IN THE SUPREME COURT OF THE STATE OF NEVADA

KODY HARLAN

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No.: 80318

APPELLANT'S APPENDIX
Volume II

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POINTS AND AUTHORITIES

PROCEDURAL HISTORY

On June 13, 2018, Kody Harlan ("Harlan") was charged by way of Criminal Complaint with one (1) count of Robbery (Category B Felony) and one (1) count of Accessory to Murder with Use of Deadly Weapon (Category C Felony) in Henderson Justice Court. On June 20, 2018, an Amended Criminal Complaint was filed adding a felony murder theory to the count of Murder with Use of Deadly Weapon against co-defendant Jaiden Caruso ("Caruso") and a deadly weapon enhancement to the count of Robbery.

On July 9, 2018, a preliminary hearing was held and the State filed a Second Amended Criminal Complaint charging Harlan with one (1) count of Murder with Use of Deadly Weapon, asserting various theories of liability against both Defendants, specifically charging a theory of felony murder by alleging Defendants committed the murder during the perpetration or attempted perpetration of a robbery. The Justice Court held Caruso and Harlan to answer all charges in District Court.

On July 18, 2018, Harlan was arraigned, pled not guilty, and invoked his right to jury trial within sixty (60) days. On July 31, 2018, Harlan waived his right to trial within sixty (60) days. Jury trial is currently scheduled for May 13, 2019, with a respective Calendar Call date of May 2, 2019.

On August 29, 2018, Caruso filed a Petition for Writ of Habeas Corpus. The State filed a Return to the Writ on September 11, 2018. The Court subsequently denied Caruso's writ on September 13, 2018. The same day, Harlan filed his Petition for Writ of Habeas Corpus. The State opposed and the Court denied Harlan's writ as well. On April 8, 2019, Defendant Harlan filed a Motion to Sever and/or Suppress. The State filed an Opposition and the Motion was denied on April 23, 2019. On April 18, 2019, Defendant Harlan filed a Motion in Limine Regarding Prior Bad Acts and Photo/Videographic Evidence which was granted in part. On April 22, 2019, the Defendant filed a Motion in Limine to Exclude Witness Testimony which

was subsequently denied. On May 9, 2019, Defendant Harlan filed a Motion for Bail Reduction. The State opposed the motion and it was denied on May 14, 2019.

At Calendar Call, all parties announced ready and trial commenced on July 29, 2019. On August 7, 2019, the jury returned a verdict of Guilty of 1st Degree Murder with Use of Deadly Weapon as to Count 1, Guilty of Robbery with Use of Deadly Weapon as to Count 2, and Guilty of Accessory to Murder with Use of Deadly Weapon as to Count 3 with respect to Defendant Harlan. The Defendant's sentencing is currently scheduled for September 18, 2019.

On August 13, 2019, Defendant Harlan filed the instant motion. The State opposes as follows.

STATEMENT OF FACTS

The jury trial in the instant case lasted between July 29, 2019 through August 7, 2019. Throughout the State's case in chief, twenty-one (21) witnesses were called to the stand to testify. Of these twenty-one witnesses, eight (8) were lay witnesses, twelve (12) were law enforcement, and one (1) was a coroner. Additionally, the State admitted one-hundred and fifty-five (155) exhibits. In Defendant Harlan's defense, he admitted various exhibits and opted not to testify. Defendant Caruso called expert, Dr. Alan Donaldson, who testified as to the effects of Xanax on the cognitive skills of juveniles. The testimony of the State's witnesses is outlined below.[1]

Angelina Knox Testimony

Angelina Knox ("Knox") went to an apartment complex party with two friends (Jacy and Patrick) on June 8, 2018. While at the party, Knox observed both the Defendants with firearms. Knox either personally heard Defendant Harlan state that he "caught a body" that day or was told by Patrick that Defendant Harlan made such a statement. Knox and her two friends obtained a ride from the Defendants after the party. Defendant Harlan was driving the Mercedes and Defendant Caruso sat in the front passenger seat. While driving, police attempted to stop the vehicle. Defendant Harlan drove erratically in an effort to flee from

[1] Provided the trial concluded on August 7, 2019, there have not been any transcripts prepared as of the date of this opposition.

police and ultimately crashed the car. Defendants Harlan and Caruso fled from the vehicle in opposite directions.

Officer K. Cochran Testimony

Officer Cochran, employed as a patrol officer with the Henderson Police Department, attempted to conduct a traffic stop[2] on the Mercedes driven by Defendant Harlan and occupied by Defendant Caruso on July 8, 2018. Despite her attempts to stop the vehicle, Defendant Harlan sped off, switched lanes, and ultimately caused an accident with another vehicle. Officer Cochran pursued Defendant Caruso as he fled through an alleyway, over a wall, through a restaurant, and ultimately surrendered. Officer Cochran was unable to pursue Defendant Harlan since he fled in the opposite direction.

Officer O. Mancuso Testimony

Henderson patrol Officer Mancuso responded to the car crash at the Chevron gas station. She received description information about the suspect (Defendant Harlan) that fled from the vehicle. Officer Mancuso ultimately apprehended Defendant Harlan at the Villas Apartments which was approximately a mile from the crash. Officers determined that Defendant Caruso resided at the Villas Apartments.

Detective M. Contradavich Testimony

Henderson Police Detective Contradavich obtained a search warrant for the residence at 2736 Cool Lilac, the Mercedes, DNA of the Defendants, and Defendant Caruso's residence at the Villas Apartments. The warrant for Defendant Caruso's apartment was obtained after jail calls between Defendant Caruso and his mother, as well as a text message to Defendant Caruso indicated Defendant Harlan may have stopped at the apartment during his efforts to flee the crash. Detectives executed the warrant a week after the crash but did not recover a firearm.

CSAs Hornback, Newbold, and Proietto

Crime Scene Analyst Hornback recovered various items from the Mercedes vehicle. These items included a 357 revolver, Nike shoes, a Footlocker receipt dated June 8, 2018,

[2] Failure to have a front license plate displayed

iPhones, and a Coach wallet with the thing inside being a high school identification card in the name of Matthew Minkler. Crime Scene Analyst Newbold took photos of Minkler during the autopsy and recovered the bullet fragments from Minkler's body. Crime Scene Analyst Proietto took photos and impounded items from the residence at Cool Lilac.

Alaric Oliver Testimony

Alaric Oliver ("Oliver") arrived at the Cool Lilac address on June 7, 2018 and stayed the night. Oliver left the house early that morning to walk to Wendy's to purchase food. When Oliver returned to the residence, Kymani Thompson, Ghunner Methvin, Charles Osurman, Vince (last name unknown), and the Defendants were present.

That afternoon, both Defendants left the house to pick up Matthew Minkler. All three returned to the house around 1:00pm. Everyone was smoking, drinking, and taking Xanax. Both Defendants had firearms and Defendant Caruso shot into the ceiling. Oliver testified that when Defendant Caruso shot into the ceiling, Defendant Harlan was awake but began to fall asleep on the couch. Subsequent to the shot to the ceiling, Kymani and Ghunner fled the residence.

Less than two hours after the shot to the ceiling, Matthew Minkler was standing in the kitchen, picked up Defendant Caruso's 357 revolver, then placed it back down on the counter. Defendant Caruso stood up from a chair in the living room, walked over to Minkler, picked up the revolver, and shot Minkler in the face.

Oliver immediately panicked and fled out the back door. Oliver testified that he never heard conversations regarding a robbery and did not notice any hostility amongst the individuals in the house. However, Oliver indicated he did not believe the shooting was accidental.

Kymani Thompson

Kymani Thompson testified that he was invited over to the Cool Lilac residence on June 8, 2018 and arrived with his friend Methvin. Kymani testified that while at the house, Alaric Oliver, Charles Osurman, Methvin, and the Defendants were present. Kymani testified that he heard both Defendants discuss wanting to obtain more weed and wanting to do a lick

(robbery). Kymani further testified that during the discussion of needing marijuana (by both Defendants), Minkler's name was brought up. Kymani testified that both Defendants left to pick up Minkler and returned with him to the house.

Kymani indicated that throughout the time at the residence, he had a bad vibe and that "something didn't feel right." After he witnessed Defendant Caruso shoot into the ceiling, Kymani and Methvin fled from the house. Kymani testified that Defendant Harlan was laying down on the couch when Caruso shot into the ceiling. Kymani indicated he returned to the house shortly thereafter to retrieve his lighter because he did not want to leave a trace of being at the house. After leaving the house the second time, Methvin received a FaceTime call from Caruso. Methvin handed the phone to Kymani who saw and heard Caruso state that he had just killed Minkler.

Kymani later spoke to Detectives and explained his theory on how Minkler was killed. Kymani believed the Defendants were trying to rob Minkler for money or weed and something went wrong. When questioned on cross examination, Kymani indicated that this theory was generated by what he heard in the media after the killing. However, on redirect, Kymani clarified that the robbery theory he explained to Detectives stemmed from what he directly saw and heard on June 8, 2019.

Ghunner Methvin

Ghunner Methvin testified that he was invited to the house on June 8, 2018 by Caruso. Ghunner arrived with Kymani and observed both Defendants possess a firearm. Ghunner observed Caruso take the bullets out of the revolver, reload them, and point at everyone in the house with the exception of Defendant Harlan.

Ghunner testified that he felt uncomfortable at the house and believed he had been invited over to be killed. Ghunner believed that Defendant Caruso was planning on doing something to someone in the house that day.

While at the house, Ghunner heard Caruso state that he wanted to commit a robbery/lick and that he wanted to kill someone. Ghunner indicated Defendant Harlan was awake on the

couch when Defendant Caruso made this statement. Within twenty (20) minutes of hearing this statement, both Defendants left the Cool Lilac residence to pick up Minkler.

After Defendants returned to the house with Minkler, they brought with them Xanax. While sitting in the living room, Defendant Caruso shot off his gun into the ceiling. Ghunner and Kymani panicked and fled the house. After leaving the house, Defendant Caruso called Ghunner and told him to come back to the house. Ghunner corroborated Kymani's recitation of events that included them returning to the house for Kymani to get something before ultimately leaving again. Ghunner further testified that Defendant Caruso FaceTimed him after they left and that Ghunner handed off the phone to Kymani.

Charles Osurman

Charles Osurman testified that he was at the house on June 8, 2018 when both Defendants arrived around 9am. Osurman testified they arrived in a Mercedes and that Defendant Caruso possessed a 357 revolver while Defendant Harlan possessed a semi-automatic. Osurman indicated that either Caruso or Harlan invited Minkler over to the house and both Defendants drove to pick up Minkler. When they arrived back at the house they had Xanax with them.

Osurman testified that after returning to the house, Defendant Caruso shot into the ceiling, almost shooting Minkler. Osurman testified that Minkler then grabbed the gun and threatened Caruso. Osurman indicated Kymani and Ghunner left the residence after the shot to the ceiling. Within fifteen minutes of the shot to the ceiling, Osurman had fallen asleep. Shortly thereafter, Osurman was awakened to a second gunshot. Osurman observed Minkler on the floor and Jaiden in the kitchen. Osurman testified that Defendant Harlan was asleep on the couch. Immediately after, Osurman and Oliver fled from the house.

Traceo Meadows

Traceo Meadows arrived at the Cool Lilac address on June 8, 2018 after Minkler was shot. He came into contact with an unknown light skinned male who left the house before the Defendants arrived. Defendant Caruso told Meadows that he accidently shot Minkler. Defendant Harlan removed Minkler's shoes, checked his pants pockets, and removed

Minkler's wallet and phone. Defendant Harlan then smashed Minkler's cell phone on the ground. Meadows then assisted Defendant Caruso in moving Minkler's body to the hallways closet. Defendant Caruso used the kitchen sink faucet to spray water on the floor where blood was located. Meadows spray painted the wall, living room, and pool table. However, Defendant Harlan spray painted "Fuck Matt" above the closet where Minkler was placed. Meadows went outside the residence and waited a few minutes for the Defendants to exit.

Defendant Harlan drove all of them to the Galleria mall where they went shopping. On the drive to the Galleria mall, Defendant Caruso started boasting about killing Minkler. After they left the mall, Meadows felt uncomfortable because of the way Defendant Harlan was looking at him and asked to be dropped off.

Detective Calvano

Detective Calvano recovered video surveillance from the Galleria Mall. The video documents the Defendants and Traceo Meadows walking into the mall at approximately 3:23pm. All three then enter the Shoe Palace store at approximately 3:30pm. All three are seen leaving with store at 4:35pm. Defendant Harlan is seen carrying a Footlocker shopping bag and Defendant Caruso is seen carrying a Shoe Palace shopping bag. Traceo Meadows is not seen carrying anything in his hands.

COR Footlocker

Somridee McCassrey, a Regional Manager for Footlocker, authenticated video surveillance and a receipt from the store located inside the Galleria mall. Defendant Harlan is depicted on video surveillance inside the Footlocker purchasing a pair of Air Force One sneakers. Defendant Harlan is seen paying for the shoes with a large amount of cash. A receipt from the store reflects the purchase was made on June 8, 2018 and paid for in cash.

Following the instructions and the testimony outlined above, the jury reasonably found Defendant guilty on both counts. This Court should not disturb that determination as Defendant fails to show that the State did not present a ***minimum threshold of evidence*** to sustain a conviction.

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Detective Spangler

Detective Spangler conducted a forensic analysis on each of the Defendants' iPhones as well as the Samsung owned by Minkler. Several videos, including the video recorded Minkler dead on the ground, was recovered from Defendant Caruso's phone. Defendant Caruso's phone also revealed calls to Charles Osurman and Ghunner Methvin in the afternoon on June 8, 2018.

Defendant Harlan's iPhone was only equipped for internet and iMessage and did not have cellular service.

Minkler's Samsung cell phone was severely damaged, including water marks, spray paint, burn marks, and more. Detective Spangler replaced the digitizer and USB port prior to extracting any information from the phone.

Detective Nichols

Detective Nichols was the lead investigator on the case and obtained a search warrant for both Defendants and Minkler's Snapchat accounts. Videos from Minkler's Snapchat account included a video of Minkler holding a substantial amount of cash on June 7, 2018.

Detective Nichols also interviewed Defendant Harlan the night of June 8, 2018 and the morning of June 9, 2018. Defendant Harlan admitted that he helped clean up the scene at Cool Lilac. Defendant Harlan also told Detectives that Minkler somehow "popped up" at the house that day and that he was not driving the Mercedes.

Defendant Harlan stated that Minkler was his "friend" and "homey" and he wouldn't want to leave him at the house. Defendant Harlan stated that they tried to move Minkler's body and that they were trying to help him and didn't know he was dead. Defendant Harlan repeatedly denied possessing a firearm and stated he was being 100% honest with police.

