IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 72829, 73991

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEF.
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DIST. ATTY.
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

AARON D. FORD
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEF.
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DIST. ATTY.
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

AARON D. FORD
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Misc. Citations

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

STATE'S FACTUAL MISSTATEMENTS

State incorrectly claims Juan Munoz *knew* Alfred Harvey had a knife. RAB:5-6. Munoz's testimony of what he heard and saw equally describes a cell phone: "I *believe* it was black...approximately four inches." IV:727-8. Jury found Alfred *not guilty* of using a knife. I:282.

State infers Munoz retreated inside the store upon seeing the object in Alfred's hand. OB:5. However, Munoz stayed outside but stopped pursuing Alfred who was walking away. IV:729-30.

Testimony State references as indicating Munoz watched Harvey steal items later found in the U-Haul is actually the testimony of Officer Richard Nelson and Officer Humphreys. IV:852-53;862.

FAILURE TO ADDRESS ARGUMENTS AND LAW

Respondent's Answering Brief's index lists 21 of the 73 legal authorities Thomas cited. By ignoring arguments and authorities presented throughout Alfred's Opening Brief, State concedes Alfred' points are meritorious in each instance. *Polk v. State*, 233 P.3d 357, 359 (Nev. 2010).

STATE'S ISSUE VIII

State's Issue VIII is non-responsive to issues raised by Alfred and is simply a recitation of harmless error without specific analysis.

ARGUMENT

I. INSUFFICIENT EVIDENCE TO PROVE ROBBERY.

A. No evidence Alfred took miscellaneous clothing items.

Allegations within an Information not only include the elements of the crime but also are a "plain, concise and definite written statement of the essential facts constituting the offense charged." NRS 173.075. Thus, facts necessary to support a conviction must be proven beyond a reasonable doubt at trial and failure to establish these facts is fatal. *Higgins v. State*, 501 P.2d 875, 876–77 (Okla. Crim. App. 1972); NRS 174.063 (defendant required to admit all facts listed within indictment/information for guilty plea).

While acknowledging State charged Alfred with taking "miscellaneous clothing items," State contends by taking wallets, face

cream, and fragrance items, Alfred took "miscellaneous clothing" because these are items that can be worn. RAB:11. State reaches this conclusion by arguing jury could make a reasonable inference that non-clothing items were actually miscellaneous clothing items because they were sold in a store that primarily sells clothing. RAB:11.

However, "clothing means a 'covering for the human body or garments in general'" and "a garment typifies 'an article of outer clothing (as a coat or dress) usu[ally] exclusive of accessories.'" *Lemans Corp. v. United States*, 34 C.I.T. 156, 163 (2010), *aff'd,* 660 F.3d 1311 (Fed. Cir. 2011) *citing Webster's Third New International Dictionary* 428, 936 (2002). Therefore, wallets, lotion, and fragrance are not clothing.

State's suggestion jury could make a reasonable inference that the items taken were clothing is faulty. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), discussed the reasonable inference standard when a jury made a decision based on conflicts in the testimony and evidence. *Id.* There are no conflicts in the evidence here because Munoz testified Alfred took two wallets and a jar of face cream. IV:703-4;715;749. These items were not listed in the Information – they are not clothing. I:30;I:184;II:252.

The question then becomes whether or not the variance between the charges and proof was material. *Jones v. State*, 96 Nev. 71, 73-74

(1980)(three to two decision discussing a variance between facts alleged in charging document and facts proven at trial). The *Jones* defendant was charged with selling narcotics to undercover Officer Jolley. However, the evidence at trial was that the defendant sold narcotics to a confidential informant and Jolley was not directly involved in the transaction. A divided court found the difference between the evidence and the charging document not material.

Courts have found a material variance when the name of the robbery victim in the Indictment was different from the name of the person who testified as the victim at trial. *Ex parte Verzone*, 868 So.2d 399 (2003); *Jacob v. State*, 651 So. 2d 147, 148 (Fla. Dist. Ct. App. 1995). Likewise, a material variance exists when the robbery victim testifies that certain property was taken but that property is not listed in the Indictment. *Hayes v. State*, 65 So. 3d 486, 490–92 (Ala. Crim. App. 2010).

Here, court knew about the variance between the evidence and the wording of the Information before trial began because State sought to amend the Information. In refusing to allow State to amend, trial court found the State's request amounted to a material change that prejudiced the Defense. III:501-13.

State's proposed amendment to the Information deleted the word "clothing," changing the words "miscellaneous clothing items" to "miscellaneous items." III:501.

But Alfred objected, saying:

> ...it's a change in the theory of the prosecution and; therefore, it requires a change in the theory of defense. This amendment came after the original calendar call as well as after the overflow calendar call and literally less than 24 hours before the start of trial...as soon as we got [this information] we did inform the State that we would be requesting a continuance because it definitely does change our theory of defense... III:501-02

Initially, court thought Alfred should not be surprised by State's requested change because he was aware of the items alleged taken in the police report. III:501. However, court agreed to speak to Defense Counsel outside the presence of the State before formally ruling on the amendment. III:504-8. Defense Counsel told court that Alfred's entire defense rested on the fact that he did not steal clothing. III:504-8.

After speaking to Defense, Court brought State back into the courtroom and said:

> ...I have to concede they kind of have a point...the defense has prepared based upon notice pleading that the Defendant committed the act of robbery with use of a deadly weapon by stealing clothing items...from the review of the information, there weren't any clothing items stolen, which is their whole defense...the point is by amending the complaint hours before the trial starts their argument is we came prepared to base a defense – because the State screwed this up and mistakenly

> alleged something that the facts don's support. So, that's how we approach the defense. Now to be surprised all of a sudden they're going to make a correction to correct what was supported by the evidence is – you can't do that hours from trial. III:508-09.

