

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Sep 18 2018 04:47 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
Case No. 75911

**APPELLANT'S MOTION TO RECONSIDER THE DENIAL OF HIS
MOTION SEEKING AN ORDER REMANDING CASE BACK TO
DISTRICT COURT FOR A DECISION BY THE TRIAL JUDGE.**

Comes Now Appellant ALFRED C. HARVEY, by and through Chief Deputy Public Defender SHARON G. DICKINSON, and pursuant to NRAP 27 asks this Court to reconsider its previous order denying his request that the case be remanded back to district court for a hearing before Alfred's trial judge, Judge Bixler. This Motion is based on Points and Authorities, Exhibits, and documents on file in this case.

DATED this 18th day of September, 2018.

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

POINTS AND AUTHORITIES

Alfred Harvey has two cases on appeal: (1) Case No. 72829 – direct appeal of jury verdict; and (2) Case No. 75911 – appeal of the denial of his motion for a new trial.

In Case No. 75911, on 06/29/18, Alfred filed a motion seeking an order from this Court remanding the case back to district court for a decision before the trial judge. *Exhibit A- without exhibits*. On 07/23/18, this Court denied his motion. *Exhibit B*.

In Case No. 72829, on 06/18/18, Alfred filed a motion seeking an order allowing for reconstruction of the record and remand back to district court for an evidentiary hearing. *Exhibit C- without exhibits attached*. On 07/25/18, this Court denied the motion. *Exhibit D*. Immediately, upon receipt of the denial, Alfred prepared and sent a motion for reconsideration to the Court on 07/25/18. *Exhibit E*.

Subsequent to the sending of the motion for reconsideration, on 07/26/18, this Court issued an order consolidating Case No. 72829 and No. 75911. After filing the order, Court filed Alfred's motion seeking reconsideration. *Exhibit F*.

In light of the fact that the Court has not yet decided Alfred's motion for reconsideration in Case No. 72829, Alfred now seeks to join Case No. 75911 in his motion for reconsideration.

Alfred seeks a remand back to district court for an evidentiary hearing on his motion for a new trial before the trial judge. Only the trial judge may properly evaluate the issue regarding the jury note because he heard all the testimony.

DATED this 18th day of September, 2018.

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

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 18 day of September, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

SHARON G. DICKINSON
HOWARD S. BROOKS

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

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

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

Exhibit A

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY,)
)
 Appellant,)
)
 vs.)
)
 THE STATE OF NEVADA,)
)
 Respondent.)
)

Electronically Filed
Jun 29 2018 08:29 a.m.
Case No. 75911
Elizabeth A. Brown
Clerk of Supreme Court

**APPELLANT'S MOTION SEEKING AN ORDER REMANDING
CASE BACK TO DISTRICT COURT FOR A DECISION BY THE
TRIAL JUDGE ALTERNATIVELY MOTION TO DISMISS ALFRED
HARVEY'S CONVICTION.**

Comes Now Appellant ALFRED C. HARVEY, by and through Chief Deputy Public Defender SHARON G. DICKINSON, and pursuant to NRAP 27 asks this Court to remand his case back to district court for hearing before Alfred's trial judge, Judge Bixler. Alternatively, Alfred asks this Court reverse his conviction. This Motion is based on Points and Authorities, Exhibits, and documents on file in this case.

DATED this 28 of June, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER
By /s/ Sharon G. Dickinson
SHARON G. DICKINSON, #3710
Chief Deputy Public Defender
309 So. Third Street, Suite #226
Las Vegas, Nevada 89155-2610

POINTS AND AUTHORITIES

In this motion, Alfred asks this Court remanded his case to district court for a hearing on his motion for a new trial with the trial judge, Judge Bixler. Alternatively, he asks his conviction be reversed due to procedural violations and a violation of his right to due process. The reason for these requests is because when he filed the NRS 176.515 motion in district court, a non-trial judge refused to allow the trial judge, Judge Bixler, decide his motion.