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ARGUMENT

I. DEFENDANT HAS FAILED TO ESTABLISH GROUNDS FOR GRANTING A NEW TRIAL PURSUANT TO NRS 176.515.

NRS 176.515 states:

> 1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.
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> 2. If trial was by the court without a jury, the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment.
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> 3. Except as otherwise provided in NRS 176.09187, a motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt.
>
> 4. A motion for a new trial based on any other grounds must be made within 7 days after the verdict or finding of guilt or within such further time as the court may fix during the 7-day period.

"Insufficiency of the evidence occurs where the prosecution has not produced a ***minimum threshold of evidence*** upon which a conviction may be based, even if such evidence were believed by the jury. Clearly, this standard does not allow the district court to act as a "thirteenth juror" and reevaluate the evidence and the credibility of the witnesses." Evans v. State, 112 Nev. 1172, 1193-94, 926 P.2d 265, 278-79 (1996) (internal citations omitted) (emphasis added).

The following is the standard for the review of the sufficiency of the evidence:

> This court has stated that in a criminal case where the jury has arrived at a guilty verdict, the relevant inquiry is "'whether, after viewing the evidence ***in the light most favorable to the prosecution***, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (emphasis added).

Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684 (1995) (murder case), *quoting* Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (murder case) and Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979).

The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be to determine whether the record evidence could reasonably support a

finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Woodby v. INS, 385 U.S., at 282 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Johnson v. Louisiana, 406 U.S., at 362. Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S. Ct. 2781, 2788-2789 (U.S. 1979). In reviewing the sufficiency of the evidence, this court must determine whether the trier of fact, acting reasonably, could have been convinced by the competent evidence of the Defendant's guilt beyond a reasonable doubt. Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law. Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S. Ct. 2781, 2788-2789 (U.S. 1979).

Even where a Defendant contests the evidence and presents his own case, the jury is free to reject the defendant's version of events. As the Nevada Supreme Court held in Cunningham v. State, 113 Nev. 897, 944 P.2d 261, 268 (1997):

> We further hold that sufficient evidence exists overall to support his murder conviction. Although Cunningham contested the evidence and presented impeachment witnesses, "[s]uch conflicting testimony addresses the sound discretion of the jury.... The jury is at liberty to reject the defendant's version of events."

Cunningham v. State, 113 Nev. 897, 944 P.2d 261, 268 (1997) (murder case), *quoting* Porter v. State, 94 Nev. 142, 146, 576 P.2d 275, 278 (1978). *See also*, Doyle v. State, 112 Nev. 879, 921 P.2d 901, 910 (1996) ('it is the jury's function, not the reviewing court, to assess the

weight of the evidence and determine the credibility of witnesses. Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975).

Additionally, there is a presumption that when faced with conflicting inferences, the trier of fact resolved such conflicts when making their determination:

> Expressed more fully, this means a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume--even if it does not affirmatively appear in the record--that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution."; see also Schlup v. Delo, 513 U.S. 298, 330, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)

McDaniel v. Brown, 558 U.S. 120, 133, 130 S. Ct. 665, 673, 175 L. Ed. 2d 582, 591 (U.S. 2010).

The court in Brown highlighted the conflicting testimony and the jury's reasonable inference in weighing circumstantial evidence to support the prosecution's version of event:

> It is true that if a juror were to accept the testimony of one bartender that Troy left the bar at 1:30 a.m., then Troy would have left the bar after the attack occurred. Yet the jury could have credited a different bartender's testimony that Troy left the Peacock at around 12:15 a.m. Resolving the conflict in favor of the prosecution, the jury must have found that Troy left the bar in time to be the assailant. It is undisputed that Troy washed his clothes immediately upon returning home. The court notes this is "plausibly consistent with him being the assailant" but also that he provided an alternative reason for washing his clothes. *Ibid.* Viewed in the light most favorable to the prosecution, the evidence supports an inference that Troy washed the clothes immediately to clean blood from them. Brown, 558 U.S. 120, 133 (U.S. 2010).

In a criminal case, a verdict supported by substantial evidence will not be disturbed by a reviewing court. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Substantial evidence has been defined as evidence that a **reasonable mind *might* accept as adequate to support a conclusion**. Brust v. State, 108 Nev. 872, 873, 839 P.2d 1300 (Nev. 1992) (emphasis added). A person's conviction may be upheld even when the evidence is circumstantial and hardly abundant. See Rossana v. State, 113 Nev. 375, 934 P.2d 1045 (1997).

In order to evaluate and weigh the testimony, the jury can rely upon circumstantial evidence:

> [A] jury may reasonably rely upon circumstantial evidence; to conclude otherwise would mean that a criminal would commit a secret murder, destroy the body of the victim, and escape punishment despite convincing circumstantial evidence against him or her . . . .

State v. Rhodig, 101 Nev. 608, 610, 707 P.2d 549, 550 (1985), *quoting* Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980) (murder case). *See also*, Cunningham v. State, 113 Nev. 897, 944 P.2d 261, 268 (1997) *quoting* United States v. Thurston, 771 F.2d 449, 452 (10th Cir. 1985) (holding that "[c]circumstantial evidence is entitled to the same weight as that given to direct evidence in determining the sufficiency of the evidence to support a verdict of conviction").

The Nevada Supreme Court has emphasized the following:

> Moreover, it is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony.

Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994), *citing* Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20 (1981).

"Other grounds" for a new trial exist where the trial judge finds that the evidence of guilt is conflicting, and after an independent evaluation of the evidence, disagrees with the jury's verdict of guilty. Evans v. State, 112 Nev. 1172 (1996). A conflict of evidence occurs where there is sufficient evidence presented at trial which, if believed, would sustain a conviction, but this evidence is contested and the district judge, in resolving the conflicting evidence differently from the jury, believes the totality of evidence fails to prove the defendant guilty beyond a reasonable doubt. State v. Walker, 109 Nev. 683, 685-86 (1993).

A. DEFENDANT'S REQUEST TO SET ASIDE GUILTY VERDICT AS TO COUNTS ONE AND TWO SHOULD BE DENIED SINCE THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE VERDICTS.

In the Defendant's motion to set aside verdict, or in the alternative, motion for new trial, Defendant Harlan asks that this Court overturn the jury's verdict on Counts one and two

due to insufficient evidence or, in the alternative, vacate the verdict and order a new trial. Defendant Harlan asserts that the jury verdicts on Counts one and two should be set aside because multiple witnesses stated there was no conversation about a planned Robbery by Harlan, Harlan was asleep the majority of the day and at the time Minkler was shot, Ghunnar Methvin's testimony about a robbery came from Defendant Caruso, and that Kymani Thompson's opinion was based off what he read in the news. However, Defendant Harlan's oversimplified and incomplete recitation of the evidence presented at trial is belied by the court record.

Defendant Harlan was convicted of Count one, Murder with Use of a Deadly Weapon and Count two, Robbery with Use of Deadly Weapon. The Information charged Defendant Harlan with having committed the Murder and Robbery under various theories of liability.

The Information read as follows:

> COUNT 1 - MURDER WITH USE OF A DEADLY WEAPON
> Defendants JAIDEN CARUSO and KODY HARLAN, did willfully, unlawfully, feloniously and with malice aforethought, kill MATTHEW MINKLER, a human being, with use of a deadly weapon, to wit: a firearm, by shooting at and/or into the head and/or body of the said MATTHEW MINKLER, the said killing having been (1) willful, deliberate and premeditated, and/or (2) committed during the perpetration or attempted perpetration of a robbery, the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.
>
> COUNT 2 - ROBBERY WITH USE OF A DEADLY WEAPON
> Defendants JAIDEN CARUSO and KODY HARLAN, aka, Kody W. Harlan did willfully, unlawfully, and feloniously take personal property, to wit: a wallet and contents, from the person of MATTHEW MINKLER, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of MATTHEW MINKLER, with use of a deadly weapon, to wit: a firearm, Defendant using force or fear to obtain or retain possession of the property, to prevent or overcome resistance to the taking of the property, and/or to facilitate escape; the Defendant(s) being criminally

> liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

Pursuant to the various theories charged, the jury could find that Defendant Harlan either directly committed the murder or committed felony murder by either aiding and abetting or committed acts in furtherance of a conspiracy to rob Matthew. Consistent with the jury verdict, there was sufficient evidence to establish Defendant Harlan conspired with Defendant Caruso to commit a Robbery with Use of Deadly Weapon against Minkler.

Despite Defendant Harlan's assertion that "multiple witnesses in this trial clearly stated that there was never any conversation about a planned Robbery by Harlan," testimony was elicited at trial indicating such a conversation occurred. As detailed above, Kymani Thompson and Ghunner Methvin overheard statements by Defendant Caruso about wanting to commit a lick. Thompson also heard Defendant Harlan mention wanting to commit a robbery and/or lick. Despite indicating on cross examination that his robbery theory stemmed from news articles, Thompson clarified on re-direct examination that his robbery theory developed solely from what he observed and heard at the Cool Lilac address on June 8, 2018. Additionally, several witnesses, including Thompson, Methvin, Oliver, and Osurman, all testified that both Defendants left to pick up Minkler after this conversation.

Moreover, there was testimony from all of the lay witnesses, including Angelina Knox and Traceo Meadows, that the Defendants were the only individuals who possessed firearms on June 8, 2018. Testimony from witnesses, including video from Defendant Caruso's phone, revealed both Defendants pointed their respective guns at other individual throughout the day.

The jury was instructed on the law that applied, as well as the ways in which they could

determine the credibility or believability of a witness.[3] More importantly, the jury was instructed on the Felony-Murder Rule.

Instruction Number 25 provided:

> There is a kind of murder which carries with it conclusive evidence of premeditation and malice aforethought. This class of first degree murder is a killing committed in the perpetration or attempted perpetration of a robbery. Therefore, a killing which is committed in the perpetration or attempted perpetration of a robbery is deemed to be Murder of the First Degree, whether the killing was intentional or unintentional or accidental. This is called the Felony-Murder Rule.
>
> The intent to perpetrate or attempt to perpetrate robbery must be proven beyond a reasonable doubt.
>
> For the purposes of the Felony–Murder Rule, the intent to commit the robbery must have arisen before or during the conduct resulting in death. **However, in determining whether the Defendant had the requisite intent to commit robbery before or during the killing, you may infer that intent from the Defendant's actions during and immediately after the killing.** There is no Felony-Murder where the robbery occurs as an afterthought following the killing. (emphasis added).

Therefore, the jury was capable of determining intent to commit the Robbery based on the actions of Defendant Harlan during and immediately after the killing. Although several witnesses testified that Defendant Harlan was either laying on the couch or asleep, there was testimony elicited that after Defendant Caruso shot Minkler, all of the witnesses fled, with the exception of Defendant Harlan. Traceo Meadows testified that Defendant Harlan did not flee but checked Minkler's pockets and pulled out his wallet and phone. Meadows testified that Defendant Harlan smashed Minkler's phone on the ground. Defendant Harlan later admitted to officers that he assisted in moving Minkler's body and throwing a tarp over him.

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[3] Instruction No. 8: The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections. If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

Meadows also testified that Defendant Harlan spray painted "Fuck Matt" above the closet where Defendant Harlan himself admitted to moving Minkler's body. After cleaning up the scene, Defendant Harlan drove Defendant Caruso and Meadows to the Galleria Mall, approximately twenty (20) minutes away.

While at the Galleria mall, video surveillance documented both Defendants and Meadows as they walked around the food court, went into ShoePalace, and eventually entered Footlocker. Defendant Harlan purchased a new pair of shoes with a substantial amount of cash that mirrored the cash held by Minkler in a Snap Chat video the day prior to the murder.

Meadows testified that after they left the mall, Defendant Harlan looked at him in a way that made him uncomfortable so he asked to be let out of the car. Defendant Harlan then drove him and Defendant Caruso to an apartment complex party where witnesses, including Angelina Knox, observed both Defendants holding firearms. Knox further testified that she overheard Defendant Harlan bragging about catching a body that day.

Finally, it was only after an extensive car and foot chase that Defendant Harlan was apprehended at the Villas Apartments, the same complex where Defendant Caruso lived. Once interviewed by police, Defendant Harlan repeatedly lied to Detectives about possessing a firearm, driving the Mercedes, and the means by which Minkler arrived at the house.

Therefore, the jury was capable of determining the credibility of the witnesses and resolving any conflicts in their testimony. The jury was also capable of applying the law and considering Defendant Harlan's behavior before and after Minkler was shot to ascertain whether there was an agreement by the Defendants to rob Minkler. The witness testimony, physical evidence, and Defendant Harlan's own statements established sufficient testimony to demonstrate that there was a conspiracy between the Defendants to rob Minkler that was in fact carried out.

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CONCLUSION

Defendant Harlan was afforded his Constitutional Right to trial amongst his peers and now asks this Court to vacate that judgment or obtain a new trial based on mere dissatisfaction with the verdict. There is no legal basis to grant either extreme request and the State respectfully requests that Defendant's Motion be denied.

DATED this 19th day of August, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ SARAH OVERLY
SARAH OVERLY
Chief Deputy District Attorney
Nevada Bar #012842

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 20th day of August, 2019, to:

RYAN HELMICK, ESQ.
Email: ryan@richardharrislaw.com

BY /s/ Deana Daniels
Legal Secretary, District Attorneys Office

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. KODY HARLAN, Defendant.	CASE NO.: C-18-333318-2 DEPT NO.: 3

SUPPLEMENTAL BRIEFING FOR MOTION FOR NEW TRIAL

COMES NOW, Defendant, KODY HARLAN, by and through his attorney of record, K. RYAN HELMICK, ESQ of RICHARD HARRIS LAW FIRM, LLP. and hereby submits this supplemental briefing for motion for a new trial.

This Motion is based upon the pleadings and papers on file herein, the attached Memorandum of Points and Authorities, and any oral argument the Court may entertain.

AFFIDAVIT FACTS

I. DECLARATION OF SHAYRA ESPARZA

I, the undersigned, Shayra Esparza, declare under the penalty of perjury as follows:

I am over the age of 18 years, and I am competent to make this declaration. All statements contained herein are true and accurate to the best of my knowledge.

Facts

I was a juror on the Kody Harlan and Jaiden Caruso case number C-18-333318-2. My verdict for 1st Degree Murder with Use of a Deadly Weapon was only given as a result of being misled about the law through the use of the jury instructions. Specifically, I was told by another Juror, Sarah Fox that they (the other jurors who wanted a guilty verdict for 1st Degree Murder with Use of a Deadly Weapon) could overrule me, so it didn't matter what my vote was. Had I not been so wrongfully misled, I would have voted for Involuntary Manslaughter with Use of a Deadly Weapon for Jaiden Caruso and Accessory to Murder with Use of a Deadly Weapon for Kody Harlan.

