it; is that fair?

10 A. Yes, that's fair.

11 Q. You said -- you filled out an affidavit from
12 Ms. McNeill or Mr. MacAuthur; is that correct?

13 A. Yes.

14 Q. Since that time you have had no conversations
15 with them?

16 A. No.

17 Q. Okay. No information from outside came into
18 the deliberation room then, no articles, no papers, no
19 internet access anything like that, right?

20 A. No.

21 Q. Everybody on the jury had different
22 personalities?

23 A. Yes.

24 Q. Some people are more aggressive, some people
25 weren't?

1 A. Yes.

2 Q. You were polled for your verdict, right? You
3 came out here and told the Judge that was your verdict?

4 A. Yes.

5 Q. During your deliberation process you didn't
6 make any reports that you felt like you were being pushed
7 around or bullied, as Mr. MacAuthur's word. You didn't
8 ask for a bailiff or ask for the court to intervene that
9 you were being pushed around, right?

10 A. No, I didn't.

11 MS. KOLLINS: Okay. I have nothing further.

12 THE COURT: Mr. MacAuthur, any questions for Ms.
13 Savko.

14 REDIRECT EXAMINATION

15 BY MR. MACAUTHUR:

16 Q. Earlier in my questioning, Ms. Savko, I asked
17 you whether -- in general terms, whether you had a problem
18 with the verdict. And then you said something about,
19 well, after?

20 A. Yes.

21 Q. Did the problem you had with the verdict have
22 anything to do with something Mr. Rago or Mr. Jankiewicz
23 did?

24 A. The problem --

25 Q. Does that make sense?

1 A. No.

2 Q. So to be clear, we're not allowed to ask you
3 about why you had second guesses or why you were okay or
4 not okay with the verdict, unless it had something to do
5 with Mr. Rago or Mr. Jankiewicz.

6 MS. KOLLINS: Objection.

7 MR. MACAUTHUR: I'm being careful not to ask you
8 any questions outside that.

9 THE COURT: Ms. Kollins was indicating an
10 objection to the way that was phrased.

11 What Mr. MacAuthur is trying to convey is he's just
12 trying to ask you questions in a certain way. It's okay
13 if you don't understand the question. He can repeat it.
14 He can repeat it or ask it a different way.

15 So without further explanation of why you're asking
16 the question, Mr. MacAuthur, you can ask it differently.
17 BY MR. MACAUTHUR:

18 Q. Did you feel like you arrived at the right
19 verdict?

20 A. At the time, yes.

21 Q. Afterward you felt like you did not?

22 A. Yes.

23 Q. Did your feelings like you had not rendered
24 the right verdict have anything to do with --

25 MS. KOLLINS: Objection, leading. Why, just ask

1 her why.

2 MR. MACAUTHUR: Then you're stuck with the
3 answer.

4 BY MR. MACAUTHUR:

5 Q. Why did you have misgivings after a verdict
6 was rendered?

7 A. My personal feeling. You know, you make a
8 choice in life. You're supposed to feel a hundred
9 percent, right, with the choices you make.

10 THE COURT: If only that were true all the
11 time.

12 THE WITNESS: I know. I didn't feel okay with
13 this choice.

14 THE COURT: Let me ask a question and then
15 counsel can follow up.

16 You know every juror who sits on a panel is a human
17 being. Ever juror that sits on the panel is making a
18 decision either you remember and talked about and maybe
19 you remember instructions that the punishment for the
20 outcome is the court's determination not anything to do
21 with jurors. I guess what we're trying to get at is the
22 misgivings that you had afterwards, it was because of the
23 outcome.

24 THE WITNESS: No. I just didn't feel like I
25 made the right choice. I should have held my own voice in

1 the room. Even if it would have just been me making us
2 sit in there for 8 more hours, I should have held my own
3 against them.