Alfred has also filed a motion to remand back his companion case, Nevada Supreme Court Case No. 73500.

Alfred's NRS 176.515 motion for a new trial centered on a piece of evidence found during the appellate process and discussed how the trial attorneys would have handled that evidence if they had been informed of it during trial. Accordingly, the non-trial judge had no background on what occurred at trial and could not make an informed ruling.

During the appellate process, on November 15, 2017, Appellate Counsel discovered a jury note within the court exhibits that was not discussed on the record. None of the trial attorneys knew anything about the note. The jury note said: "Can we have elaboration on the definition by means of force or violence or fear of injury. Michelle Moline." At the top

of the note, was a typed response: "The Court is not at liberty to supplement the evidence." Exhibit A.

On April 5, 2018, Alfred filed a Motion to for a New Trial based on the trial court not informing Alfred's attorney's about the note. Exhibit A. State filed an Opposition. Exhibit B. Alfred filed a Reply to State's Opposition. Exhibit C. Because his trial was heard by Judge Bixler, who is a senior judge, Alfred asked that Judge Bixler decide his motion. On April 27, 2018, after Alfred's investigator obtained declarations from several jurors, Alfred filed a Supplemental to his Reply motion.¹ Exhibit D. Alfred sought

¹ In the declarations, Juror Change said someone told her that the jury foreperson, Michelle Moline telephoned the Marshall during the first day of deliberations regarding a procedural issue. During the second day of jury deliberations, the Marshall entered the jury room, closed the door, and asked if the person with a procedure issue wanted to talk to the judge then the judge would talk to them. However, no one spoke with the Judge. She remembered someone telling her that the jury foreperson contacted the Marshall during the second day of deliberations also. Juror Change remembered a question being asked about a definition but did not remember if it was in written form. However, they received an answer within 5-10 minutes of asking the question. Exhibit D.

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

Jury foreperson, Michelle Moline said that on the second day of jury deliberations, she wrote a note for the Marshall to give to the judge. She identified the handwritten note which was later made a court exhibit as the note she wrote. Ms. Moline indicated the Marshall returned with a response about an hour later. The Marshall told the jury that they could not elaborate and told them this was asked and answered. Shortly after receiving the Marshall's response, the jury returned with a verdict. Exhibit D.

an evidentiary hearing on the jury note to determine what actions the Marshall and court took regarding the jury note. He also sought to learn what the Marshall said to the deliberating jury.

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

Exhibit E.

On April 30, 2018, the non-trial judge denied Alfred's motion for a new trial and declined to allow the trial judge to rule on Alfred's motions.

Exhibit F.

In his Order denying Alfred's motion for a new trial, the non-trial judge said the allegations Alfred presented "did not constitute 'new evidence,' the Court having found that Judge Bixler does not recall the jury question..." Exhibit G. Court added:

...even if the question was presented to the attorneys, the question held the notation "The Court is not at liberty to supplement the evidence" would have been the proper and legal response to the jury inquiry...the Defendant failed to show that a different outcome would have been probable." Exhibit G.

Court refused to hold an evidentiary hearing.

II.

NRS 175.101 indicates that if a trial judge is unable to perform the duties of the court after verdict due to “death, sickness or other disability” then “any other judge regularly sitting in or assigned to the court may perform those duties.” However, if the substitute judge determines he is unable to perform the duties for any reason then the substitute judge may grant a new trial. NRS 175.101.

Accordingly, allowing a non-trial judge to decide a NRS 176.515 motion when the trial judge is available violates a defendant’s right to due process as provided by NRS 175.101 which gives Alfred the right to have his motion for a new trial decided by the trial judge. The only remedy available is for this Court to remand the case back to district court to the trial judge or for this Court to reverse his conviction. *See Kelley v. State*, 637 So.2d 972 (Fla. 1st DCA 1994).