The juror that read a completely wrong interpretation of the law on 1st Degree Murder and Felony Murder was Ms. Fox. By her side and in agreement with her was Karen Rice (foreperson). Specifically, Ms. Rice said, "listen up guys Sarah found something." Then Ms. Rice looked right at me as Ms. Fox read the alleged "overrule you" part of the jury instructions. Once Ms. Fox was done reading, she looked at me and told me that since they didn't have to be unanimous on whether it was premeditated first degree murder or whether it was felony murder AND because there was a deadly weapon involved, they could simply overrule me. Ms. Fox was the one that read this out loud and did so while holding the jury instruction in her hand which would make it appear (whether intentional or not) that this was the exact law that she was being read.

At the time this false rendition of the law was read to me, the jury had been deliberating for about 6 hours. During this 6-hour time period, I had been standing strong in my position against any kind of 1st degree murder conviction. I had been on the verge of feeling that I was about to get into a physical altercation with another female juror named Theresa Houston because of the way they had been treating me, given me differing opinion on what the verdict should be. There were multiple times where I had to take a cigarette break so that I could cool down. Likewise, there were several times where I broke down in tears during the deliberations. One time in particular, Ms. Rice, the foreperson would rub my back and tell me everything was going to be fine, all the while expressing her own view of how she believed it was first degree murder. This physical touching by the foreperson could be looked at two ways: 1) just a simply good-natured effort to console me during a time of high emotions or 2) using physical touch in combination with words in an effort to manipulate me so that I would join in with Ms. Rice and the others in their first degree murder point of view. I felt it was the latter.

By the time I was read and reiterated this "overrule you" misstatement of the law, I felt defeated. I felt that my hard-fought efforts and battle that I had invested myself into for the past 6 hours of deliberation had been for nothing. The misstatement of the law was read to me in such a way that it was as if it were an "ah ha!!" moment. Ms. Fox "found" this "overrule you law" and made it seem like she found a hidden gem that allowed her and the foreperson Ms. Rice to get what they wanted without the need for my vote or opinion. I felt emotionally drained and completely defeated- I felt powerless. I basically said to myself "well if that's the law, then I have no choice in the matter." This was the breaking point for me.

When I walked into the courtroom with all the others so that the verdict could be read, I was wearing dark sunglasses. I had never worn sunglasses throughout the entire trial. When His Honor read the verdict and asked all the jurors at once to raise their

hands if this was the agreed upon verdict, I flung my arm up in a less than caring way, in way someone who would fling their arm up as if to say "whatever." The only reason that I felt like I had to raise my hand in agreement with the verdict that was read was because I was told I could be overruled and so my position didn't matter. But for this extreme and egregious misstatement of the law involved in this case, I would not have raised my hand with all the other jurors when the judge asked about the verdict ruling.

Moments after the verdict was read I, who was sitting in the front row started to cry, then I immediately got up and out of order from the other jurors before me, and stormed out of the courtroom. I continued to cry even in the back of the courtroom, while they all waited for the judge to come back and talk to them. Once I was free to leave, I immediately left the courthouse.

That night I felt sick to my stomach and depressed as well as angry about what happened to Mr. Harlan and Mr. Caruso. I wanted to help them from being convicted of a crime that I felt was unjustified but felt I was powerless in doing so. The next day I told my boss Maria Boyd how I wouldn't be coming into work that day and how I hated the State of Nevada Criminal Justice system so much for what had happened to those 2 boys. My feelings were so strong that I contemplated moving from the State because of the injustice I felt I had been tricked into.

On August 27, 2019, I received a phone call from Mr. Harlan's attorney K. Ryan Helmick. The phone call was on speaker phone and Mr. Helmick's associate attorney Hayley Price was present. It was on this initial phone call that I told Mr. Helmick as well as Mrs. Price about some of the information laid out in this affidavit. Then on August 30, 2019, Mr. Helmick, Mrs. Price, Mr. Helmick's investigator, Maybeth Andrade, Mr. Caruso's other attorney Jason Margolis and attorney William Terry all talked to me and took detailed notes. During this August 30, 2019 meeting with me, many facts above as

well as many other important facts were discovered. These other important facts were the following:

1) Prior to the deliberations taking place, I witnessed Karen Rice (foreman), and Sarah Fox talking about the case while going up the escalators. Ms. Esparza overheard talk about a comment that another juror Christopher Young made to both Ms. Rice as well as Ms. Fox where Mr. Young told them that "this was not going to be a very easy case to decide, and that there was going to be some conflicting stuff here." I heard Ms. Rice and Ms. Fox talk about how they didn't like Mr. Young's comment and about how they thought this was going to be an easy decision.

2) I stated that I felt harassed by the mother of Matthew Minkler and another unknown individual that is believed to be a part of the Minkler family. I feel I was harassed because there were many times, at least 4, where Matthew Minkler's mom would stare directly at me (outside the courtroom) and appear to be on the verge of crying. I felt it was a look of pity that was displayed upon her in an effort to get me to sympathize more with Mr. Minkler's family. The look sent a message in essence to me and I felt very uncomfortable. Additionally, at one of the lunch breaks during trial, another relative, who was a young girl of mixed ethnicity, likely between 18-19 years, who was a part of Mr. Minkler's family in some way, walked directly by me while at the pizza restaurant and gave me a long stare in an effort in seek favoritism and pity from me. Again, this made me feel very uncomfortable.

3) Another piece of misconduct that I talked about was something that I did myself during the deliberations. I confessed to using my cell phone during the deliberations to look up certain facts of the case and told those facts to some of the other jurors. Specifically, I used my cell phone to do research during the deliberations. I looked up the meaning of many of the abbreviated words that were graffitied all over the Cool Lilac house involved in this case. Once I found their meaning, I let all the other

jurors know what I found out. I even turned my cell phone around and showed some of them. Many of the graffiti abbreviations were such things as: "BDN" meaning Blood Disciple Nigga, "FTO" meaning Fuck the Opps; "Fuck 12" meaning Fuck the Police; "OTF" meaning Only the Family; and "GDK" meaning Gangster Disciple Killer.

4) Another incident of cell phone use during deliberations came from Bridget Hocker. I stated that I saw Ms. Hocker using her cell phone during the breaks in the deliberation process.

5) In regard to the stolen car fact that the lead detective in the case talked about in the trial and the judge ruled, as well as admonished the jury not to talk about, also came into the deliberation room and played a major role. Hector Martinez and I both discussed and asked questions about whose car was the Mercedes Benz, since it was possibly stolen. Additionally, Ronald Feriancek (another juror) mentioned the fact of the stolen car in the deliberations. The idea that some of these people had, was that if Mr. Harlan and Mr. Caruso were out stealing cars then they probably robbed Matthew Minkler too. And if the robbery was believed then the Felony Murder Rule would apply. I also stated that juror Gabriel Bernardo talked about the stolen car comment and how I remembered it being in regard to the pre-meditation element.

6) In addition to the facts mentioned above that reference a form of bullying of me by some of the other juror members, I specifically remember another juror Bridget Hocker impatiently say to me when she would share her differing point of view "what is it you don't understand Shayra!" and "what do you not understand Shayra!"

7) Lastly, I stated that some of the jurors talked in deliberations about a letter that Mr. Caruso wanted to read to them. The reason this came about was because some of the jurors saw Mr. Caruso hand his attorney Mace Yampolsky a handwritten letter and then heard Mr. Yampolsky say in what respectively was not a good effort by him to whisper

"no you can't read that to the jury or no were not going to read your letter to the jury." I stated that this comment by Mr. Yampolsky and this letter that Mr. Caruso wanted to read to the jury was talked about in deliberations by some of the other jurors including myself.

SHAYRA ESPARZA

STATE OF NEVADA
COUNTY OF CLARK

SUBSCRIBED and SWORN to before me this 12th day of September 2019.

NOTARY PUBLIC in and for said
County and State.

AILEEN BENCOMO
Notary Public-State of Nevada
APPT. NO. 03-82148-1
My Appt. Expires 07-12-2020

POINTS AND AUTHORITIES

II. ARGUMENT

A. A NEW TRIAL SHOULD BE GIVEN BECAUSE OF THE EXTREME JUROR MISCODUCT FOUND IN THIS CASE.

To prevail on a motion for a new trial alleging juror misconduct, "the defendant must present admissible evidence sufficient to establish: 1) the occurrence of juror misconduct, and 2) a showing that the misconduct was prejudicial. Bowman v. State, 387 P.3d 205, 132 Nev. Adv. Op. 74 (Nev., 2016); citing Meyer v. State, 119 Nev. 563-64, 80 P.3d at 455.

JUROR MISCONDUCT

The determination of juror misconduct is a factual inquiry. Id at 206. Citing Meyers 119 Nev. at 566. In Bowman, two jurors stated in affidavits to the Court that they conducted independent experiments and disclosed their experiments to other jurors prior to the jury rendering a verdict. Id at 205. In analyzing the first factor, the Court in Bowman stated that "it is uncontested that juror misconduct occurred." Id at 206. Thus, the first factor of establishing whether juror misconduct occurred was satisfied.

Similarly, in Meyer, supra, the Court stated that jurors are prohibited from conducting an independent investigation and informing other jurors of the results of that investigation. Meyer at 460. The facts in Meyer showed that a juror admitted in her affidavit that she consulted the *Physicians' Desk Reference* book (PDR) during trial and then reported her findings to fellow jurors during deliberations. Id. The Court stated that this clearly amounted to an extraneous influence upon the jury and therefore constituted misconduct.

PREJUDICE

In regard to Bowman, supra, the Court stated that the determination of prejudice is a legal inquiry. Bowman, supra, at 206. Prejudice is shown whenever there is a reasonable probability or likelihood that juror misconduct affected the verdict. Id at 205.The Court in Bowman applied the Meyer factors and concluded that Bowman presented sufficient evidence to show that there was a reasonable probability that the independent experiments affected the jury's verdict and therefore fulfilled the second requirement to prevail on a motion for a new trial. Id.

In regard to Meyer, the Court looked at whether there was a **reasonable probability** that the juror's reference to the *Physicians' Desk Reference* book affected the jury's verdict. Meyer at 460 (emphasis added). The Court stated that the misconduct in this case involved both extrinsic information as well as intrinsic communications (disregard of jury instruction prohibiting independent research). Id. The Court in considering all of the circumstances put before it concluded that the average, hypothetical juror could have been affected by this extraneous information, and there is a **reasonable probability** that the reference by the juror of the information they had received from the *Physicians' Desk Reference* book affected the verdict. Id (emphasis added).

OUR CASE

Cell Phone

In regard to the case at hand, Your Honor instructed the jurors numerous times on the record to not do any independent research, to not look up anything from the case on their phones, internet, social media, etc. Jurors are prohibited from doing independent investigation and informing other jurors of the results of that investigation. Meyer, supra, at 460. If the trial transcripts were available at this time, counsel would be happy to cite each occurrence by His

Honor, but the transcripts are understandably not available yet. Even though this admonition was given many times to the jurors, some of them failed to follow the rules.

Specifically, Shayra Esparza in the above affidavit states that she used her cell phone to do research during the deliberations. Ms. Esparza looked up the meaning of many of the abbreviated words that were graffitied all over the Cool Lilac house involved in this case. Once she found their meaning, she let all the other jurors know what she found out. She even turned her cell phone around and showed some of them. Many of the graffiti abbreviations were such things as: "BDN" meaning Blood Disciple Nigga, "FTO" meaning Fuck the Opps; "Fuck 12" meaning Fuck the Police; "OTF" meaning Only the Family; and "GDK" meaning Gangster Disciple Killer.

All of these abbreviations were spray painted around the house. There was testimony that Kody Harlan was the one that did the spray painting. These spray-painted abbreviations look really bad for the person who is alleged to have wrote them. Especially since it was also alleged through the prosecution witnesses that Harlan was the one who spray painted "Fuck Matt" on the door of the closet where Matthew Minkler's body was placed. To then (by way of a juror doing independent research on her cell phone during deliberation) tie Harlan to such sayings as "Fuck the Police," "Gangster Disciple Killer," and "Blood Disciple Nigga," extremely prejudices Harlan by possibly having other jurors believe that Harlan wrote such things. And since the words "gangster" "blood" and "killer" are all involved, no defendant would want those type of words connected to them any way shape or form, especially when they are defending their life against murder and robbery allegations.

The use of the cell phone by Ms. Esparza was extrinsic information that was improperly brought into the deliberation room. The average, hypothetical juror **could have been affected** by

this extraneous information. As such, this would be sufficient evidence to show that there is a **reasonable probability** that the independent research affected the jury's verdict and therefore would fulfill the second requirement needed to prevail on a motion for a new trial in accordance with the above case law. Lastly, it is not necessary that the extrinsic material be disclosed to the jury; **a single juror's exposure** to extrinsic material may still influence the verdict because that juror may interject opinions during deliberations while under the influence of the extrinsic material. See Tanksley v. State, 113 Nev. 997, 1005, 946 P.2d 148, 152-53 (1997) (emphasis added).

In addition to the above cell phone use during deliberation by Ms. Esparza, it has also been alleged that another juror Rachel Hocker used her cell phone during a break in the deliberations. Ms. Esparza was the one who saw this. However, Ms. Esparza did not see exactly what Ms. Hocker was researching, if anything. Nevertheless, the use of cell phones during the deliberation process, whether on a break or not, is prohibited and Your Honor instructed the jury to not do that many times. If indeed Ms. Hocker was looking at something that could potentially influence her decision in this case at all then: 1) that would be considered juror misconduct and 2) that may give rise to the reasonable probability that her independent research affected her verdict in some way or the jury's as a whole, which in turn would result in prejudice to Harlan.

Stolen Car

Unfortunately, the lead detective in this case referred on cross examination to the Mercedes Benz that Harlan was driving as being stolen when the detective, per the State, was admonished not to talk about that fact because it would be considered a prior bad act and therefore inadmissible. The jurors all heard this damaging statement and prior to the deliberations the jurors were admonished by Your Honor to disregard any reference to the

Mercedes Benz that Harlan was driving, being stolen. This fact was not to be considered AT ALL by any of the jurors in their decision on whether or not to find Harlan or Caruso guilty of the alleged crimes.

According to Ms. Esparza, as outlined in her affidavit above, the stolen car fact was talked about during deliberations. Ms. Esparza herself, as well as another juror, Hector Martinez, both discussed and asked questions about whose car the Mercedes Benz was, since it was possibly stolen. Additionally, Ronald Feriancek (another juror) mentioned the fact of the stolen car in the deliberations. The idea that some of these people had, was that if Mr. Harlan and Mr. Caruso were out stealing cars then they probably robbed Matthew Minkler too. And if the robbery was believed, then the Felony Murder Rule would apply. Ms. Esparza also stated that juror Gabriel Bernardo talked about the stolen car comment and how Ms. Esparza remembered it being in regard to the pre-meditation element.