4 THE COURT: Do you believe the verdict outcome
5 would have been different.

6 THE WITNESS: Maybe we wouldn't have had to -- I
7 don'ts know. Maybe it would have. We wouldn't have -- I
8 wouldn't have had to have chosen.

9 THE COURT: Were your concerns about the fact
10 that you had to make a choice. Would you have preferred
11 not to have to make a choice.

12 THE WITNESS: Yes, but you have to make
13 choices.

14 THE COURT: Ms. Kollins asked you some questions
15 a minute ago, sort of along the lines of there's 12 of you
16 in the room. You're deliberating. You're talking to each
17 other. You reach a verdict. You mentioned a second a ago
18 that at that time --

19 THE WITNESS: I felt fine with that.

20 THE COURT: Was that based on the evidence you
21 reviewed? Was that based on the discussion you had. What
22 was that based on that, at that time, that you felt fine
23 with.

24 THE WITNESS: When they said you just need to
25 use your brain, common sense, it made me feel like I was

1 missing something. When I use common sense, I mean, from
2 the evidence that we had, yes, you could have assumed or
3 known something was there, but I didn't know that for
4 sure.

5 THE COURT: You understand there was also an
6 instruction on reasonable doubt. And it wasn't no doubt,
7 it was -- I can read it again.

8 So I guess we're just trying to understand, did you
9 make a decision -- you know, what was your decision based
10 on when you made that decision with your fellow jurors.

11 THE WITNESS: It was based on -- say that again,
12 please. I'm sorry.

13 THE COURT: When you and your fellow jurors
14 ultimately reached a conclusion unanimously to find guilty
15 as to Count 39, what was that based on.

16 THE WITNESS: Them having intercourse. It was
17 that one, right.

18 THE COURT: They each had different factual
19 underpinnings. That was -- I'll look at the charge
20 related to it.

21 MS. KOLLINS: It was sexual assault by
22 intercourse. It was --

23 THE COURT: Related to --

24 MS. KOLLINS: It was related to the time frame
25 of the trip to California.

1 THE WITNESS: Yes.

2 THE COURT: It was related to a particular
3 incident.

4 THE WITNESS: Where it could have happened,
5 yes.

6 THE COURT: Mr. MacAuthur, any further
7 questions.

8 BY MR. MACAUTHUR:

9 Q. Ms. Savko, if I heard you correctly, you said
10 you wished you held your voice?

11 A. Yes.

12 Q. Did the conduct of Mr. Rago and/or Jankiewicz
13 contribute to muting your voice?

14 A. They got pretty loud back there.

15 Q. Would you characterize that as, yes, they
16 muted your voice, or, no, they did not?

17 A. Yes. I have had a problem was that in the
18 past.

19 MR. MACAUTHUR: No further questions.

20 THE COURT: Ms. Kollins, anything further from
21 the Court's questions for the witness.

22 RECROSS-EXAMINATION

23 BY MS. KOLLINS:

24 Q. Just to be fair so the record is complete.

25 Everybody in that deliberation room, all 12 jurors,

1 were exchanging information with each other; is that fair?
2 Everybody was talking about what their opinion was?

3 A. Yes.

4 Q. Not just Mr. Rago and not just
5 Mr. Jankiewicz?

6 A. No.

7 Q. And you were able to say what you thought and
8 why -- I mean, nobody prevented you physically from
9 speaking?

10 A. No.

11 Q. You were able to give your input, even if
12 there was people that disagreed with it; is that fair?

13 A. Yes.

14 Q. Then you ultimately made your decision?

15 A. Yes.

16 MS. KOLLINS: Nothing further.

17 THE COURT: Any final questions, Mr. MacAuthur.

18 MR. MACAUTHUR: No, your Honor.

19 THE COURT: Ms. Savko, thank you for your time.
20 It's not an easy thing. We very much thank you for your
21 time. We apologize for the late start getting to you all.
22 We had things to take care of before getting started with
23 you. You are excused. Thank you.