Court heard argument from the State but ultimately decided the trial would proceed based on the original Information containing the words "miscellaneous clothing items" and allowed each party to argue their theory of the case. III:509-512. However, court gave State a chance to amend the Information which would then require a continuance of the trial. III:513. State withdrew its request to amend.

By refusing to amend the Information without also granting a continuance, district court indirectly found the amendment State sought was a material change violating Alfred's substantive rights.

Accordingly, Count 1, the Robbery charge, must be reversed and dismissed because State failed to prove Alfred took "miscellaneous clothing items" from Munoz.

B. Nothing was taken from or in the presence of Munoz by Alfred using force or violence or fear of injury.

The element of presence requires State to prove the item taken was within the reach of, observation of or control of the alleged victim when

taken. *Guy v. State*, 108 Nev. 770, 775 (1992). [1] Munoz was watching a security camera and not near Alfred when items were concealed.

While acknowledging the element of "presence" must be proven, State argues Alfred used force when confronted outside the store by threatening Munoz with a knife. RAB:12. However, Alfred never touched Munoz, never said any threatening words, and, jury rendered a verdict finding Alfred not guilty of using a knife.[2] Thus, the fact some items were later found in Alfred's U-Haul is of no consequence because he did not use force when confronted by Munoz.

State further argues a robbery was shown by Alfred leaving the "scene" with property, noting some items were found in the van. RAB:12-13. Again, even if items were found in the van, there is no evidence Alfred took items in Munoz' presence or that he used "force of violence or fear of injury...to his...person or property..." to retain the items.

State does not point to any specific testimony, other Munoz's belief Alfred had a knife, indicating Alfred used force or violence or fear of injury when not agreeing to walk back into the store with Munoz. RAB:13.

---

[1] State's citation to *Klein v. State*, 105 Nev. 880 (1989) is irrelevant because in *Klein* court found two women had joint possession over the store's money and both were present when Defendant demanded the money.

[2] State also incorrectly claims Alfred threatened Munoz when he was leaving the store – that never happened. (RAB:13)

Instead, State relies on the jury verdict, arguing the jury found sufficient evidence of the element because Alfred threatened Munoz with a knife. RAB:13. However, the jury verdict is not a factor under evaluation on an insufficiency of the evidence claim.

When Munoz asked Alfred to go back inside the store, he did not ask him to return any other property. IV:725-7. Thus, Munoz was not attempting to recover any other merchandise at this point which is required by *Barkley v. State*, 114 Nev. 635 (1998) and *Martinez v. State*, 114 Nev. 746 (1998).

Moreover, Alfred never threatened Munoz, never pushed him, never touched him – never did anything threatening to Munoz. Because no force was used, State failed to prove a robbery beyond a reasonable doubt.

II. STRUCTURAL ERROR BY COURT PREJUDGING ALFRED'S CHALLENGE TO VENIRE

A. Violation of Fair-Cross Section

1. Distinctive Group.

State contends: "Appellant offers absolutely no evidence that any 'distinctive group' was excluded from his venire." RAB:15. State argues Harvey must show a group was totally "excluded" rather than underrepresented. RAB:15-16. However, no legal authorities make this

distinction. *See Williams v. State*, 121 Nev. 934, 939-400 (2005); *Morgan v. State,* 416 P.3d 212, 221-222 (Nev. 2019).

At trial and in his Opening Brief, Alfred objected based on African-Americans and Hispanics being a distinct group in census data. See OB:19-20;See trial at III:582-86. Accordingly, Harvey presented adequate evidence.

2. Representation not fair and reasonable.

Initially, State argues Harvey presented "no comparative data" for Court to consider. RAB:15. While trial counsel did not present comparative figures at trial, she adequately noted the discrepancies by announcing the percentages of minorities in the community verses the number of minorities on Alfred's venire. III:582-83. Moreover, at trial, *State admitted* African-Americans and Hispanics were "potentially" underrepresented. III:584.

On appeal, Harvey presented comparative data in his Opening Brief on pages 20-22 describing a comparative disparity of 82.4% for African-Americans and a comparative disparity of 85.9% for Hispanics. Therefore, Alfred presented sufficient information to show the representation of African-Americans and Hispanics in his venire was not fair and reasonable.

Although State did not dispute Alfred's census figures at trial, on appeal, State now contends Alfred was required to offer jury-eligible

population numbers. RAB:16;III:582-86. However, *Williams* and *Morgan* used the same type of census data that Harvey presented at trial and on appeal.[3]

State admits calculations show a comparative disparity rate of 82.4% for African-Americans and 85.9% for Hispanics, which are the same figures Harvey arrived at. RAB:16;OB:21. But State disagrees that these figures show the representation of these two groups in the venire was not likely fair and reasonable under the Sixth Amendment. RAB:16. State's conclusion that "comparative disparity numbers paint an inherently inaccurate picture" is not a fully developed argument and contrary to the law of *Williams* and *Morgan.* RAB:16;*Williams at* 631.

3. Underrepresentation due to systematic exclusion.

State contends district court correctly prohibited Alfred from questioning the jury commissioner and from obtaining any information regarding the selection of his venire because "the district court noted that Clark County's generalized selection process does not provide for any kind of selection exclusion process." RAB:17;III:586.

Under State's argument, as proposed by the district court, there can *never* be any type of systematize exclusion because Step 3 is pre-judged

---

[3] State's assertions to footnote 9 of *Williams* to argue only jury – eligible population figures may be used is incorrect.

based on other cases. RAB:17-20. Because there can *never* be systematic exclusion then Alfred is *never* entitled to an evidentiary hearing with the jury commissioner.