The stolen car reference would be considered extrinsic information because it came from the officer on the stand during the trial. The use of this extrinsic information by some of the jurors during deliberations would be considered juror misconduct since they were admonished not to consider the fact. The stolen car reference would give rise to the reasonable probability that's its introduction could affect the jury's verdict in some way. Undoubtedly, the average, hypothetical juror could have been affected by this fact. Indeed, Your Honor knew this and that is precisely why the admonishment by the Court was given to the jurors to disregard it and not let it be a factor in their deliberation of this case. Since Harlan was the one driving the car, it is likely that he would be seen as the one who stole the car. If one is likely to have stolen a car then one may be more likely to have stolen Matthews Minkler's wallet, which was the basis for the entire robbery claim by the State. And the robbery allegation was so important here because if a

robbery was shown by the State as to Harlan, then he could be found guilty of 1st Degree Felony Murder. Introducing a fact like the stolen car, would therefore significantly increase the probability that a juror may hold that negatively against Harlan and allow it, whether consciously or sub-consciously, to affect their verdict.

Disregarding the Jury Instructions

A jury's failure to follow a district court's instruction is intrinsic juror misconduct. Valdez v. State, 196 P.3d at 475, 124 Nev. 97 (Nev., 2008). The defendant must prove the nature of the jury misconduct and that there is a **reasonable possibility** that the misconduct affected the verdict. Id (emphasis added). The defendant may only prove the misconduct using objective facts and not the "state of mind or deliberative process of the jury." Id. In Valdez, the Court was to consider whether the jury acted improperly by deliberating the penalty while deciding the issue of guilt and, if so, whether the district court abused its discretion in denying a motion for a mistrial based on this jury misconduct. The Court held that the jury disobeyed the district court's oral instruction and therefore committed misconduct and the district court did in fact abuse its discretion by denying a mistrial based on this misconduct. Id at 470. The Court in its analysis stated that the jury's foreperson statement after the verdict "that the jury had decided Valdez's sentence was objective evidence of the misconduct." Id at 475. Secondly, there is a reasonable probability that the misconduct affected the verdict because the jury considered the penalty while deliberating Valdez's guilt. Id.

Here, we know from Ms. Esparza that some members of the jury disregarded the district courts oral instruction to follow the jury instructions given by the Court. Ms. Esparza was told by another Juror, Sarah Fox that they (the other jurors who wanted a guilty verdict for 1st Degree Murder with Use of a Deadly Weapon) could overrule her, so it didn't matter what her vote was.

The juror that read a completely wrong interpretation of the law on 1st Degree Murder and Felony Murder was Ms. Fox. By her side and in agreement with her was Karen Rice (foreperson). Specifically, Ms. Rice said, "listen up guys Sarah found something." Then Ms. Rice looked right at Ms. Esparza as Ms. Fox read the alleged "overrule you" part of the jury instructions. Once Ms. Fox was done reading, she looked at Ms. Esparza and told her that since they didn't have to be unanimous on whether it was premeditated first degree murder or whether it was felony murder AND because there was a deadly weapon involved, they could simply overrule her. Ms. Fox was the one that read this out loud and did so while holding the jury instruction in her hand which would make it appear (whether intentional or not) that this was the exact law that she was being read.

This is not what the jury instructions say the law is and because at least two jurors, one of which was the foreperson was presenting it as such to other jurors, it would be in direct violation of the district courts order to follow the law of the jury instructions only. This would therefore be considered juror misconduct. This misconduct went beyond having a reasonable probability to affect the verdict because we know for certain given Ms. Esparza's affidavit that it completely affected her verdict. But for this "overrule you" statement, Ms. Esparza would have never participated in the guilty verdict rendered in this case. Additionally, the Court in Meyer, supra, talks about the timing of the misconduct as being one of many factors the court should look at in its analysis. Meyer at 456. In this particular instance the juror misconduct was introduced after Ms. Esparza had been holding out for nearly six hours, after nearly getting into physical altercations with other bullying jurors, after crying multiple times, after having her back rubbed by the foreperson, Ms. Rice, after taking many cigarette breaks in order to try and calm down, and after being asked "what does she not understand or what does she not get" by other jurors

who didn't understand why she wouldn't agree with their position. Ms. Esparza at this point felt defeated, mistreated, and tricked through a misstatement of the jury instructions. Sure enough, the verdict was rendered shortly after this misconduct was introduced.

Jurors Not to Discuss the Case Prior to Deliberations

Your Honor had instructed the jurors many times throughout the trial to not talk about the case with anyone, including other jurors. They were told the only time they could talk about the case was back in deliberations. However, there were some jurors who broke this rule.

Prior to the deliberations taking place, Ms. Esparza witnessed Karen Rice (foreperson), and Sarah Fox talking about the case while going up the escalators. Ms. Esparza overheard talk about a comment that another juror Christopher Young made to both Ms. Rice as well as Ms. Fox where Mr. Young told them that "this was not going to be a very easy case to decide, and that "there was going to be some conflicting stuff here." Ms. Esparza heard Ms. Rice and Ms. Fox talk about how they didn't like Mr. Young's comment and about how they thought this was going to be an easy decision.

Since this conversation took place prior to the deliberations, it would be considered extrinsic evidence. By the foreperson and Ms. Fox painting this case as an "easy decision" or "easy case," to each other, right after speaking with another juror Christopher Young, would show at least some evidence of two jurors agreeing upon a decision on the case, prior to deliberations. Moreover, because the foreperson was one of these two jurors, it causes even more concern as the foreperson of the jury carries the most weight of persuasion and is looked at as a leader by most of the other jurors.

In doing the same legal analysis as all the other facts of misconduct mentioned above, we see that this too would be considered juror misconduct because all three jurors, Mr. Young, Ms.

Rice and Ms. Fox, violated the Court's order of not talking about the case amongst each other until the deliberations take place. The facts mentioned above were talked about prior to deliberations and thus would be in violation of the Courts order. Secondly, this misconduct would have had a reasonable probability to affect the verdict of this case for the reasons mentioned above and especially since one of the participants in the conversation ended up being the foreperson of the jury.

Jurors Bill of Rights Were Violated and There Were Attempts by Third Parties to Influence the Jury Process.

Jurors have a right to be treated with courtesy and respect as due officers of the court, to be free from harassment and to be informed of their right to individually choose whether to discuss a verdict with trial counsel or the media. Report of the Supreme Court, "Jury Improvement Commission," October 2002, at 82. Juror misconduct falls into two categories: 1) conduct by juror's contrary to their instructions or oaths, and 2) **attempts by third parties to influence the jury process.** Maestas v. State, 128 Nev. Adv. Op. 12, 275 P.3d 84; citing Meyer v. State, 119 Nev. at 561 (emphasis added).

Ms. Esparza stated that she felt harassed by the mother of Matthew Minkler and another unknown individual that is believed to be a part of the Minkler family. Ms. Esparza feels she was harassed because there were many times, at least four, where Matthew Minkler's mom would stare directly at Ms. Esparza (outside the courtroom) and appear to be on the verge of crying. Ms. Esparza felt it was a look of pity that was displayed upon her in an effort to get her sympathize more with Mr. Minkler's family. The look sent a message in essence to Ms. Esparza and Ms. Esparza felt that it made her very uncomfortable. Additionally, at one of the lunch breaks during trial, another relative, who was a young girl of mixed ethnicity, likely between 18-19 years of

age, who was a part of Mr. Minkler's family in some way, walked directly by Ms. Esparza while at the pizza restaurant and gave her a long stare in an effort in seek favoritism and pity from her. Again, this made Ms. Esparza feel very uncomfortable. Ms., Esparza felt this to be a form of intentional harassment by these individuals of Minkler's family in an effort to persuade, in a non-verbal form, to convict Mr. Harlan as well as Mr. Caruso. Outside influences brought upon a juror would be considered extrinsic evidence. Additionally, these were attempts by third parties to influence the jury process in their favor. Thus, this would also be considered a form of juror misconduct.

Secondly, Ms. Esparza felt harassed and bullied during the deliberations by two other jurors as well. Ms. Esparza specifically remembers another juror Bridget Hocker impatiently say to Ms. Esparza when she would share her differing point of view "what is it you don't understand Shayra!" and "what do you not understand Shayra!" This was after Ms. Esparza had been holding out, so to speak, for hours. Essentially some of the other jurors such as Ms. Hocker were getting frustrated with the delay in deciding the case and voiced her concern that she needed to get back to work already.

Karen Rice's Failure to Disclose Information During Voir Dire

Jurors who fail to disclose information or give false information during voir dire commit juror misconduct, which, if discovered after the verdict, may be grounds for a new trial under the standards established for juror misconduct during voir dire as opposed to misconduct that occurs during deliberations. Meyer, supra, at 461.

Ms. Esparza stated that Ms. Rice was talking to other jurors about how she had a nephew who was killed from a DUI driver and how she has a tattoo as a result. It is counsel's understanding that she failed to disclose this information during voir dire. As such, she could

have been holding onto a bias against people who have committed a crime, especially one that involves a death. Again, counsel does not have the trial transcripts in order to look back and verify this but from memory and speaking with other counsel, it is counsel's understanding that this may have not been disclosed. Failure to disclose such information prevents defense counsel from properly exercising its challenges for cause as well as its peremptory challenges. Additionally, the failure to disclose prevents Harlan from knowing about a potential underlying bias against him and/or his case. Both instances above result in severe prejudice to Harlan.

The Caruso Letter

Lastly, Ms. Esparza stated that some of the jurors talked in deliberations about a letter that Mr. Caruso wanted to read to them. The reason this came about was because some of the jurors saw Mr. Caruso hand his attorney Mace Yampolsky a handwritten letter and then heard Mr. Yampolsky say in what respectively was not a good effort by him to whisper "no you can't read that to the jury or no were not going to read your letter to the jury." Ms. Esparza stated that this comment by Mr. Yampolsky and this letter that Mr. Caruso wanted to read to the jury was talked about in deliberations by some of the other jurors, including herself.

The letter would be considered extrinsic evidence that was improperly talked about in the deliberation room. There is at least some probability that any conversation about this letter during the deliberations could have affected the verdict. Ms. Esparza said that the letter was talked about in a way as if Caruso's lawyer was hiding something from them by not allowing it to be read to them, which in turn negatively affects the jurors view of Caruso. Most importantly though, it hits on Mr. Caruso's right not to have to testify. The letter is a form of Caruso testifying and whether his letter was read to them or not should not have even been talked about by the jurors or considered in their deliberations of this case.

CONCLUSION

The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors may be harmless individually. Maestas, supra, at 275; citing Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). What we have here are multiple instances of juror misconduct, each one carrying its own weight and impact. When they are looked at in their totality, the impact is significantly more powerful. Aristotle said it best, "The whole is greater than the sum of its parts." The Courts have continually agreed with this philosophy in many aspects of criminal law. Words like "totality of the circumstances" and "cumulative error" show us this. And Cumulative error warrants reversal....Valdez v. State, 196 P.3d at 470. In this case, we certainly have cumulative error because were not dealing with just one instance of juror misconduct, we are dealing with several. As such, the totality of the circumstances have to be considered here. Bowman, supra, at 206. Additionally, the State must prove **beyond a reasonable doubt** that the cumulative errors in this case did not cause Harlan prejudice. Id at 476 (emphasis added). Prejudice is shown whenever there is a reasonable probability or likelihood that juror misconduct affected the verdict. Bowman, supra, at 205.

Given the many instances of juror misconduct that took place in this case, Harlan is entitled to a new trial, and respectfully asks for such.

DATED this 12th day of September 2019.

RICHARD HARRIS LAW FIRM, LLP.

K. RYAN HELMICK, ESQ.
Nevada State Bar No. 12769
801 South Fourth Street
Las Vegas, Nevada 89101
Phone (702) 333-3333
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September 2019, I served a true and correct copy of the foregoing **DEFENDANT'S SUPPLEMENTAL BRIEFING FOR MOTION FOR NEW TRIAL**addressed to the following counsel of record at the following address(es), as follows:

_____ E-MAIL on _____ 2019, by emailing the address below:

Giancarlo Pesci
CLARK COUNTY DISTRICT ATTORNEY'S OFFICE
200 E. Lewis Ave.
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An employee at RICHARD HARRIS LAW FIRM

OPPS
STEVEN B. WOLFSON
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAIDEN CARUSO,#8213339
KODY HARLAN, aka, Kody W. Harlan, #5124517

Defendants.

CASE NO: C-18-333318-1
C-18-333318-2

DEPT NO: III

STATE'S SUPPLEMENTAL OPPOSITION TO DEFENDANTS' MOTION FOR NEW TRIAL

DATE OF HEARING: 10/10/19
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through GIANCARLO PESCI, Chief Deputy District Attorney, and SARAH OVERLY, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendants' Motion for New Trial.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

PROCEDURAL HISTORY

On June 13, 2018, Kody Harlan ("Harlan") was charged by way of Criminal Complaint with one (1) count of Robbery (Category B Felony) and one (1) count of Accessory to Murder with Use of Deadly Weapon (Category C Felony) in Henderson Justice Court. On June 20, 2018, an Amended Criminal Complaint was filed adding a felony murder theory to the count of Murder with Use of Deadly Weapon against co-defendant Jaiden Caruso ("Caruso") and a deadly weapon enhancement to the count of Robbery.

On July 9, 2018, a preliminary hearing was held and the State filed a Second Amended Criminal Complaint charging Harlan with one (1) count of Murder with Use of Deadly Weapon, asserting various theories of liability against both Defendants, specifically charging a theory of felony murder by alleging Defendants committed the murder during the perpetration or attempted perpetration of a robbery. The Justice Court held Caruso and Harlan to answer all charges in District Court.

On July 18, 2018, Harlan was arraigned, pled not guilty, and invoked his right to jury trial within sixty (60) days. On July 31, 2018, Harlan waived his right to trial within sixty (60) days. Jury trial is currently scheduled for May 13, 2019, with a respective Calendar Call date of May 2, 2019.

On August 29, 2018, Caruso filed a Petition for Writ of Habeas Corpus. The State filed a Return to the Writ on September 11, 2018. The Court subsequently denied Caruso's writ on September 13, 2018. The same day, Harlan filed his Petition for Writ of Habeas Corpus. The State opposed and the Court denied Harlan's writ as well. On April 8, 2019, Defendant Harlan filed a Motion to Sever and/or Suppress. The State filed an Opposition and the Motion was denied on April 23, 2019. On April 18, 2019, Defendant Harlan filed a Motion in Limine Regarding Prior Bad Acts and Photo/Videographic Evidence which was granted in part. On April 22, 2019, the Defendant filed a Motion in Limine to Exclude Witness Testimony which

was subsequently denied. On May 9, 2019, Defendant Harlan filed a Motion for Bail Reduction. The State opposed the motion and it was denied on May 14, 2019.