24 MS. KOLLINS: We'd just admit Ms. McNeill's
25 affidavit. I don't have questions for Ms. McNeill. I

1 assume there is no objection.

2 MR. MACAUTHUR: No.

3 THE COURT: Make sure that's in evidence.

4 THE COURT: Do you have a copy.

5 MS. KOLLINS: I have a clean copy for the
6 court.

7 THE COURT: We'll make that State's 2.

8 MS. KOLLINS: I don't have any questions for Ms.
9 McNeill. Based on what I've heard today, I don't have any
10 questions for Tobi Calderon I feel are relevant. It's
11 already clear Mr. MacAuthur contacted who he contacted.
12 He had investigators contact those witnesses on his behalf
13 before this hearing started. I don't think it made a
14 difference.

15 I don't have anything on behalf of the State.

16 THE COURT: All right. Thank you.

17 Mr. MacAuthur, are there any other witnesses.

18 MR. MACAUTHUR: No, your Honor.

19 THE COURT: I'll invite Mr. MacAuthur first.
20 Are there any final remarks you wish to make for the
21 court's consideration.

22 The court is going to, as directed, issue a written
23 order following this evidentiary hearing within the time
24 frame prescribed by the Supreme Court. By my calculation
25 I believe that written order would be due -- we calculated

1 it as December 27th, but that could be mistaken. It's not
2 my intention to delay issuing a written order.

3 I do want to have time to put it together, but other
4 then that -- and go back over, perhaps, listen to the
5 testimony again, to make sure it's fresh in my mind. That
6 JAVZ recording will not be available until tomorrow, so
7 it's my intention while it's still fresh to issue a
8 written order related to the case. But beyond that, if
9 there is anything you'd like to add to the record.

10 MR. MACAUTHUR: Thank you, Judge.

11 CLOSING STATEMENT

12 BY MR. MACAUTHUR:

13 Ms. McNeill reminds me to be brief.

14 Judge, going back 2 years ago, this trial was
15 intense. I don't want to have to revisit any of it. The
16 point is that the outcome was irregular. It seems so
17 strange that he was convicted on one count and acquitted
18 on all the others, because either they believed the
19 State's witness, namely Morgan Savage, or they didn't.

20 There was no way to say, well, she's right about this
21 one thing, but we disbelieve everything else. There was
22 no way to distinguish many of the counts. They have the
23 exact same elements, exact same timeline. Ultimately, Mr.
24 Honea was convicted in a 3-count window of 1 of those 3
25 counts related to Carlsbad, California. But it makes one

1 wonder why, if there were 3 counts associated with the
2 Carlsbad, California trip, why was only one of them
3 true.

4 It invites the question of, well, is this a
5 compromised verdict. Which is not illegal. Jurors are
6 allowed to compromise. It's not a good look to the
7 intellectual mind, but they're allowed to do that. But in
8 this instance, there was circumstantial evidence that two
9 things went wrong. Mr. Rago seemed to be influenced by
10 outside information. And that Mr. Jankiewicz appeared to
11 have an awfully strange coincidental relationship to
12 Morgan Savage.

13 Now, I understand the court's view back then, because
14 the law is not really well-written on extrinsic versus
15 intrinsic juror misconduct. It's easy when you're on the
16 extremes. Somebody makes threats against a juror, or they
17 offer a bribe. That's clearly extrinsic. The court is
18 going to explore that all day. But on intrinsic, it's
19 going to be like, well, you know what, I've had this
20 neighbor and he was black. I can't stand him, so I'll
21 hold it against this juror. We can't really go into why
22 jurors think what they think and what information they
23 rely on. It's a limitation of democracy. But this
24 instance falls on the line between those two. It is not
25 clearly intrinsic, which we're not supposed to explore,

1 and it's not clearly extrinsic, which would have been an
2 open door invitation to an evidentiary hearing. What we
3 had was intrinsic misconduct where one juror -- Juror No.
4 1 reaches outside of the deliberations, before they even
5 start, to consult one or more articles.