However, *Afzali v. State*, 130 Nev. 313 (2014) and the unpublished Afzali v. State, Case No. 54019, WL 4005727 (Nev. 2016) require the district court give jury selection information to the Defense. The court controls documents used by the jury commissioner in the jury selection process just as it does for the selection of grand jurors. Because this information is not readily available to the Defense and not a matter of public record, Alfred may only obtain it by asking for an evidentiary hearing with the jury commissioner. Here, unlike in the unpublished Afzali opinion, Alfred was given no documentation or information on the compilation of his venire.

State argues Alfred must first show a history of discrimination in the Clark County jury selection process, citing *Williams* at 941. RAB:15. However, *Williams* mentioned this when discussing the possibility of the court using specific exclusion to cure systematic discrimination - a different issue than presented in Alfred's brief.

Regarding Battle v. State, unpublished at 385 P.3d 32 (Nev. 2016), because district court did not rely on it, State cannot claim it supports district

court's decision. Also, State's citation to an unpublished Court of Appeals decision (Baker v. State) is prohibited by NRAP 36(c)(3) and should be disregarded.

State further claims since district court never said an evidentiary hearing was needed, court did not prejudge the request and no structural error occurred. RAB:19-30. However, by relying on decisions from other cases, district court prejudged the need for an evidentiary hearing and concluded there can *never* be systematic exclusion. Thus, Alfred was unable to make a more detailed challenge under Step 3 because court prejudged this issue.

III. ALFRED'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY COURT LIMITING THE CONTENT OF HIS RESERVED OPENING STATEMENT

State claims court advised Alfred on how to make an opening statement rather than restricting him and Alfred did not object to court's order. RAB:20-21.

State ignores the fact that the reason court restricted Alfred during his opening statement was because State objected and asked court to admonish Alfred. IV:876-77;OB:27-28. Thus, it is disingenuous for State, now on appeal, to argue plain error applies, claiming Alfred did not object to State's

objection and court's order. RAB:20-21. There was no opportunity for Alfred to further argue against court's position. IV:881.

State's reference to numerous cites regarding plain error is a diversion from the fact it was the State who objected. RAB:20-21. Moreover, plain error applies when the court is unable to make a ruling because an objection was not made at trial - here, court made a ruling. NRS 178.602.

State also contends Alfred seeks additional "rights or privileges" beyond what an opening statement normally would allow. RAB:20. In his Opening Brief, Alfred asked the Court to decide if NRS 175.141 allowed a defendant to give the *same* type of defense opening statement after State rests its case as the defense would give at the start of trial thereby allowing him to reference the facts. OB:26-32. Alfred made a statutory construction argument.

State further claims appellate review is precluded because Alfred did not make an offer of proof as to what his opening would have been.[4] RAB:21-20;23. On the one hand State suggests there are some missing transcripts (which is not true) and on the other hand State argues Alfred did

[4] NRAP3C(e)(2)(C) discusses fast track statements while this is a full brief. NRAP 30(b)(1-4) discusses portions of the transcript for the appendix but nothing is missing. Likewise, other cases cited by State on page 21 (paragraph beginning with "Further") involve instances were something is missing from the appendix or a summary judgement or an inadequate cite to the appendix in the briefs. None of these assertions apply here.

not make a sufficient record of his objection (which was State's objection). However, the record is clear as to what Alfred's opening would have contained – it would have referenced State's evidence as discussed in ISSUE I and in the closing. V:961-62. He would have argued the facts will not show force was used and that no clothing items were taken. State's evidence is part of the transcripts in the appendix. III:500-V:987.

Next, State claims trial court may limit openings statements. RAB:22. However, NRS 175.141 gives Alfred a substantive right to make an opening statement, just as NRS 16.030(6) gives parties a substantive right to ask questions during voir dire. *Whitlock v. Salmon*, 104 Nev. 24, 26 (1988). State ignores Alfred's statutory construction argument regarding NRS 175.141. OB:28-30.

State cites several federal cases, claiming they allow the court to limit opening statements. But the federal courts do not address NRS 175.141 and a State may give its citizens more procedural rules than those given by the federal government. See *Wilson v. State*, 123 Nev. 587, 595 (2007).

One of the cases State cites, *United State v. Dinitz*, 424 U.S. 600, 602-06 (1976) suggests that an attorney may be banned from the courtroom for failing to abide by a court's order limiting opening statements when summarizing the facts the evidence will show and identifying the issues.

Accordingly, based on *Dinitiz,* Alfred could not contest court's ruling. Moreover, the trial court's decision to prohibit Alfred from referencing the facts and issues was more restrictive.

Another case cited by State, *United States v. Burns*, 298 F.3d 523, 543 (6th Cir. 2002), indicates "[a]n opening statement is designed to allow each party to present an objective overview of the evidence intended to be introduced at trial." In *Burns*, the issue was whether court erred in allowing State to use a PowerPoint in opening. Here, the issue involves the exclusion of facts supporting Alfred's opening statement.

In *United States v. Doyle*, 121 F.3d 1078, 1094 (7th Cir. 1997) the trial court limited the scope of openings statements for both parties. Here, court only limited Alfred.

In his Opening Brief, Alfred cited several cases which State chose not to respond to: *United States v Amawi,* F.Supp2d 955 (District Court, N.S., Ohio 2008); and, *State v. Pedroza-Perez;* 240 Ariz. 114, 116 (2016) *citing Oesby v. United States*, 398 A.2d 1, 5 (D.C. 1979). Through *Amawi*, Alfred argued he had a constitutional right to discuss the facts, the evidence, and the theory of his case during his reserved openings statement. Yet State incorrectly claims Alfred presented no "authority whatsoever for his assertion." RAB:23.

Because Alfred presented argument referencing *Amawi*, State's decision to not respond is a concession that his argument is correct. OB:30-31; *See Polk.* It is an acknowledgment that the right to the assistance of counsel and the Fifth Amendment are violated when court unjustifiably limits the scope of a defendant's opening statement or requires him to give his opening statement immediately after State's opening.