At Calendar Call, all parties announced ready and trial commenced on July 29, 2019. On August 7, 2019, the jury returned a verdict of Guilty of 1st Degree Murder with Use of Deadly Weapon as to Count 1, Guilty of Robbery with Use of Deadly Weapon as to Count 2, and Guilty of Accessory to Murder with Use of Deadly Weapon as to Count 3 with respect to Defendant Harlan. The Defendant's sentencing is currently scheduled for September 18, 2019.

On August 13, 2019, Defendant Harlan filed the instant motion. The State filed an opposition on August 20, 2019. At the hearing on August 29, 2019, the Court granted an extension for the Defendant to supplement and briefing. The Defendant's Supplemental Motion was to be filed by September 12, 2019. The State's Supplemental Opposition is due by September 26, 2019, and the Defendant's Reply is due by October 3, 2019. The matter is currently set for hearing on October 10, 2016. On September 11, 2019, the Defendant filed his Supplemental Brief. The State opposes as follows.

STATEMENT OF FACTS

The jury trial in the instant case lasted between July 29, 2019 through August 7, 2019. Throughout the State's case in chief, twenty-one (21) witnesses were called to the stand to testify. Of these twenty-one witnesses, eight (8) were lay witnesses, twelve (12) were law enforcement, and one (1) was a coroner. Additionally, the State admitted one-hundred and fifty-five (155) exhibits. In Defendant Harlan's defense, he admitted various exhibits and opted not to testify. Defendant Caruso called expert, Dr. Alan Donaldson, who testified as to the effects of Xanax on the cognitive skills of juveniles. The testimony of the State's witnesses is outlined below.[1]

Angelina Knox Testimony

Angelina Knox ("Knox") went to an apartment complex party with two friends (Jacy and Patrick) on June 8, 2018. While at the party, Knox observed both the Defendants with firearms. Knox either personally heard Defendant Harlan state that he "caught a body" that

[1] Provided the trial concluded on August 7, 2019, there have not been any transcripts prepared as of the date of this opposition.

day or was told by Patrick that Defendant Harlan made such a statement. Knox and her two friends obtained a ride from the Defendants after the party. Defendant Harlan was driving the Mercedes and Defendant Caruso sat in the front passenger seat. While driving, police attempted to stop the vehicle. Defendant Harlan drove erratically in an effort to flee from police and ultimately crashed the car. Defendants Harlan and Caruso fled from the vehicle in opposite directions.

Officer K. Cochran Testimony

Officer Cochran, employed as a patrol officer with the Henderson Police Department, attempted to conduct a traffic stop[2] on the Mercedes driven by Defendant Harlan and occupied by Defendant Caruso on July 8, 2018. Despite her attempts to stop the vehicle, Defendant Harlan sped off, switched lanes, and ultimately caused an accident with another vehicle. Officer Cochran pursued Defendant Caruso as he fled through an alleyway, over a wall, through a restaurant, and ultimately surrendered. Officer Cochran was unable to pursue Defendant Harlan since he fled in the opposite direction.

Officer O. Mancuso Testimony

Henderson patrol Officer Mancuso responded to the car crash at the Chevron gas station. She received description information about the suspect (Defendant Harlan) that fled from the vehicle. Officer Mancuso ultimately apprehended Defendant Harlan at the Villas Apartments which was approximately a mile from the crash. Officers determined that Defendant Caruso resided at the Villas Apartments.

Detective M. Contradavich Testimony

Henderson Police Detective Contradavich obtained a search warrant for the residence at 2736 Cool Lilac, the Mercedes, DNA of the Defendants, and Defendant Caruso's residence at the Villas Apartments. The warrant for Defendant Caruso's apartment was obtained after jail calls between Defendant Caruso and his mother, as well as a text message to Defendant Caruso indicated Defendant Harlan may have stopped at the apartment during his efforts to

[2] Failure to have a front license plate displayed

flee the crash. Detectives executed the warrant a week after the crash but did not recover a firearm.

CSAs Hornback, Newbold, and Proietto

Crime Scene Analyst Hornback recovered various items from the Mercedes vehicle. These items included a 357 revolver, Nike shoes, a Footlocker receipt dated June 8, 2018, iPhones, and a Coach wallet with the thing inside being a high school identification card in the name of Matthew Minkler. Crime Scene Analyst Newbold took photos of Minkler during the autopsy and recovered the bullet fragments from Minkler's body. Crime Scene Analyst Proietto took photos and impounded items from the residence at Cool Lilac.

Alaric Oliver Testimony

Alaric Oliver ("Oliver") arrived at the Cool Lilac address on June 7, 2018 and stayed the night. Oliver left the house early that morning to walk to Wendy's to purchase food. When Oliver returned to the residence, Kymani Thompson, Ghunner Methvin, Charles Osurman, Vince (last name unknown), and the Defendants were present.

That afternoon, both Defendants left the house to pick up Matthew Minkler. All three returned to the house around 1:00pm. Everyone was smoking, drinking, and taking Xanax. Both Defendants had firearms and Defendant Caruso shot into the ceiling. Oliver testified that when Defendant Caruso shot into the ceiling, Defendant Harlan was awake but began to fall asleep on the couch. Subsequent to the shot to the ceiling, Kymani and Ghunner fled the residence.

Less than two hours after the shot to the ceiling, Matthew Minkler was standing in the kitchen, picked up Defendant Caruso's 357 revolver, then placed it back down on the counter. Defendant Caruso stood up from a chair in the living room, walked over to Minkler, picked up the revolver, and shot Minkler in the face.

Oliver immediately panicked and fled out the back door. Oliver testified that he never heard conversations regarding a robbery and did not notice any hostility amongst the individuals in the house. However, Oliver indicated he did not believe the shooting was accidental.

Kymani Thompson

Kymani Thompson testified that he was invited over to the Cool Lilac residence on June 8, 2018 and arrived with his friend Methvin. Kymani testified that while at the house, Alaric Oliver, Charles Osurman, Methvin, and the Defendants were present. Kymani testified that he heard both Defendants discuss wanting to obtain more weed and wanting to do a lick (robbery). Kymani further testified that during the discussion of needing marijuana (by both Defendants), Minkler's name was brought up. Kymani testified that both Defendants left to pick up Minkler and returned with him to the house.

Kymani indicated that throughout the time at the residence, he had a bad vibe and that "something didn't feel right." After he witnessed Defendant Caruso shoot into the ceiling, Kymani and Methvin fled from the house. Kymani testified that Defendant Harlan was laying down on the couch when Caruso shot into the ceiling. Kymani indicated he returned to the house shortly thereafter to retrieve his lighter because he did not want to leave a trace of being at the house. After leaving the house the second time, Methvin received a FaceTime call from Caruso. Methvin handed the phone to Kymani who saw and heard Caruso state that he had just killed Minkler.

Kymani later spoke to Detectives and explained his theory on how Minkler was killed. Kymani believed the Defendants were trying to rob Minkler for money or weed and something went wrong. When questioned on cross examination, Kymani indicated that this theory was generated by what he heard in the media after the killing. However, on redirect, Kymani clarified that the robbery theory he explained to Detectives stemmed from what he directly saw and heard on June 8, 2019.

Ghunner Methvin

Ghunner Methvin testified that he was invited to the house on June 8, 2018 by Caruso. Ghunner arrived with Kymani and observed both Defendants possess a firearm. Ghunner observed Caruso take the bullets out of the revolver, reload them, and point at everyone in the house with the exception of Defendant Harlan.

Ghunner testified that he felt uncomfortable at the house and believed he had been invited over to be killed. Ghunner believed that Defendant Caruso was planning on doing something to someone in the house that day.

While at the house, Ghunner heard Caruso state that he wanted to commit a robbery/lick and that he wanted to kill someone. Ghunner indicated Defendant Harlan was awake on the couch when Defendant Caruso made this statement. Within twenty (20) minutes of hearing this statement, both Defendants left the Cool Lilac residence to pick up Minkler.

After Defendants returned to the house with Minkler, they brought with them Xanax. While sitting in the living room, Defendant Caruso shot off his gun into the ceiling. Ghunner and Kymani panicked and fled the house. After leaving the house, Defendant Caruso called Ghunner and told him to come back to the house. Ghunner corroborated Kymani's recitation of events that included them returning to the house for Kymani to get something before ultimately leaving again. Ghunner further testified that Defendant Caruso FaceTimed him after they left and that Ghunner handed off the phone to Kymani.

Charles Osurman

Charles Osurman testified that he was at the house on June 8, 2018 when both Defendants arrived around 9am. Osurman testified they arrived in a Mercedes and that Defendant Caruso possessed a 357 revolver while Defendant Harlan possessed a semi-automatic. Osurman indicated that either Caruso or Harlan invited Minkler over to the house and both Defendants drove to pick up Minkler. When they arrived back at the house they had Xanax with them.

Osurman testified that after returning to the house, Defendant Caruso shot into the ceiling, almost shooting Minkler. Osurman testified that Minkler then grabbed the gun and threatened Caruso. Osurman indicated Kymani and Ghunner left the residence after the shot to the ceiling. Within fifteen minutes of the shot to the ceiling, Osurman had fallen asleep. Shortly thereafter, Osurman was awakened to a second gunshot. Osurman observed Minkler on the floor and Jaiden in the kitchen. Osurman testified that Defendant Harlan was asleep on the couch. Immediately after, Osurman and Oliver fled from the house.

Traceo Meadows

Traceo Meadows arrived at the Cool Lilac address on June 8, 2018 after Minkler was shot. He came into contact with an unknown light skinned male who left the house before the Defendants arrived. Defendant Caruso told Meadows that he accidently shot Minkler. Defendant Harlan removed Minkler's shoes, checked his pants pockets, and removed Minkler's wallet and phone. Defendant Harlan then smashed Minkler's cell phone on the ground. Meadows then assisted Defendant Caruso in moving Minkler's body to the hallways closet. Defendant Caruso used the kitchen sink faucet to spray water on the floor where blood was located. Meadows spray painted the wall, living room, and pool table. However, Defendant Harlan spray painted "Fuck Matt" above the closet where Minkler was placed. Meadows went outside the residence and waited a few minutes for the Defendants to exit.

Defendant Harlan drove all of them to the Galleria mall where they went shopping. On the drive to the Galleria mall, Defendant Caruso started boasting about killing Minkler. After they left the mall, Meadows felt uncomfortable because of the way Defendant Harlan was looking at him and asked to be dropped off.

Detective Calvano

Detective Calvano recovered video surveillance from the Galleria Mall. The video documents the Defendants and Traceo Meadows walking into the mall at approximately 3:23pm. All three then enter the Shoe Palace store at approximately 3:30pm. All three are seen leaving with store at 4:35pm. Defendant Harlan is seen carrying a Footlocker shopping bag and Defendant Caruso is seen carrying a Shoe Palace shopping bag. Traceo Meadows is not seen carrying anything in his hands.

COR Footlocker

Somridee McCassrey, a Regional Manager for Footlocker, authenticated video surveillance and a receipt from the store located inside the Galleria mall. Defendant Harlan is depicted on video surveillance inside the Footlocker purchasing a pair of Air Force One sneakers. Defendant Harlan is seen paying for the shoes with a large amount of cash. A receipt from the store reflects the purchase was made on June 8, 2018 and paid for in cash.

Following the instructions and the testimony outlined above, the jury reasonably found Defendant guilty on both counts. This Court should not disturb that determination as Defendant fails to show that the State did not present a ***minimum threshold of evidence*** to sustain a conviction.

Detective Spangler

Detective Spangler conducted a forensic analysis on each of the Defendants' iPhones as well as the Samsung owned by Minkler. Several videos, including the video recorded Minkler dead on the ground, was recovered from Defendant Caruso's phone. Defendant Caruso's phone also revealed calls to Charles Osurman and Ghunner Methvin in the afternoon on June 8, 2018.

Defendant Harlan's iPhone was only equipped for internet and iMessage and did not have cellular service.

Minkler's Samsung cell phone was severely damaged, including water marks, spray paint, burn marks, and more. Detective Spangler replaced the digitizer and USB port prior to extracting any information from the phone.

Detective Nichols

Detective Nichols was the lead investigator on the case and obtained a search warrant for both Defendants and Minkler's Snapchat accounts. Videos from Minkler's Snapchat account included a video of Minkler holding a substantial amount of cash on June 7, 2018.

Detective Nichols also interviewed Defendant Harlan the night of June 8, 2018 and the morning of June 9, 2018. Defendant Harlan admitted that he helped clean up the scene at Cool Lilac. Defendant Harlan also told Detectives that Minkler somehow "popped up" at the house that day and that he was not driving the Mercedes.

Defendant Harlan stated that Minkler was his "friend" and "homey" and he wouldn't want to leave him at the house. Defendant Harlan stated that they tried to move Minkler's body and that they were trying to help him and didn't know he was dead. Defendant Harlan repeatedly denied possessing a firearm and stated he was being 100% honest with police.

ARGUMENT

I. DEFENDANTS' SUPPLEMENTAL MOTION IS IMPROPER AND SHOULD NOT BE CONSIDERED BY THIS COURT.

NRS 176.381 states:

> 1. If, at any time after the evidence on either side is closed, the court deems the evidence insufficient to warrant a conviction, it may advise the jury to acquit the defendant, but the jury is not bound by such advice.
>
> 2. The court may, on a motion of a defendant or on its own motion, which is made after the jury returns a verdict of guilty or guilty but mentally ill, set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. The motion for a judgment of acquittal must be made within 7 days after the jury is discharged or within such further time as the court may fix during that period.
>
> 3. If a motion for a judgment of acquittal after a verdict of guilty or guilty but mentally ill pursuant to this section is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed. The court shall specify the grounds for that determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial is granted conditionally and the judgment is reversed on appeal, the new trial must proceed unless the appellate court has otherwise ordered. If the motion is denied conditionally, the defendant on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings must be in accordance with the order of the appellate court.

NRS 176.515(4)[3] provides that a motion for new trial based on any other grounds must be made within 7 days after the verdict or finding of guilt or within such further time as the court may fix during the 7 day period.

On August 13, 2019, Defendant Harlan filed a Motion to Set Aside the Verdict As to Counts One and Two; In the Alternative Motion for A New Trial And to Request Additional

[3] 1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.
2. If trial was by the court without a jury, the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment.
3. Except as otherwise provided in NRS 176.09187, a motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt.
4. A motion for a new trial based on any other grounds must be made within 7 days after the verdict or finding of guilt or within such further time as the court may fix during the 7-day period.