6 Now, I know that everybody agreed it was one, but one
7 juror felt like it was her impression it was more than one
8 because it was two different topics. One about the
9 arrest. And the other about the teenager drops a bomb.
10 But regardless of whether the court heard one and believed
11 one or more than one, the point is, is that one juror was
12 very specific -- this is Makinster -- that he talked about
13 it on the second or third day and that he talked about it
14 again at a different day at lunch, then he talked about it
15 again in deliberation. What's more, it's not just the way
16 a couple of jurors that suggested, like, he offered it,
17 but we all went no. One juror remembered him saying more
18 then that. And if she said that to us, by golly it would
19 have been in our affidavit.

20 The reason why we have an evidentiary hearing is
21 because they are a fact finding mission. I'm grateful for
22 that partition. She said, your Honor, under oath that
23 Mr. Rago said that Josh needed to be convicted of
24 something, because if he got a not guilty all the way down
25 the board he was going to sue the County or someone. I

1 suggest it's probably Las Vegas Metropolitan Police
2 Department, but her words were County. Then he's going to
3 get a whole bunch of money.

4 So relying on that, it appeared that the most
5 important thing to Mr. Rago was that Josh should not be
6 rewarded with money. And that the only way to stop that
7 was by convicting him of a crime that sends him to prison
8 for life.

9 You also heard from multiple jurors that Rago and
10 Jankiewicz were particularly close. One juror even said
11 they were together all the time. Sometimes with other
12 people, others times by themselves. Then in the second
13 bombshell of this trial two years later, we find out that
14 two people obtained information that Jankiewicz knew
15 someone, didn't know who, who knew Morgan Savage. The
16 court's allowed to make permissible inferences. There is
17 a zero percent chance that Jankiewicz was going to come in
18 here and say, hey, my sister, Taylor Jankiewicz, who also
19 has a heroin addiction, who also was on East Charleston
20 and Torrey Pines, who also happened the make friends with
21 Morgan Savage just like Morgan told us. You don't have to
22 take the representations of counsel as trust. I'm not
23 submitting what I've said as evidence. What I'm saying is
24 what are the chances I'm right about that without knowing
25 what these witnesses are going to say 2 years ago.

1 We asked for the evidentiary hearing, and we didn't
2 get it because it wasn't clear whether this was intrinsic
3 or extrinsic. It still falls on the line and it was
4 compelling enough where the Supreme Court sent it back.
5 And it turns out that's exactly what we were afraid that
6 it was, that Brett Aaron Jankiewicz, his sister, with the
7 heroin problem, knew Morgan. And he confided that in
8 another juror, Ms. Makinster, who testified to you today.

9 I wish I followed up with when did you know that
10 thing, but apparently he knew it, according to Ms. Savko
11 during voir dire. When we asked them, hey, do you know
12 any of the witnesses. Do you know any of the counsel. If
13 you have any sort of conflicts. That's when you're
14 supposed to present it. And he laid in wait. He sat
15 through a 3-week trial knowing that his sister knew Morgan
16 and feeling like he knew something everybody else did not.
17 That's misconduct. And it deprived Mr. Honea of 12
18 neutral jurors. That's prejudicial. He was entitled to
19 12 people who didn't know him, didn't know the facts, and
20 didn't feel any particular way after voir dire. He found
21 an ally in Mr. Rago, who, again, very small chance he's
22 going to come in here and tell you, hey, Judge. I knew
23 what the order was, but I defied it, potentially multiple
24 times. I talked about it on the way out of the courtroom
25 into the hallway. I talked about it again at lunch. Then

1 I tried to show everybody inside of jury deliberation and
2 everybody stopped me.

3 He wasn't going to tell you that. Just because he is
4 not a defendant and just because there is no legal
5 consequences for Rago or Jankiewicz doesn't mean that it's
6 not scary as hell sitting in front of a judge, having to
7 admit you defied her rules. They don't know they can't
8 get trouble for that. So they behave the same way that a
9 lot of people behave. Especially when they're a
10 defendant, they get on the stand and lie under oath to
11 save themselves. If this evidentiary hearing was only
12 based on Rago and Jankiewicz, you would never know the
13 other details.