Here, Judge Bixler was available. Judge Bixler was not dead, ill, or under a disability that prohibited him from handling court duties. However, Judge Smith, the non-trial judge, simply decided he would not allow Judge Bixler to hold a hearing on the motions or to make a decision. Thus, the non-trial judge’s actions violated NRS 175.101 and Alfred’s right to due

process. See *Whitlock v. Salmon*, 104 Nev. 24, 26 (1988)(statutes confer a substantive right).

Alfred was prejudiced because the non-trial judge lacked an understanding of the facts of the trial and therefore reached an incorrect decision on the merits of the motion. Thus, the non-trial judge could not make an informed decision when deciding the NRS 176.515 motion and determining whether or not “a different outcome would have been probable.” NRS 176.515.

III. CONCLUSION

In view of the above, Alfred Harvey asks this Court to remand his case back to district court for an evidentiary hearing before his trial judge, Judge Bixler, and to allow Judge Bixler decide his motion for a new trial. Alternatively, Alfred asks this Court reverse his conviction.

DATED this 28 day of June, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER
By /s/ Sharon G. Dickinson
SHARON G. DICKINSON, #3710
Chief Deputy Public Defender
309 So. Third Street, Suite #226
Las Vegas, Nevada 89155-2610

Exhibit B

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75911

FILED

JUL 23 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING MOTION

This is an appeal from a district court order denying appellant's motion for new trial. Appellant has filed a motion to remand this appeal to the district court, arguing that the trial judge should have decided his motion for new trial. Alternatively, appellant moves this court to dismiss his conviction. Respondent opposes the motion and appellant has filed a reply.

Appellant's arguments supporting the motion for remand go to the merits of this pending appeal—whether the district court erred in some manner when it denied appellant's motion for new trial. This court prefers to leave the merits of this appeal to be addressed through appropriate briefing under NRAP 31(a)(1) rather than motion practice. Accordingly appellant's motion for remand or, alternatively, to dismiss his conviction is denied.¹

It is so ORDERED.

Drygas, C.J.

¹Appellant has appealed his judgment of conviction in Docket No. 72829.

cc: Hon. Douglas Smith, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

Exhibit C

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY, _____
Appellant,)
vs.)
THE STATE OF NEVADA,)
Respondent.)

Case No. 72829 Electronically Filed
Jun 18 2018 10:31 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

Comes Now Appellant ALFRED C. HARVEY, by and through Chief Deputy Public Defender SHARON G. DICKINSON, and pursuant to NRAP 10(c) and NRAP 27 asks this Court to remand his case back to district court for an evidentiary hearing before his trial judge, Judge Bixler. Alternatively, he asks this court to issue an order allowing Alfred to use in his appeal the declarations and affidavits he obtained from jurors, the investigator, and trial attorneys which were included in his motion to reconstruct the record. This Motion is based on Points and Authorities, Exhibits, Affidavits, Declaration, and documents on file in this case.

DATED this 15th of June, 2018.

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

POINTS AND AUTHORITIES

I. FACTS

During the appellate process, on November 15, 2017, Appellate Counsel discovered a jury note within the court exhibits that was not discussed on the record. None of the trial attorneys knew anything about the note.¹ The jury note said: “Can we have elaboration on the definition by means of force or violence or fear of injury. Michelle Moline.” At the top of the note, was a typed response: “The Court is not at liberty to supplement the evidence.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. RECONSTRUCTION OR CLARIFICATION OF THE RECORD.

NRAP 10 states in pertinent part:

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

...

(b) The Record on Appeal.

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

...

(c) Correction or Modification of the Record. If any difference arises about whether the trial court record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record conformed accordingly. Questions as to the form and content of the appellate court record shall be presented to the Clerk.