Moreover, because State did not address Alfred's statutory construction argument, Court may conclude NRS 175.141 is unambiguous and allows a defendant to make the same type of opening statement discussing the evidence before and after State presents its case.

State's repeated argument that the trial court's directives to Alfred were simply a reminder to not argue is not accurate and misleading. RAB:22-23.

State objected twice. First, State objected before Alfred began his opening. Court reminded Alfred that an opening statement is not argument. IV:876-77.

State's second objection was during Alfred's opening. At this point court never told Alfred that an opening statement is a statement not an argument as State incorrectly claims. IV:881. Instead, court directed Defense Counsel to not "reference what's already been presumed as

evidence" and said: "You can't reference what's already been presented..." IV:881.

In its brief, State incorrectly presents court's two separate rulings as occurring at the same time. RAB:22. However, the record shows there were two separate rulings from two separate State objections during two different stages of the trial. State simply misrepresents the record. RAB:22-23.

Furthermore, State argues court did not prohibit Alfred from stating facts but only facts related to the evidence already presented. RAB:23. The facts are the evidence. The facts supported Alfred's defense that he did not steal clothing and did not use force.

Constitutional error applies because Alfred was denied the assistance of counsel and due process by the restriction. Because he was unable to give an opening statement discussing the evidence and the facts but State was allowed to do so, it cannot be said that the error was harmless beyond a reasonable doubt.

IV. DENIAL OF THE RIGHT TO A FAIR TRIAL

A. Motion to suppress show-up and in-court identification.

State claims even though the out-of-court identification was found unduly suggestive, an in-court identification of the same suspect is allowed. RAB:25-26.

State's analysis is confusing. *Sanchez v. Sheriff, Washoe County*, 86 Nev. 142 (1970) discusses whether a pre-trial writ or motion to suppress should be used when a defendant challenges identification. State incorrectly suggests *Sanchez* distinguished pre-trial and preliminary hearing identifications.

Likewise, *Lamb v. State*, 96 Nev. 452, 454 (1980) and *Hicks v. State*, 96 Nev. 82, 84 (1980) are inapplicable because in each case the trial court found the first identifications – the out-of-court identifications - were not suggestive.[5] Here, however, the trial court held that the first identification of Alfred could not be admitted because it was unduly suggestive.

Also, *Perry v. New Hampshire*, 565 U.S. 228 (2012) is inapplicable because the police never conducted an out-of-court show-up. "Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry* at 248. In *Perry,* a witness was talking to the police when she looked out her window, saw the suspect, and told the police that was the man trying

---

[5] State's in-court and out-of-court identification argument is irrelevant to this issue because trial court found the first identification unduly suggestive. RAB:25-26.

to break into cars. Thus, without police involvement, cross-examination is key to reliability.

In contrast, here, the out-of-court show-up was conducted by the police and court suppressed the identification as being unduly suggestive.

State's narrative on the importance of cross-examination to test the reliability of an identification does not address police misconduct in conducting an unduly suggestive lineup as we have in this instance.

State next discusses in-court identifications. RAB:29-32. However, none of the cases cited involve a court finding the initial out-of-court identification procedures used by the police unduly suggestive: *Baker v. State,* 88 Nev. 369 (1972); *Baker v. Hocker*, 496 F.2d 615 (9th Cir. 1974), *Johnson v. Sublett*, 63 F.3d 926 (9th Cir. 1995). In these cases it was the actual in-court identification that court addressed.

Without any legal authority, State claims an earlier unduly suggestive identification can be "cured by a later identification. RAB:30. *Foster v. California*, 394 U.S. 440 (1969) and *State v. Walker*, 429 So.2d 1301 (Fla. App. 1983), as addressed in the Opening Brief, would seem to disagree. OB:34-35.

The error in admitting the in-court identification after finding the out-of-court-identification unduly suggestive was not harmless because if the

court had prohibited Munoz from identifying Alfred then it is likely he would not have been convicted solely based on the video.

B. Lost evidence and denial of jury instruction.

State argues any suggestion as to what missing photographs would have shown is speculative and not material. RAB:32-33.

However, as addressed in the Opening Brief, the photographs were material to show what occurred outside TJM, to show Alfred driving away, and to show he did not drop a knife on the ground.

Police were grossly negligent or acted in bad faith because although they impounded the video from inside the store, they did to ask for video or pictures taken outside the store. *Daniel v. State*, 114 Nev. 261 (1998).

C. Denial of proposed larceny jury instruction.

Larceny is a continuing offense culminating in a robbery if a defendant uses force or fear when attempting to leave with the stolen property. *People v. Williams*, 305 P.3d 1241, 1248 (Cal. 2013); *Jefferson v. State*, 108 Nev. 953, 954-55 (1992) and *Randolph v. State*, 93 Nev. 532, 533 (1977)(not overruled by *Barton v. State*, 117 Nev. 686 (2001) or *Jackson v. State,* 128 Nev. 598 (2012). Thus, in some instances larceny is considered a lesser included of robbery.

But even if it is not, it was error to refuse to give an instruction on

petit larceny because if the jury believed Alfred did not use force then they could return a verdict for larceny. See *Peck v. State*, 116 Nev. 840, 845 (2000), *overruled by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006).

The giving of this instruction would not be confusing to the jury as State suggests, especially since at some point jury sent a note asking for further clarification of the use of force. Thus, the error was not harmless.

V. REVERSIBLE ERROR OCCURRED WHEN JURY SENT TRIAL COURT A NOTE, TRIAL COURT NEVER NOTIFIED THE PARTIES, MARSHALL SPOKE TO JURY, AND TRIAL COURT SENT A RESPONSE TO THE DELIBERATING JURY WITHOUT CONSULTING PARITIES.