14 Let me focus on the prejudice. You heard from more
15 than one juror and from the information we submitted in
16 our motion for new trial that, at the end of the first
17 day, there was a split of 7 to 5 guilty versus not guilty.
18 I don't close early in the day. There's a weekend in
19 between. Some jurors feel like something has shifted when
20 they come back, and ultimately Blaire Savko expressed in
21 her own way that she wasn't convinced beyond a reasonable
22 doubt, that she had uncertainty. She felt dumb because
23 Rago and Jankiewicz were so certain that Josh was guilty,
24 and they said that she had to use common sense. She said
25 that Jankiewicz sat back and act like she was dumb. As a

1 matter of fact, I think that's Ms. Makinster, but both of
2 them had similar testimony. Acted like they were dumb
3 because they didn't see how Josh was guilty. Blaire Savko
4 said that she wished she'd kept her voice. Not found a
5 voice, kept her voice. It was her intention to vote not
6 guilty. And by what she described as pressure, originally
7 I asked bullied, she agreed with me, but that not perhaps
8 being the best word I asked her to find her own word.
9 When she took the opportunity to do that she said,
10 pressure and something else.

11 She then changed her guilty verdict to guilty. Ms.
12 Makinster expressed, for lack of a better term, similar
13 misgivings, but not for the same reason. She said that
14 Rago and Jankiewicz appeared to know something she didn't.
15 And it's implied that she felt like that must have been
16 credible because, it pushed her toward thinking she should
17 also vote guilty. So with an impure motive of Rago trying
18 to keep Josh from being able to sue Metro and Jankiewicz
19 having a real word sister who was real world friends with
20 Morgan, saying that Josh had to be convicted of something,
21 they hijacked our jury.

22 They did not have to do it the way of saying, hey,
23 these are our secrets and this is how you should look at
24 the evidence. They could just lock down guilty for wrong
25 reasons and persuade other people to also vote guilty for

1 reasons not related to the evidence, but related to their
2 own personal convictions.

3 Lastly, it's always a slog uphill when we bring to
4 the attention of all parties that, hey, this is weird. I
5 get that it's an adversarial process. I don't expect it
6 to ever run smoothly. But there was so much ill-will
7 between both parties, because of both parties, that any
8 time something unexpected happened the assumption was
9 somebody was doing something dirty. The State's mad over
10 being betrayed by Morgan. We're mad over people changing
11 what they said and getting a verdict we can't explain.
12 Sometimes it's just because other people are crap.
13 Jankiewicz and Rago were crappy, and they should not have
14 been on our jury. If Jankiewicz had answered the
15 questions put to him on voir dire honestly, he would have
16 been removed. If Rago had followed your instructions
17 faithfully, he would have been removed. And Ms. Coliel
18 (ph) would have replaced one or both of them when it was
19 time to deliberate.

20 So we've lost two years. Josh has not been able to
21 return to his normal life. He's grateful as hell to be
22 out of custody. And thank you, Judge, for having done
23 that. But it's not like he can make long-term plans and
24 move to another state, start a business, get married, have
25 kids, because this case is pending.

1 So now we finally have the evidentiary hearing that
2 we should have had two years ago. I feel like I won the
3 lottery because what I thought happened did. It's going
4 to be up to your Honor as to whether you think this
5 misconduct, which is now proven, tainted the verdict in
6 such a way that it undermined our faith in its legitimacy.
7 I think it's obvious that it does, but then again, I'm
8 defense counsel. I pick my side of the aisle on purposes
9 because it fits with my ideology.