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

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

A trial court has the authority to reconstruct off the record discussions or missing objections and arguments and to clarify the rulings in order to protect Alfred's right to due process on appeal and to ensure that he is given the correct standard of review on appeal. If an objection or argument or exhibit is not recorded or not made part of the record or if the transcript is incomplete, the Nevada Supreme Court allows for reconstruction of the record by the trial court. See *Lopez v. State*, 105 Nev. 68, 769 P.2d 1276 (1989) (reconstruction when a portion of the testimony was missing). Reconstruction not only applies to what is said during the trial but may also be used to describe what was viewed in the courtroom. *Philips v. State*, 105 Nev. 631, 782 P.2d 381 (1989)(court suggested appellate counsel could compose a statement regarding the race of the prospective jurors to support his *Batson* claim when the record did not include any reference to the race of the prospective jurors). Additionally, in *Quangbengboune v. State*, 220 P.3d 1122 (Nev. 2009), the Court held that the trial record could be modified or corrected when inaccuracies in the interpreter's translations of the defendant's testimony were verified during the appellate process. The *Quangbengboune* Court held that the defendant could bring a motion in district court pursuant to NRAP 10 (c) to correct the record. In view of this, NRAP 10(c) and legal authorities support Alfred's request to

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

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

The process of responding to jury notes as used by the trial court and the Marshal in this case conflicts with NRS 175.451. The Legislature enacted NRS 175.451 to allow the jury to receive additional information on the law if confused. Accordingly, in *Gonzales v. State*, 366 P.3d 680, 682 (Nev. 2015), the Nevada Supreme Court held: [W]here a jury's question during deliberations suggests confusion or lack of understanding of a significant element of the applicable law, the court has a duty to give additional instructions on the law to adequately clarify the jury's doubt or

confusion.” However, no error occurs if the Defense does not provide the court with proffered instructions to clarify the jury’s doubt or confusion. *Jeffries v. State*, 397 P.3d 21, 28 (Nev. 2017), *reh’g denied* (Sept. 29, 2017). Therefore, Alfred should have been informed of the note so he could proffer instructions.

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

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

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

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

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

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

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

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

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

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

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

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

Additionally, a bailiff's improper ex parte contact with the jury after receiving a jury note may also be newly discovered evidence warranting a

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

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

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

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

III. CONCLUSION

In view of the above, Alfred Harvey asks this Court to remand his case back to district court for an evidentiary hearing before his trial judge, Judge Bixler. Alternatively, he asks this court to issue an order allowing Alfred to use, in his appeal, the declarations and affidavits he obtained from jurors, the investigator, and his trial attorneys which were included in his motions filed in district court.

DATED this 15th day of June, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

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

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 15 day of June, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

SHARON G. DICKINSON
HOWARD S. BROOKS

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

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

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

Exhibit D


IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72829

FILED

JUL 25 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER DENYING MOTION

This is an appeal from a judgment of conviction. During the preparation for the appeal, appellant's counsel discovered in the court's exhibits a note from the jury containing a typed response. However, the record did not reveal how the note became a court exhibit. Accordingly, appellant filed a motion to reconstruct the record asking the trial court to make a record explaining how the note became a court exhibit. He also filed a motion for a new trial. The motions were heard by a district court judge who was not the trial judge and denied. Appellant has filed a motion asking this court to remand the matter for an evidentiary hearing on his motions, to be conducted by the trial judge. The motion is opposed and appellant has filed a reply.

Appellant's motion essentially asserts that the district court erred by hearing the motion to reconstruct the record (instead of allowing the motion to be heard by the trial judge) and by denying the motion. Such an assertion asks us to review the actions of the district court judge, and is not appropriately resolved in the context of a motion. Accordingly, the motion to remand the appeal to the district court is denied. Appellant's alternative request to allow the affidavits and declarations presented to the district court with his motion to reconstruct the record to be used as part of

the record in this appeal is denied. The affidavits and declarations were not considered by the district court prior to entry of the judgment of conviction and are thus not part of the trial court record or the record on appeal. See NRAP 10(a), (b). This court cannot consider documents that are not part of the record on appeal. *Carson Ready Mix v. First Nat'l Bk.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981).