A. NRS 175.415 and NRS 178.388.

NRS 175.415 and NRS 178.388 instruct the trial court on how to handle a jury note received during deliberations thereby creating a substantive right for the defendant. *See Whitlock v. Salmon*, 104 Nev. 24, 26 (1988)(statutes confer a substantive right in voir dire).

But State interprets these statutes differently from Alfred. State interprets NRS 175.415 and NRS 178.399 as giving Alfred no statutory right to be present and no right to help craft a response to a jury note. RAB:38. State claims because court decided not to respond to the jury note in this case, Alfred did not need to be contacted.

Court uses de novo review for issues of statutory construction and constitutional overlay. *Jackson v. State*, 291 P.3d 1274, 1277 (Nev. 2012) (statutory and constitutional interpretation); *DeStefano v. Berkus*, 121 Nev. 627, 629 (2005)(interpreting statutes). Court gives weight to the plain meaning of the words used by the Legislature in NRS 175.415, construing the statute as a whole so "not be read in a way that would render words or phrases superfluous or make a provision nugatory." *Mangarella v. State*, 117 Nev. 130, 133 (2001) *quoting Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502 (1990). If the language is plain, Court will not look beyond the statute for a different meaning. *Nay v. State,* 123 Nev. 326, 331 (2007).

NRS 175.415 says in pertinent part:

> After the jury have retired for deliberation...if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of, or after notice to, the district attorney and the defendant or the defendant's counsel.

See II:272:Jury Instruction 23.

Here, NRS 175.415 is plain and gives mandatory directions to the court. It says if the jury has a question on any point of law, "they must require the officer to conduct them to court." NRS 175.415. Legislature's use of the word "must" imposes a requirement. NRS 0.025(1)(c).

Likewise, the word "shall" in NRS 175.415 imposes a duty to act. NRS 0.025(1)(d). The duty imposed is for the jury to receive the requested information in the presence of or after notice to the defendant or his counsel. Thus, Legislature gave Alfred a substantive right to be present when the court decides how to respond to a jury question and when the information is given. Legislature also gave Alfred and the jury the right to receive an answer to the question. Thus, State is wrong when saying NRS 175.415 does not require court to give an answer to a jury question and only requires defendant's presence if the court decides to answer the question is wrong. RAB:38.

State also claims court's response was not an answer. RAB:38. While it is true that court did not properly respond to the given question, it still was an answer.

State also is incorrect in contending NRS 178.388(1) does not give Alfred a right to be present during the discussion of jury notes because NRS 178.388(5) excuses a defendant from the settling of jury instructions. RAB:38.

NRS 178.388(1) states:

> Except as otherwise provided in this title, the defendant must be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence...

However, "[t]he defendant's presence is not required at the settling of jury instructions." NRS 178.388(5).

NRS 178.388(1) is comparable to Fed. R. Crim. P. 43(a)[6] which states in pertinent part:

> ...the defendant must be present at: (1) the initial appearance, and plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing.

Like, NRS 178.388, Rule 43(c)(3) contains an exception, excusing a defendant from proceedings involving questions of law like the settling of jury instructions. *United States v. Perez*, 612 F.3d 879, 882–83 (7th Cir. 2010). Thus, Rule 43 and NRS 178.388 are similarly worded.

When interpreting Rule 43, federal courts consider jury notes differently from the settling of jury instructions. Rule 43 requires the judge to answer a jury's question in open court and defendant's counsel must be given an opportunity to respond and be heard prior to judge responding to the jury. *Rogers v. U. S.*, 422 U.S. 35, 39 (1975). Under Rule 43, a defendant has the right to be present at every critical stage of the trial – including the discussion of jury notes. *United States v. Martinez,* 850 F.3d 1097, 1100 (9th Cir. 2017). Thus, like Rule 43, NRS 178.388(1) gives

---

6 State did not address Rule 43.

Alfred the statutory right to be present during discussions and an opportunity to help craft a response to a jury note.

B. Sixth Amendment and Due Process

Due Process and the right to the assistance of counsel provide a criminal defendant with: (1) "the right to be present when a judge communicates to the jury (whether directly or via his or her marshal or other staff)" and (2) "the right to have his or her attorney present to provide input in crafting the court's response to a jury's inquiry." *Manning v. State*, 348 P.3d 1015, 1019 (2015).

Yet, State contends trial court did not abuse its discretion in responding to the jury note without notifying and conferring with the parties because court decided the jury instructions given were adequate. RAB:37-38.

1. Confusion on an element of the crime.

Jury asked: "Can we have elaboration on the definition by means of force or violence or fear of injury?"

State claims the note does not show confusion. RAB:38.

The question asked by the jury in this case is similar to the one asked in *Jeffries v. State*, 397 P.3d 21,28 (Nev. 2018). In *Jeffries*, the jury asked: "May we have more clarity/explanation on malice aforethought."

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

Because Alfred's closing argument was that he did not use force, the response to this question was critical and key to his defense. V:961-62;967-69. As Court knows, a robbery is nothing more than a larceny with force. *Martinez v. State*, 114 Nev. 746, 748 (1998).

In *Gonzalez v. State*, 366 P.3d 680, 683–84 (Nev. 2015), Court said when a "jury's question suggests confusion or a lack of understanding of a significant element of the applicable law," the trial court "has a duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion." Accordingly, trial court committed error by not further clarifying the law in response to the jury's questions.

2. Court's inadequate response.

Court responded: "The Court is not at liberty to supplement the evidence." V:1021a.

State argues jury was adequately instructed.