Time For Supplemental Briefing. In the Defendant's Motion, he cited to NRS 175.381 in an effort to request the verdict be set aside. The Defendant asserted that the verdicts for Count 1 and 2 were not supported by the evidence. The Defendant further asserted that Ghunnar Methvin and Kymani Thompson's testimony led to the jury being misled on Defendant Harlan's involvement in the robbery. The Defendant asked this Court "for additional time to provide the court supplemental briefing on **this issue**." See "Defendant's Motion, p. 4, lines 13-14 (emphasis added).

However, on September 11, 2019, roughly a month after the Defendant filed his original motion for a new trial/set aside the verdict, the Defendant filed the instant "Supplemental Briefing for Motion for New Trial." In this supplemental motion, the Defendant never once supplements the "issue" he addressed in his original motion. In fact, there is no claim of insufficiency of the evidence in Defendant's supplemental motion. Instead, the Defendant asserts completely new claims, that being juror misconduct. The Court granted the Defendant's request to supplement his existing motion, not to file a completely new motion and claim.

Here, the Defendant seeks a new trial based on jury misconduct and was thus required to file the motion within seven (7) days after the verdict. The Defendant originally filed a motion for insufficient evidence within seven (7) days after trial. When it appeared to the Defendant that this claim would not be effective, he sought additional time to assert "other grounds" for a new trial. The Defendant is essentially trying to get several bites at the apple while ignoring the statutory rules that govern the motions he is filing.

Thus, since the Defendant should have filed his motion for new trial involving jury misconduct within seven (7) days of the verdict (not a month thereafter), this motion is not properly before the Court and should be denied.

II. DEFENDANT HAS FAILED TO ESTABLISH GROUNDS FOR GRANTING A NEW TRIAL BASED ON JUROR MISCONDUCT

"To prevail on a motion for a new trial alleging juror misconduct, 'the defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a

showing that the misconduct was prejudicial.'" Id. (quoting Meyer v. State, 119 Nev. 554, 563-64, 80 P.3d 447, 455 (2002). Even when juror misconduct is established, no new trial is necessary if "it appears beyond a reasonable doubt that no prejudice occurred, a new trial is unnecessary." Bowman, 387 P.3d at 205 (quoting Hernandez v. State, 118 Nev. 513, 522, 50 P.3d 1100, 1107 (2002)).

N.R.S. 50.065 precludes the consideration of affidavits or testimony of jurors regarding their state of mind or mental processes.

> 1. A member of the jury shall not testify as a witness in the trial of the case in which the member of the jury is sitting as a juror. If the member of the jury is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.
>
> 2. Upon an inquiry into the validity of a verdict or indictment:
>
> (a) A juror shall not testify concerning the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.
>
> (b) The affidavit or evidence of any statement by a juror indicating an effect of this kind is inadmissible for any purpose.

"Proof of misconduct must be based on objective facts and not the state of mind or deliberative process of the jury." Meyer, 119 Nev. at 563, 80 P.3d at 454 (citing Government of Virgin Islands v. Gereau, 523 F.2d 140, 148-49 (3rd Cir. 1975)); NRS 50.065. Jury misconduct can be both extrinsic, such as accessing media reports about the case, or intrinsic, such as a juror making a decision based on unadmitted evidence. Meyer, 119 Nev. at 561, 80 P.3d at 453. Extrinsic misconduct can be proven with juror affidavits or testimony stating that the jury received outside information. Id. 119 Nev. at 562, 80 P.3d at 454. However, "juror affidavits that delve into a juror's thought process cannot be used to impeach a jury verdict and must be stricken." Id.

In Echavarria, the Court considered whether an affidavit concerning the juror's deliberative process could be considered when determining misconduct, holding:

> Echavarria alleges that Pool revealed to defense counsel in a post-trial interview that she only voted for the death penalty because she thought the verdict would be overturned on appeal due to juror misconduct. At the evidentiary hearing, the court excluded Pool's statements regarding her reason for voting for the death penalty as violative of NRS 50.065(2), which prohibits consideration of affidavits or testimony of jurors concerning their mental processes or state of mind in reaching the verdict. *See Riebel v. State*, 106 Nev. 258, 263, 790 P.2d 1004, 1008 (1990). We agree that the district court properly excluded evidence of Pool's mentation in deciding upon a verdict.
>
> Echavarria v. State, 108 Nev. 734, 741–42, 839 P.2d 589, 594 (1992).

This was reiterated in Riebel, where Riebel sought a new trial based on juror misconduct by attempting to address the jurors' state of minds. Riebel v. State, 106 Nev. 258, 263–64, 790 P.2d 1004, 1008 (1990). To begin, when this court is inquiring into the validity of a verdict, NRS 50.065(2) prohibits consideration of affidavits or testimony of jurors concerning their mental processes or state of mind in reaching the verdict. See Pappas v. State, Dep't Transp., 104 Nev. 572, 575, 763 P.2d 348, 349–50 (1988), and Barker v. State, 95 Nev. 309, 312, 594 P.2d 719, 721 (1979) (portions of affidavits or testimony regarding readily ascertainable objective facts about conduct and statements could be considered; portions regarding mental processes or state of mind were properly excluded). Id. at 264. The letters involved in this case clearly address the jurors' states of mind leading up to the verdict. Id. For example, one juror wrote, "we were only able to reach a verdict based upon our *belief* that the court would consider our *thoughts* in this matter." (Emphasis added.) Riebel's claim that the letters contain objective facts which may properly be considered by this court is without merit. Id.

Generally, juror misconducts based on allegations of extrinsic influence are not automatically prejudicial. Meyer, 119 Nev. at 564, 80 P.3d at 455. Prejudice is only presumed in the most egregious types of extraneous influence, such as jury tampering. Id. Extrinsic

materials such as media reports from television or newspaper, or intrinsic jury misconduct require case-by-case analysis. Id. 119 Nev. at 565, 80 P.3d at 456. When prejudice is not presumed, a defendant bears the burden to show "there is a reasonable probability or likelihood that the juror misconduct affected the verdict." Bowman, 381 P.3d at 205 (citing Meyer, 119 Nev. at 564, 80 P.3d at 455). Factors relevant to this determination include:

> "How the material was introduced to the jury (third-party contact, media source, independent research, etc.), the length of time it was discussed by the jury, and the timing of its introduction (beginning, shortly before verdict, after verdict, etc.). Other factors include whether the information was ambiguous, vague, or specific in content; whether it was cumulative of other evidence adduced at trial; whether it involved a material or collateral issue; or whether it involved inadmissible evidence (background of the parties, insurance, prior bad acts, etc.)."

Id. at 566, 80 P.3d at 453.

"The district court is required to objectively evaluate the effect the extrinsic material had on the jury and determine whether it would have influenced the average, hypothetical juror." Zana v. State, 125 Nev. 541, 548, 216 P.3d 244, 248 (2009) (quoting Meyer, 119 Nev. at 566, 80 P.3d at 456). The district court's denial of a motion for new trial based on juror misconduct will be upheld absent and abuse of its broad discretion. Id. 119 Nev. at 561, 80 P.3d at 453. Also, not every allegation of jury misconduct requires a hearing. U.S v. Montes, 628 F.3d 1183, 1187 (9th Cir. 2011). A hearing is not required if the seriousness of the alleged misconduct or bias is minimal and that the content of the allegations could not have prejudiced the defendant. Id. at 1187-88; see also People v. Ray, 13 Cal. 4th 313, 344, 914 P.2d 846, 863 (1996) ("a hearing is required only where the court possess information which, if prove to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties . . .).

A. Cell Phone

The Defendants assert that this Court should grant them a new trial based on the cell phone use by two jurors during deliberations. Specifically, the Defendants asserts that juror Esparza's internet research regarding the graffitied abbreviations inside the Cool Lilac address could have prejudiced the Defendants and affected the verdict.

The court in Meyer v. State addressed the issue of a juror conducting outside research. Meyers, 119 Nev. 571, 80 P. 3d 447. Specifically, the juror consulted the Physicians' Desk Reference (PDR) on the side effects of Accutane during trial and then discussed it with other jurors during deliberations. Id. at 571. The court determined that while this research was deemed a form of juror misconduct, there must also be further analysis on whether this misconduct resulted in prejudice. Id. at 572. The court held that in order to demonstrate prejudice, Meyer must prove that there is a reasonable probability that the PDR reference affected the jury's verdict. Id. The court held that because the misconduct involved extrinsic evidence, the Confrontation Clause was implicated and de novo review of the district court's findings relating to prejudice was appropriate. Id. Applying some of the factors cited above, the court noted that the misconduct involved both extrinsic information as well as intrinsic communications (disregard of jury instruction prohibiting independent research). Id. The jury's exposure to the information was brief and it occurred at the beginning of the deliberations. Id. The court noted that they did not know the length of time it was discussed. Id. However, the side effects of Accutane was a **material issue in the case**, and the information tended to undermine Meyer's theory that the victim's physical marks were caused by a reaction to medication or falling. Id. (emphasis added). Considering all of the circumstances, the court concluded that the average, hypothetical juror could have been affected by this extraneous information, and there was a reasonable probability that the PDR information affected the verdict. Id. Thus, Meyer met his burden of establishing prejudice. Id.

Unlike in Meyer, the information researched by juror Esparza was not material. There was testimony from various witnesses that the house was spray painted prior to any of the individuals arriving at the house. There was no testimony from any of the witnesses that the Defendants spray painted "BDN" (Blood Disciple Nigga), "FTO" (Fuck the Opps), "Fuck 12" (Fuck the Police), "OTF" (Only the Family), and "GDK" (Gangster Disciple Killer). Furthermore, there was no testimony that any party, including the Defendants, were involved or associated with gang activity.

Additionally, researching the meanings of the graffitied abbreviations is extrinsic evidence that, when objectively evaluated, would not have influenced the average or hypothetical juror. Generally, juror misconducts based on allegations of extrinsic influence are not automatically prejudicial. Meyer, 119 Nev. at 564. Prejudice is only presumed in the most egregious types of extraneous influence, such as jury tampering. Id. Extrinsic materials such as media reports from television or newspaper, or intrinsic jury misconduct require case-by-case analysis. Id. at 565. When prejudice is not presumed, a defendant bears the burden to show "there is a reasonable probability or likelihood that the juror misconduct affected the verdict." Bowman, 381 P.3d at 205 (*citing* Meyer, 119 Nev. at 564, 80 P.3d at 455). The district court need not address both prongs in order—it can assume misconduct and deny the Motion for a New Trial if it does not find that the alleged misconduct influenced the verdict. Bowman, 387 P.3d at 206-07. Also, not every allegation of jury misconduct requires a hearing. U.S v. Montes, 628 F.3d 1183, 1187 (9th Cir. 2011). A hearing is not required if the seriousness of the alleged misconduct or bias is minimal and that the content of the allegations could not have prejudiced the defendant. Id. at 1187-88; see also People v. Ray, 13 Cal. 4th 313, 344, 914 P.2d 846, 863 (1996) ("a hearing is required only where the court possess information which, if prove to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties . . .).

Here, the extraneous information regarding the meaning of the abbreviated terms hardly raises a presumption of prejudice. Aside from juror Esparza researching the meaning behind the abbreviations, there is nothing to demonstrate or suggest there was any further discussion on the topic or that it influenced the jurors' deliberations. The Defendants fail to provide information about the length of discussion regarding these meanings or whether there was any discussion at all. The Defendants merely claim that "these spray-painted abbreviations look really bad for the person who is alleged to have wrote them." Defendant Harlan's Supplemental Brief, p. 10. Furthermore, the abbreviations, which were introduced through various photo exhibits throughout trial, were clearly associated with negative and/or gang affiliated meanings. A juror's independent research in confirming these reasonable

assumptions hardly presumed prejudice. The alleged misconduct was minimal and unlikely affected the verdict. This is corroborated by the minimal information and discussion juror Esparza details in her affidavit. Finally, the meanings of the abbreviated words were not a material issue or fact in the case.

The Defendants also asserts that juror Esparza observed another juror, Hocker, using her cell phone during a break in deliberations. The Defendants concedes that juror Esparza never saw what juror Hocker was doing on her phone. This unsupported and speculative assertion that Hocker was not only researching something extrinsic to the case, but that the research was prejudicial to the Defendants, is wholly without merit and should not be considered as a reliable claim by this court.

Thus, the Defendants have not shown how use of a cell phone by either juror Esparza or Hocker consisted of misconduct or resulted in prejudice which would warrant a new trial.

B. Stolen Car

The Defendants assert that Detective Nichol's reference to the stolen Mercedes in cross examination was discussed in juror deliberations and warrants a new trial since "the idea that some of these people had, was that if Mr. Harlan and Mr. Caruso were out stealing cars then they probably robbed Matthew Minkler too." Defendant Harlan's Supplemental Brief, p. 12.

In Echavarria, a juror revealed to defense counsel in a post-trial interview that she only voted for the death penalty because she thought the verdict would be overturned on appeal due to juror misconduct. Echavarria v. State, 108 Nev. 734, 741–42, 839 P.2d 589, 594 (1992). At the evidentiary hearing, the court excluded the juror's statements regarding her reason for voting for the death penalty as violative of NRS 50.065(2), which prohibits consideration of affidavits or testimony of jurors concerning their mental processes or state of mind in reaching the verdict. Id. at 741-742.

In Riebel, the jury sent a note along with their handwritten verdict asking that the "sentence be tempered by compassion, and include psychiatric care." Riebel v. State, 106 Nev. 258, 790 P.2d 1004 (1990). After the verdicts and prior to sentencing, defense counsel questioned jurors regarding the note that accompanied the verdict. In response, several jurors

wrote to the judge explaining that they had issued a guilty verdict based on the mistaken belief that the judge would consider their plea for leniency in sentencing. Id. at 263. Riebel argued that the exchange between the judge and the jury during the jury's deliberations resulted in a compromised verdict based on the jury's erroneous belief that it could influence the sentence, as evidenced by the letters from individual jurors. Id. He argued that it was reversible error to allow a jury to consider punishment when deliberating its verdict or to lead the jury to believe that it could influence the sentence. Id.

The Supreme Court held that Riebel's argument failed, holding "when this court is inquiring into the validity of a verdict, NRS 50.065(2) prohibits consideration of affidavits or testimony of jurors concerning their mental processes or state of mind in reaching the verdict. *See* Pappas v. State, Dep't Transp., 104 Nev. 572, 575, 763 P.2d 348, 349–50 (1988), and Barker v. State, 95 Nev. 309, 312, 594 P.2d 719, 721 (1979) (portions of affidavits or testimony regarding readily ascertainable objective facts about conduct and statements could be considered; portions regarding mental processes or state of mind were properly excluded). Id. The Court held that the letters involved in the case clearly addressed the jurors' states of mind leading up to the verdict. Id. at 264. For example, one juror wrote, "we were only able to reach a verdict based upon our *belief* that the court would consider our *thoughts* in this matter." Id. (Emphasis added.) The Court held that Riebel's claim that the letters contained objective facts which could properly be considered by the court was without merit. Id.