It is so ORDERED.

Dryden, C.J.

cc: Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney

Exhibit E

Sharon Dickinson

From: efilng@nvcourts.nv.gov
Sent: Wednesday, July 25, 2018 7:24 PM
To: Sharon Dickinson
Subject: Your filing, Re: 72829 - Criminal Appeal - Motion, was filed subject to acceptance No. 72829.

RECEIPT OF ELECTRONIC DOCUMENT SUBMITTED FOR FILING

Docket Number: 72829
Case Category: Criminal Appeal
Submitted by: Sharon G Dickinson
Date Submitted: Jul 25 2018 07:22 p.m.
Document Category: Motion
Document Title: Motion to Reconsider
Filing Status: **Filed subject to acceptance**

This notice was automatically generated by the electronic filing system. Do not respond to this email. If you have any questions, contact the Nevada Supreme Court Clerk's office at 775-684-1600 or 702-486-9300.

Exhibit F

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72829

ALFRED C. HARVEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75911

FILED

JUL 26 2018

ORDER CONSOLIDATING APPEALS

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

Docket No. 72829 is an appeal from a judgment of conviction. Docket No. 75911 is an appeal from an order denying a motion for a new trial and to reconstruct the record. Having considered the documents before this court, we conclude that these appeals should be consolidated. See NRAP 3(b)(2). Accordingly, we consolidate these appeals for all appellate purposes.

Appellant shall have until September 20, 2018, to file and serve a single appendix and opening brief addressing all issues raised in these appeals. Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1). Failure to comply with this order may result in the imposition of sanctions.

It is so ORDERED.¹

Dwyer, C.J.

¹Given this order, appellant's motion for an extension of time to file the opening brief in Docket No. 72829 is denied as moot.

cc: Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney

Exhibit G

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY, _____)
Appellant,)
vs.)
THE STATE OF NEVADA,)
Respondent.)

Case No. 72829
Electronically Filed
Jul 26 2018 09:05 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

Comes Now Appellant ALFRED C. HARVEY, by and through Chief Deputy Public Defender SHARON G. DICKINSON, and pursuant to NRAP 10(c) and NRAP 27 asks this Court to reconsider its order issued on July 25, 2018 denying his motion seeking remanded to district court for an evidentiary hearing before trial judge, Judge Bixler. Alternatively, Alfred requests an order allowing him to use the declarations and affidavits he obtained from jurors, the investigator, and trial attorneys in his appeal. This Motion is based on Points and Authorities, Exhibits, Affidavits, Declaration, and documents on file in this case.

DATED this 25th of July, 2018.

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

POINTS AND AUTHORITIES

Alfred brings this motion to reconsider because there seems to be a misunderstanding of the facts and law. In the order the Court cites *Carson Ready Mix v. First Nat'l Bk*, 97 Nev. 474, 476 (1981) to hold “[t]he affidavits and declarations were not considered by the district court prior to entry of the judgment of conviction and are thus not part of the trial record or the record on appeal.” Order:2.

NRAP 10 defines the trial record in pertinent part:

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

...

Accordingly, NRAP 10(a) *does not limit* the trial record to affidavits and declarations considered by the judge prior to entry of the judgment of conviction. The only limitation within NRAP 10(a) is that documents must be filed in the district court. Here, the affidavits and declarations were filed in the district court. Therefore, they are part of the district court record and may be cited to under the rules - except for the fact the district court told Alfred he could not.

Likewise, *Carson Ready Mix, Inc.*, does not support the Court’s ruling. In *Carson Ready Mix, Inc.*, copies of the defendant’s proposed jury

instructions were not within his appendix on appeal and not filed in the district court record. The reason for the omission was that the trial court discussed jury instructions and objections in its chambers. Later, not all the objections and discussions were put on the record in violation of NRCP 51. On appeal, the appellant attempted to reconstruct the record by sending affidavits *directly* to the Supreme Court rather than following the procedure for reconstruction outlined in NRAP 10(c). The Court admonished the appellant that it was his responsibility to make sure the objections were properly placed on the record in district court and to follow NRAP 10(c) if anything was amiss.