10 I don't have anything else I have to add on that.
11 But I think the outcome is apparent.

12 THE COURT: Thank you, Mr. MacAuthur.

13 Ms. Kollins, final remarks.

14 CLOSING STATEMENT

15 BY MS. RHOADES:

16 We are reading directly from the Supreme Court
17 order. We're here to determine if prejudicial juror
18 misconduct, in fact, occurred, and if so, whether -- just
19 going back here -- whether the misconduct occurred back to
20 what the Defendant needs to prove himself. Whether the
21 conduct occurred, whether it's prejudicial. It is his
22 burden to show that based on evidence.

23 It is not what they believe. It's not what they
24 believe happened or what they think happened or reading
25 between the lines. That's not what it is at all.

1 So the first question is whether juror misconduct
2 occurred in fact, which the evidence presented today you
3 can't even determine that juror misconduct did in fact
4 occur.

5 Regarding the money and that he was going to sue
6 somebody, that came from one witness. There's
7 contradictory evidence about that. Mr. Rago said that
8 that never happened. He never talked about anything.
9 There was one witness that testified about that. So that
10 -- you can't even be sure that that misconduct, that
11 conduct actually occurred.

12 The article, there is no evidence that anybody ever
13 saw the article, except Mr. Rago. And he only saw the
14 headline. He testified about that. Even Ms. Savko, Ms.
15 Makinster, they testified they never saw the article at
16 all. So how can that be misconduct. He didn't show it to
17 anybody. Mr. Rago testified he didn't show it to anybody.
18 All the other witnesses testified they never saw it. It
19 didn't come up in deliberations. Mr. Rago said he saw
20 that headline, which, by the way the article was
21 completely in favor of the Defendant and of Mr. MacAuthur.
22 It has quotes from Mr. MacAuthur on that and presents
23 stuff that was testified about during trial in front of
24 the jury anyway. So there was nothing collateral that
25 would enure to the State's benefit in any way at all.

1 The relationship with Mr. Jankiewicz that
2 Ms. Makinster testified about, so that's the first time
3 anybody has ever heard anything about her knowing about
4 that relationship. That wasn't even in her affidavit or
5 what she told Mr. MacAuthur and Ms McNeill.

6 How she testified about that, she said, someone that
7 he knew that wasn't related knew Morgan. That's all the
8 information she had. I don't know where that came from.
9 Again there is contradictory evidence, because
10 Mr. Jankiewicz said he never talked about that. He talked
11 about his sister, how he hasn't talked to her in 5 years.
12 He had no idea that she was Facebook friends with Morgan
13 Savage. So there is contradictory evidence about that.

14 Even taking Ms. Makinster's word that he said that,
15 she said that that didn't come into deliberations at all
16 either. That it was some tangential relationship that
17 didn't come up at all. So I don't think that they can
18 even prove -- again, it's their burden to prove -- that
19 there was actual misconduct. And I don't think they even
20 get there. But more importantly, the prejudice. They can
21 not show prejudice. You know, just going back to the
22 misconduct, going to lunch together is not misconduct. A
23 belief that a defendant is guilty after sitting through
24 trial and hearing evidence and seeing evidence and holding
25 evidence in your hand, that's not misconduct either.

1 Telling other jurors what they think is not misconduct.

2 Going to the prejudice, the reasonable probability or
3 likelihood that it effected the verdict. So the
4 misconduct is the article and this alleged relationship
5 that Mr. Jankiewicz may have known Morgan Savage. Those
6 are the two misconducts that we're looking at. Which I
7 don't even think they have shown that that is misconduct.
8 But even assuming that it is, there is no prejudice. Every
9 single witness that came here and testified today said
10 that it didn't come up in deliberations, that it didn't
11 effect their deliberations. It didn't effect their
12 verdict. Their verdict was what it was based on the
13 evidence they passed around and looked at. So there's
14 absolutely no showing of prejudice, and the Defendant has
15 not shown either prong of this argument and the motion
16 should be denied.