In *Tellis v. State*, 84 Nev. 587, 591(1968) this Court gave the trial judge "wide *discretion* in the manner and extent he answers a jury's questions during deliberation." Trial court's refusal to answer a question is not error if he "is of the opinion the instructions already given are adequate, correctly state the law and fully advise the jury on the procedures they are to follow in their deliberation..." *Id.*

However, the *Gonzalez* Court created an exception to the *Tellis* rule when the jury question suggests confusion or the jury seeks clarification on a significant element of the law. *Gonzalez* 683–84. In such an instance, "court has a duty to give additional instructions on the law..." *Id.*

Subsequently, in *Jeffries* this Court required the Defense to offer supplemental instructions for the court to give to the jury if jury notes shows jury is confused on an element of the crime.

Here, however, Alfred was not given a chance to offer supplemental jury instructions at the time of the trial because trial court never advised him of the note. VIII:1481-85.

Nonetheless in the Opening Brief, Alfred outlined what his attorney would have done if shown the jury note. OB:42. Alfred would have objected to court's given response and he would have asked for further instructions defining the words "actual force, fear and violence" as listed in

Black's Law Dictionary. He would have advised the court to ask jurors to focus on instructions #6, 11, and 12. He would have offered supplemental jury instructions based on *Crane v. State*, 88 Nev. 684 (1972) as well as petit larceny. VI:1483-85; See defense proposed instructions at I:194-95;197.

3. Manning.

In *Manning*, this Court adopted the federal response to jury questions during deliberations requiring court to notify the parties and allow input before trial responds. *Manning at* 1018-19.

Yet, State claims *Manning* is distinguishable because the jury in *Manning* was deadlocked when requesting information from the court and the jury in this case was only asking a question on the law.[7] RAB:38-42.

There is nothing in *Manning* to support State's distinction that the *Manning* procedures are limited to certain types of jury notes. Moreover, Court used the same *Manning* procedures in the subsequent *Jeffries* case in 2017 when the jury asked questions about the elements of the crime. *Jeffries at* 27-28.

State's claim that none of Alfred's constitutional rights are implicated when jury requests further information on the element of a crime and the

---

[7] Here, shortly after receiving court's response, the jury returned a verdict thus suggesting a coerced verdict. VII:14358-60:VIII:1659-61.

Defense are not notified is contrary to the reasoning discussed in *Manning* and *Jeffries*. RAB:39.

C. Standard of Review – error is not harmless beyond a reasonable doubt or is structural.

Manning and the Ninth Circuit used de novo review when evaluating trial court's response to a jury note. *United States v. Martinez*, 850 F.3d 1097, 1100 (9th Cir. 2017); *Manning at* 1017-18. Therefore, State's reference to an abuse of discretion standard as used in *Tellis* and *Jefferies* is a different standard. RAB:37.

Using de novo review, court decides if the error was harmless beyond a reasonable doubt under a three factor test as outlined in the Opening Brief. OB:43-45; *Manning at 1019.* However, *Martinez* suggests there whether "the failure to consult counsel about a mid-deliberations jury note is structural error turns on both the nature of the jury's request and the need for counsel's participation in formulating a response." *Martinez at* 1105.

1. Probable Effect.

State claims court did not respond to the note thereby suggesting there was no effect. However, court responded by giving an incorrect response about the evidence when the jury asked clarification on the law. Thus, court created further confusion.

*2. **Likelihood of a different message.***

State does not seem to address this portion of the three part test except to say that it was unlikely that the judge would have been swayed in giving any supplemental instructions or a larceny instruction. RAB:41. We will never know because Alfred was denied an evidentiary hearing before the trial judge. See ISSUE VII.

*3. **If changes would affect the verdict.***

State claims even if court had discussed the note with the attorneys the result would not have been different because the judge decides what instructions are given. RAB:41.

However, NRS 175.161(3) gives Alfred the right to propose jury instructions.[8] Thus, Alfred has a substantive right given to him by the Legislature to craft jury instructions.

/ / /

/ / /

---

[8] "Either party may present to the court any written charge, and request that it be given. If the court believes that the charge is pertinent and an accurate statement of the law, whether or not the charge has been adopted as a model jury instruction, it must be given. If the court believes that the charge is not pertinent or not an accurate statement of law, then it must be refused." NRS 175.161(3).

4. Structural error

In *Martinez*, the Ninth Circuit suggested that an error of this type could be structural because of the nature of the questions and counsel's need for participation. *Martinez at* 1105.

Balint v. Warden, N. Kern, WL 1423701, at *1–2 (C.D. Cal. Apr. 20, 2017) says the United States Supreme Court has not ruled on whether structural error applies in this instance.

Because the jury question centered on the element of the crime that was central to Alfred's defense – the use of force – Court should deem the error structural because Alfred was denied his right of assistance of counsel during the settling of jury instructions. Alternatively, it was not harmless beyond a reasonable doubt because it was a question about an element of the crime.

VI. CUMULATIVE TRIAL ERROR.

State claims the crime of robbery is not grave. RAB:42. However, robbery is considered a serious grave crime for cumulative error analysis. Romero v. State, 67731, 2016 WL 3257826, at *6–7 (Nev. June 10, 2016). As addressed in Issue I, the evidence was not overwhelming. All issues show the quality and quantity of the errors was substantial. See *Valdez v. State*, 124 Nev. 1172, 1195-98 (2008).

VII. COURT CREATED REVERSIBLE ERROR WHEN DECIDING POST-TRIAL MOTIONS.

A. Evidentiary hearing and decision by trial judge.

1. Judge Bixler v. Judge Smith

Judge Smith[9] was the non-trial judge who made decisions on Alfred's motion for a new trial and motion to correct the record. Judge Smith refused to allow the trial judge, Senior Judge Bixler, to decide Alfred's motions, saying he spoke to him and he did not remember the jury note. The only record we have of Judge Bixler's memory or lack thereof is from Judge Smith. Therefore, State's claim that Judge Bixler was unable to handle court duties under NRS 175.101 is speculative. RAB:43-44.