Initially, it is important to point out that criminal cases do not follow NRCP 51. Therefore, *Carson Ready Mix, Inc.* is not dispositive because the case at bar is a criminal case not a civil case.

Additionally, in contrast to *Carson Ready Mix, Inc.*, here, it was the trial court – not the appellant as in *Carson* – who created the error. It was the trial court who did not make a record of what the trial court did during jury deliberations. Here, the jury gave the marshall a note seeking the answer to a question. It appears the note was given – we are not sure – to the judge. The judge did not notify the parties and the note was not discovered until after the judgement was filed. Thus, Alfred could not make

a record in district court *prior* to the filing of the judgment because the *trial court withheld this information from him*.

Furthermore, unlike *Carson Ready Mix, Inc.*, here, it was and is the *duty of the trial court* – not Alfred – to correct the error in the record because it was the *district court* not Alfred who made the error in not contacting the parties to inform them of the note from the jury. As a matter of public policy, the public can have no confidence in a judiciary that withholds information from a defendant during a trial and then later claims on appeal the record cannot be reconstructed and blames the defendant for not making an adequate record for review.

Finally, when Alfred discovered the *trial court erred*, he filed a NRAP 10(c) motion as required:

(c) Correction or Modification of the Record. If any difference arises about whether the trial court record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record conformed accordingly. Questions as to the form and content of the appellate court record shall be presented to the Clerk.

He asked for the trial court's error to be reconstructed in the record because he intended to raise this issue on appeal. He asked for the trial judge to make a decision as he is entitled to by NRS 175.101. He asked that the district court record truly reflect what the district court and the court staff did

during the trial. Thus, Alfred followed the rules as delineated in *Carson Ready Mix, Inc.*, and NRAP 10 (c).

However, this Court's decision seems contrary to *Carson Ready Mix, Inc.*, and NRAP 10 (c) and NRS 175.101. Even though the error was created by the trial court and not him, this Court has denied him any remedy, just as he was denied any remedy by the district court.

This Court has the authority to order the district court to follow the rules and that is what Alfred asked when seeking a remand. Requiring the district court to follow the rules is different from this Court making a decision for the district court. When the Court creates rules such as those in NRAP 10(c), defendants are entitled under due process to expect the rules to be followed and to allow for reconstruction of the record with the trial judge after the judgment has been filed.

Lastly, it is important to note that by its very nature, a NRAP 10(c) motion can only be filed *after the judgement* is filed because it is a rule used by the parties when a case is on appeal. An NRAP 10(c) motion allows for correction or reconstruction of the district court record to ensure a defendant is given due process on appeal. But Court's order mistakenly concludes the information contained within the declarations of jurors was not considered by the trial court. In reality, the juror's declarations contain information the

trial court would have known at the time the marshall spoke to the jury. It contains information the court should have known prior to the filing of the judgment and contains some of the information withheld from the trial attorneys. A remand is necessary for the trial court to make a record of its error so that Alfred may obtain due process on direct appeal.

III. CONCLUSION

In view of the above, Alfred Harvey asks this Court to reconsider its decision and remand his case back to district court for an evidentiary hearing before his trial judge, Judge Bixler. Alternatively, he asks this court to issue an order allowing Alfred to use, in his appeal, the declarations and affidavits he obtained from jurors, the investigator, and his trial attorneys which were included in his motions filed in district court.

DATED this 25th day of July, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Sharon G. Dickinson
SHARON G. DICKINSON, #3710
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 25 day of July, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

SHARON G. DICKINSON
HOWARD S. BROOKS

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

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

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