17 THE COURT: Mr. MacAuthur, final rebuttal, ass
18 this is your motion.

19 MR. MACAUTHUR: Thank you, Judge.

20 CLOSING STATEMENT

21 BY MR. MACAUTHUR:

22 Having listened to the State's argument, it gets
23 rid of the nuances of complexity of human interaction.
24 She takes a binary, either it was said or it wasn't. And
25 if it wasn't said, then there's no prejudice and we move

1 on. So in rebuttal I would like to focus on the prejudice
2 and why the State's argument is flawed.

3 I'm reminded that when you go to school a lot of
4 times you see Mormon kids are always really well-dressed,
5 nice cars, clean, friendly. Mormons make great neighbors.
6 Part of the reason for that is because it's part of the
7 projecting who you are in your culture so you can bring
8 more people into the fold. Like, hey, they're
9 well-dressed. They're nice. They're successful. Maybe I
10 should explore how they live. And that kind of appeal
11 helps invite them to church, and some people convert.

12 The same thing is true of jurors. When you start
13 with a juror who has made up their mind that a person is
14 guilty for an illegitimate reason and they're pushing for
15 other people to agree, even if they're not sharing that
16 illegitimate reason, it's an improper factor. It's an
17 improper force. And here's the prejudice that was
18 observable.

19 First, the State characterizes the article that
20 Mr. Rago read as having been favorable to me because my
21 comments are all in it. That's an assumption by the
22 State. We don't have anyone testifying as to how Mr. Rago
23 received that article. Maybe he read it and thought, you
24 know, that MacAuthur sure is an arrogant ass. And he
25 pissed me off. I wish I didn't have to listen to him for

1 3 weeks. He'd probably get a lot of people to agree with
2 him.

3 THE COURT: We heard testimony from one of the
4 witnesses today that the way it was understood by Mr. Rago
5 was it made the case important.

6 MR. MACAUTHUR: Understood. I don't mean to say
7 that the way I'm characterizing it is what I want the
8 court to rely on. I'm merely saying that the State
9 characterized the article as having been favorable to the
10 defense. The State is not inside of the jurors' minds.
11 Fortunately, you've reminded me that, yes, we did receive
12 some insight on how he received the article. And he
13 treated it as important. It was part of the larger
14 narrative that he did not want Josh to get off scot free
15 and be able to sue -- what I think was characterized as
16 the County.

17 So Mr. Rago, having reached outside of the evidence
18 available in the case, namely by reading articles, formed
19 an opinion that was not based on evidence, that he did not
20 want to see Josh get found not guilty, and then somehow
21 receive a windfall by a successful civil suit against the
22 County. That's not what he was asked to do. He was asked
23 to determine whether there was sufficient evidence to
24 believe beyond a reasonable doubt that Josh committed a
25 crime. And the proof that that's not what he did is

1 inherent in the fact that there is one guilty count, 39,
2 and there's 2 other counts from that exact same day and
3 those exact same circumstances in is not guilty there.
4 Either josh did it or he didn't. It doesn't make any
5 sense how he's found guilty of one count.

6 Mr. Rago made himself a non-objective, non-neutral
7 juror and denied Josh the opportunity to have an objective
8 juror in his place.

9 Number 2, Mr. Jankiewicz, he completely undermined
10 the entire purpose. We spent a lot of time on voir dire.
11 I think we spent at least 3 days on voir dire. This case
12 went forever. And Mr. Jankiewicz sat through all of that
13 knowing that his sister knew Morgan, and then took that
14 prejudice with him into the room giving other jurors the
15 impression that they knew something that the jurors did
16 not. He doesn't have to say what that something is. You
17 can see the effect in their testimony. It made them feel
18 stupid, or it made them feel like Jankiewicz and Rago knew
19 something credible and that a guilty verdict was
20 appropriate for that reason. But that wasn't evidence
21 produced by either party at trial.