Here, Judge Bixler was available and State agrees. RAB:44. But State also says he was unavailable because he did not remember the case. RAB:44. However, forgetting something is not the standard for intervention by a new judge as outlined in NRS 175.101. It requires a serious disability.

Moreover, for all we know, Judge Bixler was correct in not remembering. Perhaps he could not remember the jury note because the marshall handled the note on his own and never told the judge. Therefore, Judge Smith erred in not allowing Judge Bixler to handle Alfred's after trial motions.

---

9 Judge Miley was not involved. RAB:43.

State further claims NRS 175.101 and NRS 176.515 do not give Alfred the right to have a new trial motion heard by the trial judge. State bases this argument on the wording of the statutes and on *Dieudonne v. State*, 127 Nev. 1, 5-8 (Nev. 2011).

Dieudonne indicates a defendant does not have the right to be sentenced by the judge who accepted his guilty plea. A judge who accepts a guilty plea is unfamiliar with the specifics of the crime whereas a judge managed an entire trial knows the facts. Thus, it makes sense for the trial judge to decide a motion for a new trial and motion to reconstruct the record.

Also, the plain meaning of the words and the title of NRS 175.101 give Alfred a substantive right to have his motions decided by the trial judge. The title says: "Disability of judge after verdict..." and the body of the statute mentions a disability occurring with "judge before whom the defendant has been tried." While NRS 176.515 does not specifically mention the trial judge deciding a motion for a new trial, NRS 176.515 and NRS 175.101 when read together indicate the trial judge should decide after verdict motions. Court presumes legislature enacts a statute "with full knowledge of existing statutes relating to the same subject.'" *Berkus at* 631. Therefore, Alfred was prejudiced by Judge Smiths ruling – as addressed in the Opening Brief. See OB:49-52.

2. Evidentiary hearing.

State claims an evidentiary hearing was not necessary based on Alfred's arguments on this issue, citing *Mann v. State*, 118 Nev. 352, 356 (2002) and *Marshall v. State*, 110 Nev. 1328, 1331 (1994), RAB:51-53. Both *Mann* and *Marshall* involve post-conviction writs of habeas not motions for a new trial or an NRAP 10(c) motion. Habeas actions will occur if Court affirms Alfred's conviction on direct appeal – not now.

Prosecutor's title and argument claiming the evidentiary hearing issue in this case involves post-conviction motions is wrong. RAB:43. This is a case on direct appeal not post-conviction. Because the prosecutor in this case does habeas actions, he knows *Mann* and *Marshall* are irrelevant to issues addressed on direct appeal. Post-convictions habeas actions are more limited in scope than direct appeal cases.

State further claims an evidentiary hearing was not necessary because the trial judge did not error in handling the jury note. RAB:52.

Judge Smith told Alfred how he thought he would have handled the note with the trial attorney and that other district court judges agreed with him. VIII:1687. Yet, in the end he admitted the attorneys should have been notified but thought it was unfair to go back and recreate what occurred.

VIII:1698. As discussed in Issue V, the trial judge failed to follow controlling law and procedures in *Manning* and *Jeffries*.

An evidentiary hearing would have given judge an opportunity to rule on Alfred's specific arguments and requests for supplemental jury instructions. It would have given Alfred the opportunity to make his argument for supplemental jury instructions as required by *Jeffries* and addressed in Alfred's motions. VII:1483-85;VIII:1483-85. Here, Judge Smith denied an evidentiary hearing and then never specifically ruled on Alfred's request for supplemental jury instructions as outlined in his motions.

Also, an evidentiary hearing was needed to determine how the trial court responded when receiving the jury note and how the marshall[10] responded. Thus, a hearing would have allowed for specific rulings and further develop Alfred's argument for his motions.

However, State incorrectly claims there is no indication any contact between the marshall and the jury was improper. We know improper contact occurred because the note the marshall gave the jury was not discussed with Alfred.

---

[10] Bailiff's improper ex parte contact with the jury after receiving a jury note may also be newly discovered evidence warranting a new trial. *Lamb v. State*, 127 Nev. 26, 43-46 (2011).

Here, trial court created error. Thus, it was the duty of the trial court to hold a hearing and correct and clarify the record. It was the district court, not Alfred, who had contact with the jury. Alfred was prejudiced because without an evidentiary hearing argument regarding this issue on appeal is limited.

B. NRAP 10 – Correction or reconstruction of the record.

State claims Alfred misused NRAP 10(c) by trying to change and add to the record. RAB:49-51. State alleges NRAP 10(c) does not allow inquiry into a mysterious jury note that is found in the district court evidence vault and listed as a court exhibit in Alfred's trial.

1. Appellate Counsel's Duties.

Appellate Counsel's duties are outlined in ADKT 411. Under Standard 2 (b), Appellate Counsel is required to identify issues *inside* and *outside* the trial record. Another *duty* of Appellate Counsel is to file a NRAP 10(c) motion in district court if the trial record does not *truly disclose* what occurred in district court.

In this instance the trial court record does not *truly disclose* what occurred in district court because court never contacted the attorneys about the jury note but had communication with the jury. Although district court, the marshall, and perhaps others had ex parte contact with the jury (either

through the note or verbally) the district court record does not truly disclose what occurred. Thus, Appellate Counsel is required to investigate and file a NRAP 10(c) motion to ensure the trial record *truly discloses* what occurred.

The purpose of NRAP 10(c) is not solely to settle disputes as State contends. RAB:50. However, here there is a dispute as to what occurred regarding the jury note thereby making an evidentiary hearing and reconstruction of the record applicable. The dispute is that we do not know how the jury note was made a court document and what communication court had with the jury.

Yet, State claims the only thing that can be reconstructed is a hearing. RAB:51. Not so - as shown in cases discussed in the following section. Moreover, the current record is incomplete because missing from the record is the ex parte contact the court and others had with the deliberating jury. The only information Alfred uncovered about the mysterious jury note came from the jurors and the district court rejected their affidavits. Their affidavits did not invade the jury thought process because they only discussed the jury note.