Here, there was nothing extrinsic about the car as it was during cross examination by defense counsel that the statement was elicited. The Court, upon defense counsels' request, instructed the jury to disregard the information about the Mercedes being stolen. Per juror Esparza's affidavit, there was some discussion about this fact during deliberations. Therefore, any discussion regarding the stolen vehicle was intrinsic evidence and juror Esparza's affidavit can only be considered when ascertaining the objective facts about the statements. However, any portions relating to the mental processes or state of mind of jurors is excluded and inadmissible.

However, the Defendants seek to apply the jurors' mental states of mind in asserting a claim for a new trial. Specifically, juror Esparza's affidavit states:

> The idea that some of these people had, was that if Mr. Harlan and Mr. Caruso were out stealing cars then they probably robbed Matthew Minkler too. And if the robbery was believed then the Felony Murder Rule would apply. Ms. Esparza also stated that juror Gabriel Bernardo talked about the stolen car comment and how Ms. Esparza remembered it being in regard to the pre-meditation element.

Defendant Harlan's Supplemental Motion, p. 6.

The Defendants seeks to blatantly ignore NRS 50.065(2) and apply the jurors' mental processes and states of mind leading to the verdict. Since these portions of the affidavit are precluded pursuant to the NRS 50.065 and the overwhelming case law, the Defendants have failed to present admissible evidence to establish juror misconduct.

Therefore, when applying an objective standard to the consideration of the stolen vehicle, it is improbable to conclude that reference to the stolen car during cross-examination by defense counsel resulted in a mistrial or the inability to adequately apply the evidence to the Felony-Murder Rule. The statement elicited was that the vehicle was stolen. However, there was no testimony regarding who stole the vehicle or whether the Defendants were aware the vehicle was stolen. There was no testimony regarding the theft of the vehicle, a punched ignition, or any other indications the vehicle was stolen. Furthermore, there was far more unfavorable evidence regarding the Defendants' charged conduct than that of possessing a stolen vehicle. Similar to the meaning of the graffitied abbreviations in the home, the fact that the Defendants drove a stolen vehicle was not a material issue in the case and would not have resulted in prejudice to the Defendants.

C. Disregarding Jury Instructions

"Juror misconduct" falls into two categories: (1) conduct by jurors contrary to their instructions or oaths, and (2) attempts by third parties to influence the jury process. Meyer v. State, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003). The first category includes jurors failing to follow standard admonitions not to discuss the case prior to deliberations, accessing media

reports about the case, conducting independent research or investigation, discussing the case with nonjurors, basing their decision on evidence not admitted, discussing sentencing or the defendant's failure to testify, making a decision on the basis of bias or prejudice, and lying during voir dire. Id. It also includes juror incompetence issues such as intoxication. Id. The second category involves attempts to influence the jury's decision through improper contact with jurors, threats, or bribery. Id.

A jury's failure to follow a district court's instruction is intrinsic juror misconduct. Valdez v. State, 124 Nev. 1172, 1186–87, 196 P.3d 465, 475 (2008). When the district court denies a motion for a mistrial based on such misconduct, we review the decision for an abuse of discretion. Id. "[A] new trial must be granted unless it appears, beyond a reasonable doubt, that no prejudice has resulted" from the jury misconduct. Id. The defendant must prove the nature of the jury misconduct and that there is a reasonable possibility that the misconduct affected the verdict. Id. The defendant may only prove the misconduct using objective facts and not the "state of mind or deliberative process of the jury." Id. Because intrinsic misconduct can rarely be proven without resort to inadmissible juror affidavits that delve into the jury's deliberative process, only in **extreme circumstances will intrinsic misconduct justify a new trial.** Meyer v. State, 119 Nev. At 565 (emphasis added).

In Valdez v. State, the jury returned a verdict and the foreperson indicated that a portion of the jury's deliberations had been devoted to the penalty, and it had already decided Valdez's sentence. Valdez v. State, 124 Nev. at 1181. The defense subsequently moved for a mistrial based on the assertion that the jury violated its oath by considering the penalty during the guilt phase. Id. The court held that the jury committed misconduct by failing to follow the oral bifurcation instruction, which the court and prosecutor gave during jury selection, and the district court's written response to the jury's question about penalty deliberations. Id. at 1187. The jury foreperson's statement that the jury had decided Valdez's sentence was objective evidence of the misconduct. Id. Thus, the jury's actions constituted intrinsic jury misconduct. Id. The court found that there was a reasonable probability that the misconduct affected the verdict because the jury considered the penalty while deliberating Valdez's guilt. Id. In

particular, the jury may have compromised, selecting the guilty verdict to impose the desired penalty. Id. While the State argued that Valdez could not have been prejudiced because he stipulated to the sentence on the murder conviction, this argument, per the Supreme Court, failed to address the prejudice Valdez sustained in the jury's determination of his guilt or innocence. Id. The fact pattern of Valdez, however, is not present in the case before this Court, and as such, is inapplicable.

In Newcastle v. State, Newcastle argued that the district court erred in denying his motion for new trial based on juror misconduct. Newcastle v. State, No. 64740, 2014 WL 4672902, at *2 (Nev. Sept. 18, 2014). Newcastle argued that two jurors expressed the sentiment that Newcastle "was in prison for a reason," which seemed to indicate they were disregarding the instruction regarding Newcastle's presumption of innocence. Id. The court concluded that the district court did not abuse its discretion in concluding that this situation did not arise to such a level. *See* Servin v. State, 117 Nev. 775, 792, 32 P.3d 1277, 1289 (2001) (reviewing district court decision on timely motion for new trial for abuse of discretion). The comments may have indicated that the jurors had disregarded the instructions by considering improper, unadmitted character evidence. However, considering the aforementioned evidence of Newcastle's guilt and that the expressed sentiment of the jurors would be the same regarding any of the other possible perpetrators, Newcastle failed to demonstrate a "reasonable probability or likelihood that the juror misconduct affected the verdict." Meyer, 119 Nev. at 564, 80 P.3d at 455. Newcastle v. State, No. 64740, 2014 WL 4672902, at *2 (Nev. Sept. 18, 2014).

The general rule at common law was that jurors may not impeach their own verdict. Meyer v. State, 119 Nev. at 562. However, common law also recognized an exception to that general rule. Id. Where the misconduct involves extrinsic information or contact with the jury, juror affidavits or testimony establishing the fact that the jury received the information or was contacted are permitted. Id. An extraneous influence includes, among other things, publicity or media reports received and discussed among jurors during deliberations, consideration by jurors of extrinsic evidence, and third-party communications with sitting jurors. Id. In contrast,

intra-jury or intrinsic influences involve improper discussions among jurors (such as considering a defendant's failure to testify), intimidation or harassment of one juror by another, or other similar situations that are generally not admissible to impeach a verdict. Id. Thus, proof of misconduct must be based on objective facts and not the state of mind or deliberative process of the jury. Id Juror affidavits that delve into a juror's thought process cannot be used to impeach a jury verdict and must be stricken. Id.

The Nevada Legislature codified the common-law rules regarding admission of jury testimony to impeach a verdict in NRS 50.065. Id. at 563. This court, interpreting NRS 50.065, has stated that a motion for a new trial may only be premised upon juror misconduct where such misconduct is readily ascertainable from objective facts and overt conduct without regard to the state of mind and mental processes of any juror. Id.

Here, the Defendants assert that there was juror misconduct, alleging that members of the jury disregarded the jury instructions given by the Court. The Defendants use juror Esparza's explanation regarding the conflicting interpretations of the jury instructions by members of the jury to support this claim, which is part of the deliberative process and pursuant to statute cannot be considered and pursuant to statute and case law must be stricken.

D. Discussing the Case Prior to Deliberations

The Defendants allege juror misconduct based on things that happened, "Prior to deliberations taking place," that being a conversation between two jurors about what they allegedly heard another juror say regarding whether it was going to be an easy case to decide. Defendant Harlan's Supplemental Motion, p. 15, Lines 9-17. The Defendants then asserts, "Since this conversation took place prior to deliberations, it would be considered extrinsic evidence." Id. at p. 15, Lines 18-19. The Defendants then attempt to make the leap, without evidence, that this alleged conversation, "would show at least some evidence of two jurors agreeing upon a decision on the case, prior to deliberations," going further by opining that because one of the jurors was the foreperson it thus carried, "the most weight of persuasion." Id. at p. 15, Lines 24-25. Arguments created ex nihilo do not constitute juror misconduct.

As explained above, jury misconduct can be both extrinsic, such as accessing media reports about the case, or intrinsic, such as a juror making a decision based on unadmitted evidence. Meyer, 119 Nev. at 561, 80 P.3d at 453. Extrinsic misconduct can be proven with juror affidavits or testimony stating that the jury received outside information. Id. 119 Nev. at 562, 80 P.3d at 454. However, "juror affidavits that delve into a juror's thought process cannot be used to impeach a jury verdict and must be stricken." Id. Generally, juror misconduct based on allegations of extrinsic influence are not automatically prejudicial. Id. at 564. Prejudice is only presumed in the most egregious types of extraneous influence, such as jury tampering. Id. Extrinsic materials such as media reports from television or newspaper, or intrinsic jury misconduct require case-by-case analysis. Id. at 565. When prejudice is not presumed, a defendant bears the burden to show "there is a reasonable probability or likelihood that the juror misconduct affected the verdict." Bowman, 381 P.3d at 205 (*citing* Meyer, 119 Nev. at 564, 80 P.3d at 455). Factors relevant to this determination include:

> "How the material was introduced to the jury (third-party contact, media source, independent research, etc.), the length of time it was discussed by the jury, and the timing of its introduction (beginning, shortly before verdict, after verdict, etc.). Other factors include whether the information was ambiguous, vague, or specific in content; whether it was cumulative of other evidence adduced at trial; whether it involved a material or collateral issue; or whether it involved inadmissible evidence (background of the parties, insurance, prior bad acts, etc.)." Id. at 566, 80 P.3d at 453.

"The district court is required to objectively evaluate the effect the extrinsic material had on the jury and determine whether it would have influenced the average, hypothetical juror." Zana v. State, 125 Nev. 541, 548, 216 P.3d 244, 248 (2009) (*quoting* Meyer, 119 Nev. at 566, 80 P.3d at 456). The district court's denial of a motion for new trial based on juror misconduct will be upheld absent and abuse of its broad discretion. Id. 119 Nev. at 561, 80 P.3d at 453.

In this case before this Court, contrary to the Defendants' assertion, the alleged conduct does not constitute any misconduct—extrinsic or intrinsic. The alleged conduct is not an

extrinsic influence on the jury, like accessing the internet for information about the case. The allegation also fails to be intrinsic as it involves a conversation before deliberations even occurred and fails to show how this alleged conversation had any bearing on the actual jury deliberations, let alone show "there is a reasonable probability or likelihood that the juror misconduct affected the verdict." Bowman, 381 P.3d at 205 (citing Meyer, 119 Nev. at 564, 80 P.3d at 455). The Defendants bear the burden to show both jury misconduct and prejudice. Bowman, 387 P.3d at 206-07, and in this regard, Defendants have failed on both requirements.

E. No Jurors Rights Were Violated and There Were no Attempts by Third Parties to Influence the Jury Process

The Defendants allege jurors' rights were violated citing to the, "Juror Bill of Rights" in a caption when there is no such thing. In the body of the argument the Defendant instead cites to "Jury Improvement Commission" report generated in October 2002. That report does not constitute a Juror Bill of Rights, nor does it create a legal remedy of a new trial. The Defendants then move on to allege third party influence on the jury took place based on Juror Esparza's allegation of feeling harassed by non-verbal stares. (Defendant Harlan's Supplemental Motion, p. 16, Lines 19-28; p. 17, Lines 1-6.)

Non-verbal stares, assuming they even happened, do not constitute extrinsic jury misconduct. Extrinsic misconduct can be proven with juror affidavits or testimony stating that the jury received outside information. Meyer, 119 Nev. at 562, 80 P.3d at 454. The jurors did not receive any outside information. Ms. Esparza alleges she received non-verbal stares—nothing about non-verbal stares introduced outside information into the verdict. The Defendants further claim that Matthew Minkler's mother "visibly" pleaded with jurors for help avenging her son. (Defendant Caruso's Motion, p. 7, Lines 10-11.) As explained before, "juror affidavits that delve into a juror's thought process cannot be used to impeach a jury verdict and must be stricken." Meyer, 119 Nev. At 562. Thus, what Ms. Esparza thought about the non-verbal stares, "cannot be used to impeach a jury verdict and must be stricken." Id.

Generally, juror misconducts based on allegations of extrinsic influence are not automatically prejudicial. Id. at 564. Prejudice is only presumed in the most egregious types of extraneous influence, such as jury tampering. Id. A non-verbal stare does not constitute jury tampering. Ms. Esparza's interpretation of Ms. Minkler's "stare" where she appeared to be on the "verge of crying" is not only understandable considering she is observing the jury trial for her murdered son, but certainly does not rise to the level of jury tampering. When prejudice is not presumed, a defendant bears the burden to show "there is a reasonable probability or likelihood that the juror misconduct affected the verdict." Bowman, 381 P.3d at 205 (citing Meyer, 119 Nev. at 564, 80 P.3d at 455). Factors relevant to this determination include:

> "How the material was introduced to the jury (third-party contact, media source, independent research, etc.), the length of time it was discussed by the jury, and the timing of its introduction (beginning, shortly before verdict, after verdict, etc.). Other factors include whether the information was ambiguous, vague, or specific in content; whether it was cumulative of other evidence adduced at trial; whether it involved a material or collateral issue; or whether it involved inadmissible evidence (background of the parties, insurance, prior bad acts, etc.)." Id. at 566, 80 P.3d at 453.

Since nothing was introduced to the jury, there is no prejudice that could have occurred. "The district court is required to objectively evaluate the effect the extrinsic material had on the jury and determine whether it would have influenced the average, hypothetical juror." Zana v. State, 125 Nev. 541, 548, 216 P.3d 244, 248 (2009) (*quoting* Meyer, 119 Nev. at 566, 80 P.3d at 456. There is no way a non-verbal stare that introduces no extrinsic material to the case would have influenced the average, hypothetical juror. As such, the Defendants' allegation fails.

Moreover, Ms. Esparza's feeling, "harassed and bullied" because allegedly juror Bridget Hocker asked, "what is it you don't understand Shayra" during deliberations does not constitute jury misconduct. On the contrary, it constitutes jury deliberations—the back and forth between jurors regarding the evidence and the law as they deliberate the charges. Additionally, any conversations between Ms. Esparza and the others regarding the very acts

of deliberations squarely falls into the deliberative process that cannot be invaded or cited to as a means of seeking a new trial.