22 Mr. Jankiewicz' verdict was based on outside
23 evidence. It was based on information he received outside
24 of court that was not sworn, that was not vetted, that was
25 not corroborated or contradicted in cross-examination. He

1 therefore so deprived Josh of a neutral objective juror.
2 But that's not where it ended.

3 There is also prejudice on the part of Ms. Makinster
4 and Ms. Savko. I'm skipping Ms. Monson because Ms. Monson
5 said that while she was aware of these things and she
6 thought they were inappropriate, she was confident she
7 arrived at her verdict the proper way. But what we don't
8 see going back to my Mormon neighbors example is how did
9 the negative influences of Rago and Jankiewicz impact her
10 in ways that she's not conscious of. I'm not going to ask
11 the court to rely on that point, I'm merely saying it's
12 more complicated than the binary description given by the
13 State.

14 The prejudice for the last two points are on Ms.
15 Makinster and Ms. Savko. Ms. Makinster said she felt
16 like Mr. Jankiewicz and Mr. Rago knew something she
17 didn't. And assuming that that thing was true, she felt
18 like he didn't have a choice but to find him guilty --
19 Josh -- in the absence of certainty that came from the
20 evidence in the case.

21 Lastly is Ms. Savko. Same outcome, different reason.
22 She said that the two people who most strongly promulgated
23 findings of guilt -- and this is not just from
24 Ms. Savko -- were from Rago and Jankiewicz. Consistently
25 everyone told you, other than Rago and Jankiewicz, that

1 they were together all the time. That it was common to
2 see them together. Sometimes with others, sometimes by
3 themselves. And that they went to lunch together, in one
4 witness' opinion, pretty much everyday throughout the
5 entire trial.

6 What an odd coincidence that the two people who
7 engaged in juror misconduct happened to click up and
8 continued to talk to each other about whatever they talked
9 about for the duration of trial. And then apply pressure
10 to Ms. Savko, who characterized herself as the last
11 hold-out. She wish she'd sat there and kept her voice,
12 even if it took another 8 hours, so she could vote not
13 guilty. She felt pressured. She felt bullied. And now
14 she regrets it.

15 The Supreme Court asked for this hearing to establish
16 the prejudice. I believe it's been well-established
17 through Mr. Rago and Mr. Jankiewicz, Ms. Makinster, Ms.
18 Savko. Four of a 12 member jury panel, fully 33
19 percent.

20 THE COURT: Thank you. All right.

21 We have completed the evidentiary hearing. As
22 the court pointed out the limited remand from the Supreme
23 Court was a 90-day turnaround to have a full hearing
24 conducted and a written order issued. The court will
25 further review the testimony from today, as well as in the

1 context of the original briefings and render a written
2 order within the time frame prescribed.

3 Thank you.

4 MR. MACAUTHUR: Thank you.

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CERTIFICATE
OF
CERTIFIED COURT REPORTER

* * * * *

I, the undersigned certified court reporter in and for the
State of Nevada, do hereby certify:

That the foregoing proceedings were taken before me at the
time and place therein set forth; that the testimony and
all objections made at the time of the proceedings were
recorded stenographically by me and were thereafter
transcribed under my direction; that the foregoing is a
true record of the testimony and of all objections made at
the time of the proceedings.

A handwritten signature in cursive script, reading "Sharon Howard", followed by a large, circular flourish.


Sharon Howard
C.C.R. #745

CERTIFICATE
OF
CERTIFIED COURT REPORTER

* * * * *

I, the undersigned certified court reporter in and for the
State of Nevada, do hereby certify:

That the foregoing proceedings were taken before me at the
time and place therein set forth; that the testimony and
all objections made at the time of the proceedings were
recorded stenographically by me and were thereafter
transcribed under my direction; that the foregoing is a
true record of the testimony and of all objections made at
the time of the proceedings.

A handwritten signature in cursive script, reading "Sharon Howard", followed by a large, circular flourish.

Sharon Howard
C.C.R. #745

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