2. District Court's Duties under NRAP 10.

District Court has the authority to reconstruct off the record discussions or missing objections and arguments and to clarify the rulings or

correct the record in order to protect a Defendant'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) (testimony was missing); *Quangbengboune v. State*, 220 P.3d 1122 (Nev. 2009)(incorrect interpretation).

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)(race of the prospective jurors may be reconstructed). Thus, it is not limited as State suggests. RAB:50.

3. Prosecutor's Duties.

Rules of Professional Conduct require fairness to opposing party and counsel. Specifically, a prosecutor shall not obstruct the other party's access to evidence. RPC 3.4(a). Here, by objecting to an evidentiary hearing and to Alfred's motion to reconstruct the record regarding the jury note, prosecutor is obstructing Alfred's access to evidence.

State incorrectly tries to limit the record on appeal through its arguments and when citing irrelevant cases on appeal: *Carson Ready Mix,*

Inc. v. First National Bank of Nevada, 97 Nev. 474 (1981)(discussing NRCP 51 – not criminal case), *United States v. Elizalde-Adame*, 262 F.3d 637, 640 (7th Cir. 2011)(appellant sought to add documents trial court never used when making a decision) and *United States v. Walker,* 601 F.2d 1051, 1054 (9th Cir. 1979)(government could add additional information not reviewed by district court). In contrast, here, Alfred is merely seeking to reconstruct what occurred behind closed doors when the jury sent a note to the court.

C. Motion for New Trial.

State claims district court did not abuse its discretion in denying the motion for a new trial because the jury note and potential misconduct by the bailiff was not newly discovered evidence under NRS 176.515. RAB:45-49. Also, State claims a different result is not probable.

1-2. Newly discovered jury note after verdict and marshall's contact with jury is new evidence.

State claims a note is not evidence, it is not a response, and there is no evidence of bailiff misconduct. RAB:45-6.

However, State did not address *Brioady v. State*, 396 P.3d 822, 824 (Nev. 2017), *reh'g denied* (Oct. 2, 2017) – an argument in the Opening Brief – where Court found juror misconduct was newly discovered evidence under

NRS 176.515 warranting a new trial. RAB:56. By not addressing Alfred's argument, State concedes. *Polk.*

Alfred discusses the note and response in detail in V.

State further claims the record is insufficient for Alfred to show newly discovered evidence involving misconduct by the bailiff due to a conversation. RAB:48. Because court denied Alfred's request for an evidentiary hearing, the record is unclear as to marshall's communications. However, under *Manning*, his communications in giving the jury the note were improper.

As to misconduct by the bailiff, we know misconduct occurred because the bailiff gave a note that was formulated and presented to the jury without the parties consent. A bailiff's improper ex parte contact with the jury may also be newly discovered evidence warranting a new trial. *Lamb v. State*, 127 Nev. 26, 43-46 (2011).

The issue of whether a motion for new trial should be granted due to bailiff misconduct regarding a note or because the court did not notifying the parties of a note was not decided in *Gonzalez* or *Manning* as State infers. RAB:46. However, *Manning* said: "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). *Manning at* 1019. Thus, the marshall's

communication with the jury as directed by the court may be sufficient for the court to grant a motion for a new trial.

State also reargues sufficiency of the evidence and arguments already made in Issue V. RAB:46-7. Thus, Alfred incorporates Issues I and V here in response.

State admits jury had questions about the law (RAB:46) thus indirectly acknowledging juror *confusion* with jury instructions.

3. Material to movants defense.

State claims the note was not material to Alfred's defense because it was not evidence. RAB:46-47.

However, the jury note showed juror confusion on a material element of the crime which focused on Alfred defense – the use of force –as argued in closing. See VII:1423-24. Thus, how the court responded was material to Alfred's defense and the possible giving of supplemental jury instructions was material to Alfred's defense.

4. Could not be found with reasonable diligence.

No dispute.

5. Not cumulative.

No dispute.

6. Would have rendered a different result probable.

Alfred outlined the actions he would have taken if he had been advised by court of the jury question. OB:59-62.

But State argues that even if Alfred had been informed by court of the jury note, a different result would not have been probable. RAB:47-48. State suggests court would not have followed his requests for supplemental instructions. (OB:59-62).

State bases its conclusion on Judge Smith's opinion and not the unknown opinion of Judge Bixler. There is no record of what Judge Bixler would have done because State opposed Judge Bixler deciding the motions and the request for an evidentiary hearing. Judge Smith cannot make a record as to what Judge Bixler would have done because he does not have personal knowledge. Thus, State is incorrect.

State claims court's response properly instructed the jury. RAB:47. However the court's note did not address the question asked and therefore created more confusion.

Here, as addressed in Issue V, a different result would have occurred if Defense Counsel had been allowed to submit input on the jury note as allowed by Jury Instruction 23, NRS 175.451, *Gonzales*, and *Manning*. IF court would have followed proposed supplemental jury instructions it is

more likely than not the jury would have returned a not guilty verdict or a petit larceny verdict.

7. Does not contradict a witness or involve facts shown by the best evidence.

No dispute.

Based on the above, court erred in denying the motion for a new trial.

CONCLUSION

Alfred asks Court to reverse his conviction.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

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

CERTIFICATE OF COMPLIANCE

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

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 8,672 words which exceeds the 7,000 word limit, and the appropriate motion has been filed.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22 day of February, 2019.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By *_/s/ Sharon G. Dickinson_*
SHARON G. DICKINSON, #3710
Deputy Public Defender
309 South 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 22 day of February, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
STEVEN S. OWENS

SHARON G. DICKINSON
HOWARD S. BROOKS

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

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

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