F. Allegation of Juror Rice's Failure to Disclose Information During Voir Dire

The Defendants allege, in essence, that Juror Rice had a duty to disclose she had a nephew that was killed from a DUI driver and she has a tattoo as a result based on, "counsel's understanding that she failed to disclose this information during voir dire." (Defendant Harlan's Supplemental Motion, p. 17, Lines 27-28.) "Counsel's understanding" that something, "may not have been disclosed" (Id. at page 18, Line 4), does not create misconduct. There has to actually be evidence, not "understandings" about what may or may not have been disclosed, as there is no evidence this question was even posed during voir dire.

Moreover, Defendant cites to Meyer to allege that this purported misconduct requires the granting of a new trial. However, the Defendant's reliance on Meyer is completely misplaced as it governs alleged misconduct during deliberations and not during voir dire. In Brioady v. State, the Defendant was on trial for sexual assault of a minor and lewdness with a minor. Brioady v. State, 133 Nev. 285 (2017). During voir dire the judge asked if any of the potential jurors had been the victim of a crime. Id. The juror in question did not answer the question. Id. After Brioady was convicted, he filed a motion for a new trial when it was discovered that the juror had, in fact, been a childhood victim of molestation. Id. It was also discovered that during deliberations the juror disclosed to the other jurors that she had been a victim of childhood sexual abuse. Id. The Nevada Supreme Court spelled out the standard for an allegation of juror misconduct during voir dire when it stated:

> To prevail on a motion for a new trial on the basis of juror misconduct during voir dire a defendant must demonstrate (1) that the juror at issue failed to honestly answer a material question, and (2) that a correct response would have provided a valid basis for a challenge for cause. *See* McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). Brioady at 286.

The Defendants cannot meet these necessary requirements as there has been no showing that Juror Rice failed to honestly answer any question, let alone a material question.

Moreover, the Defendants cannot demonstrate that the correct response would have provided a valid basis for a challenge for cause, even assuming Juror Rice has a tattoo for a nephew who was killed by a drunk driver, since there is no indication that Juror Rice could not be fair and impartial to Defendants facing murder for non-driving under the influence charges.

G. The Caruso Letter

Defendant Harlan also argues that some of the jurors talked during deliberations about a letter Mr. Caruso wanted to read to the jury that was not introduced into evidence. The Defendant alleges that the letter was extrinsic evidence that creates, "some possibility" that conversations about the letter, "could have affected the verdict." (Defendant Harlan's Supplemental Motion, p. 18, Lines 19-22.) The Defendant alleges that jurors had a conversation during deliberations that Mr. Caruso's attorney was hiding something from them by not allowing the letter to be read.

First, there is nothing extrinsic about a supposed letter that was neither introduced during trial nor obtained by the jury during deliberations. If the letter had been posted online and then accessed by a juror and brought into the deliberations, there would be an argument that it was extrinsic. As it stands, the only factual allegation is that during the deliberative process there was a discussion about a piece of evidence that was never introduced during trial, nor extrinsically introduced to the jury. As explained in Meyer, "…proof of misconduct must be based on objective facts and not the state of mind or deliberative process of the jury. Juror affidavits that delve into a juror's thought process cannot be used to impeach a jury verdict and must be stricken." Meyer, 119 Nev. at 566, 80 P.3d at 456. Thus, the entirety of Ms. Esparza's affidavit, and the arguments associated therewith throughout the Defendants' motions, must be stricken as they are not objective facts but rather her purported state of mind and/or the deliberative process of the jury, which is legally prohibited.

Therefore, the Defendants have failed to prove any misconduct, extrinsic or intrinsic, and as such, the Defendants' motions should be denied.

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CONCLUSION

Defendants' Motions for a New Trial should be DENIED.

DATED this 26th day of September, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/GIANCARLO PESCI
GIANCARLO PESCI
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CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 25th day of September, 2019, by electronic transmission to:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. KODY HARLAN, Defendant.	CASE NO.: C-18-333318-2 DEPT NO.: 3

RESPONSE TO STATE'S OPPOSITION TO HARLAN'S SUPPLEMENTAL BRIEFING FOR MOTION FOR NEW TRIAL

COMES NOW, Defendant, KODY HARLAN, by and through his attorney of record, K. RYAN HELMICK, ESQ of RICHARD HARRIS LAW FIRM, LLP. and hereby submits this supplemental briefing for motion for a new trial.

This Motion is based upon the pleadings and papers on file herein, the attached Memorandum of Points and Authorities, and any oral argument the Court may entertain.

STATEMENT OF FACTS

The Defense objects to the statement of facts set forth by the State in their motion because the trial transcripts have not been filed yet, which leaves them no ability to cite the facts they have written down, so that they can be looked at for accuracy. As the undersigned mentioned in Harlan's first motion for a new trial, it is the Defense's position that this court, having had sat through the entire trial, is at least aware of the majority of the facts.

I. HARLAN'S MOTION IS PROPER.

The words "IN THE ALTERNATIVE MOTION FOR A NEW TRIAL AND TO REQUEST ADDITIONAL TIME FOR SUPPLEMENTAL BRIEFING," were put in the title of Harlan's motion for a reason. The goal with the bare bones "Notice Motion" was to simply give the court notice so that Harlan wouldn't lose his right to file this Motion for a New Trial. Additionally, at the time we all appeared on this "Notice Motion," which was August 29, 2019, all the facts from juror Ms. Esparza had not been gathered. Attached is Exhibit "A," which is the JAVS video of the August 29, 2019 hearing. The undersigned specifically states to the court that he is working on some very important new information and needs just a couple weeks more. The undersigned felt no need to disclose in front of the State what the Defense's on-going investigation was doing, nor should we have had to. Additionally, the undersigned put so many different requests in the title of Harlan's motion in order to make sure we preserved every viable option. Lastly, the fact that the Defense ultimately chose to go down the juror misconduct road instead of the insufficiency of the evidence one, was a decision the Defense was and should be allowed to make. Either 1) insufficiency of the evidence or 2) juror misconduct all fall under the umbrella of a "Motion for a New Trial." Again, the Defense didn't put a lot of facts down in

their bare bones "Notice Motion," because all we were trying to do was stop the clock so to speak, so we didn't lose our ability to file the future substantive motion.

Therefore, Harlan's motion is proper and should be heard by this court.

II. THE TOTALITY OF THE MULTIPLE INSTANCES OF JUROR MISCONDUCT WARRANTS A MISTRIAL.

The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors may be harmless individually. Maestas v. State, 128 Nev. Adv. Op. 12, 275 P.3d 84; citing Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). Additionally, the State must prove **beyond a reasonable doubt** that the cumulative errors in this case did not cause Harlan prejudice. Bowman v. State, 387 P.3d 205, 132 Nev. Adv. Op. 74 (Nev., 2016); (emphasis added). Prejudice is shown whenever there is a reasonable probability or likelihood that juror misconduct affected the verdict. Id at 205.

It is obvious from reading the State's opposition that they are trying to minimize each incident of juror misconduct that took place in this case. But even assuming arguendo that some of the juror misconduct was "harmless," this doesn't mean that when taken as a whole the effect is the same. Nevertheless, the Defense submits that the juror misconduct found in this case was not harmless.

There were multiple instances of juror misconduct based off of "extrinsic evidence" that could have affected the verdict in this case. "Could have" is the key word here. The law asks whether the average, hypothetical juror **could have been affected** by this extraneous information. Meyer v. State, 119 Nev. 563-64, 80 P.3d at 460. The Defense does not have to show beyond a reasonable doubt that it did, but rather the State has the burden to show beyond a reasonable doubt that it did not. See Bowman, supra, at 387.

In regard to "intrinsic evidence," the State writes in their opposition that "only in **extreme** circumstances will intrinsic misconduct justify a new trial." (State's Opposition P. 20).

The Defense agrees that with this statement, but the Defense also agrees that the intrinsic misconduct displayed in this case was **extreme.** Additionally, intrinsic juror misconduct requires a **case-by-case analysis**. Meyers, supra, at 565 (emphasis added).

A. EXTREME INTRINSIC JUROR MISCONDUCT

Disregarding of the Jury Instructions

Ms. Esparza, as outlined in her affidavit stated that "I was told by another Juror, Sarah Fox that they (the other jurors who wanted a guilty verdict for 1st Degree Murder with Use of a Deadly Weapon) could overrule me, so it didn't matter what my vote was. Had I not been so wrongfully misled, I would have voted for Involuntary Manslaughter with Use of a Deadly Weapon for Jaiden Caruso and Accessory to Murder with Use of a Deadly Weapon for Kody Harlan." Ms. Esparza then goes on to say: "The juror that read a completely wrong interpretation of the law on 1st Degree Murder and Felony Murder was Ms. Fox. By her side and in agreement with her was Karen Rice (foreperson). Specifically, Ms. Rice said, "listen up guys Sarah found something." Then Ms. Rice looked right at me as Ms. Fox read the alleged "overrule you" part of the jury instructions. Once Ms. Fox was done reading, she looked at me and told me that since they didn't have to be unanimous on whether it was premeditated first degree murder or whether it was felony murder AND because there was a deadly weapon involved, they could simply overrule me. Ms. Fox was the one that read this out loud and did so while holding the jury instruction in her hand which would make it appear (whether intentional or not) that this was the exact law that she was being read."

Being misled by another juror (one of which being the foreperson) about the ability to overrule a fellow juror in a first-degree murder trial, is extreme to say the least. This cuts against

one of the most important constitutional rights a criminal defendant has, which is to be required to be found guilty beyond a reasonable doubt and by a unanimous verdict. "Tricking" another juror over to their side while they are already in a vulnerable state, through the use of the jury instructions is extreme misconduct. As the undersigned mentioned above, the context of this statement was very important. Ms. Esparza said that this statement was made after she had been standing strong in her position against the others for six hours, after she had shed many tears in frustration, after she had had her back rubbed by the foreperson in an effort to "calm her down", and after she had gotten into verbal arguments with other jurors. She was vulnerable at the time this "overrule you" statement was pushed on her. She felt defeated, drained and gave in when she felt that her vote didn't matter anyways. This was extreme intrinsic juror misconduct and should be treated as such, which results in a new trial for Harlan.

Stolen Car

For similar reasons mentioned above about the disregarding of the jury instructions, the stolen car reference would and should be considered extreme intrinsic juror misconduct. The State cites Echavarria in their opposition wherein a juror revealed to defense counsel in a post-trial interview that she only voted for the death penalty because she thought the verdict would be overturned on appeal due to juror misconduct. (State Opposition, P. 17) In addition to Echavarrria , the State cites the Riebel case and talks about a jury that considered punishment in their deliberations which lead to their verdict, was not enough for the Court at that time to rule for a mistrial. (State's Opposition, P. 18).

However, our scenario is much different than both of the above cases cited by the State because we are talking about an important piece of **inadmissible evidence** that was talked about during the deliberations. Inadmissible evidence that was 1) kept out for a reason- so as not to

prejudice Harlan and Caruso, but yet the State tries to diminish its importance to their case by yet again, as they did with the graffiti above, label it as not being material to the case. It is material to the case because the entire case was about whether this was or was not a robbery. It was uncontested that Harlan was driving the Mercedes Benz and the fact that it was declared stolen only goes to show your average, hypothetical juror that maybe Harlan was a thief. If he could steal this nice car then he could rob Minkler too. This is exactly the type of rationale that Ms. Esparza said in her affidavit was going on amongst some of the jurors during deliberations. Therefore, consideration of this inadmissible evidence during deliberations was extremely improper and prejudiced Harlan.

The Caruso Letter

Caruso's letter that was talked about in the deliberation room and directly impacted in one way or another the verdict is akin to the jury talking about the fact that the Defendant didn't testify in the case, which is improper. But the letter goes one step further than this because it would be considered unadmitted evidence. Talking about 1)unadmitted evidence and 2) the failure of the defendant to testify (albeit in another way) would also be considered extreme juror misconduct. This therefore gives rise to a **reasonable probability that the juror misconduct affected the verdict.** As such, the burden shifts to the State to prove beyond a reasonable doubt that no prejudice occurred. Bowman v. State, 387 P.3d 205.

B. EXRINSIC JUROR MISCONDUCT

It seems that the State and the Defense having differing definitions as to what evidence would be considered extrinsic vs that of intrinsic and the presumptions that lie with extrinsic evidence. Therefore, Webster and the following case law should help clear things up. Webster defines the word "Extrinsic" as: not forming part of or belonging to a thing; originating from or

on the outside. Webster's Dictionary (emphasis added). Intrinsic is defined as: belonging to the essential nature or constitution of a thing. Webster's Dictionary (emphasis added). In addition to jury tampering, certain federal circuit courts of appeal have concluded that **exposure to any extrinsic influence** establishes a reasonable likelihood that the information affected the verdict and **prejudice is assumed**. Meyers, supra at 455 (emphasis added); Citing U.S. v. Keating, 147 F.3d at 900-02 (prejudice is presumed in cases involving juror exposure to extrinsic evidence). See also U.S. v. Kelley, 140 F.3d at 608 (upon showing that extrinsic factual matter tainted jury deliberations, defendant enjoys rebuttable presumption of prejudice); Williams-Davis, 90 F.3d at 495-96 (discussing application of Remmer presumption of prejudice in juror misconduct cases).

Cell Phone

Jurors are prohibited from conducting an independent investigation and informing other jurors of the results of that investigation. Meyers, supra, at 460. Ms. Esparza used her cell phone to "investigate" what some of the graffitied words meant in the Cool Lilac house and informed other jurors of her results. The State says that these words and their meaning were not material to the case. We disagree, because the State specifically put witnesses up on the stand to talk about the spray paint: Who had it in their hand? Who was doing the spray painting? Who spray painted "Fuck Matt" on the door?... and so forth. They used those witnesses to tie Harlan to the spray painting in general. The spray painting, especially that of "Fuck Matt" is a fact that tends to show that maybe this incident wasn't just an accident, maybe it was planned. The State jumped all over this possibility and used it heavily in their arguments during trial. It could then lead a reasonable juror to conclude the following: if someone was writing "blood nigga," and "gangster killer," then that could also be the person who wrote "Fuck Matt," and the person who would write this maybe did plan to kill Minkler or rob him. Of course, these are all speculative conclusions the

undersigned is making because we haven't talked to all the other jurors. However, the point is that your average, hypothetical juror could have been affected by the extrinsic research Ms. Esparza did on her cell phone.

Additionally, it was reported by Ms. Esparza that another juror Hocker was also on her cell phone during on the breaks in deliberations. Yes, we don't know what she was doing on her phone and if it was anything that could have affected her verdict or that of the other jurors. The only way this information could be obtained is through the use of an evidentiary hearing, which will be talked about and requested below.

As stated above by the Meyers case as well as the multiple supporting Federal cases, "exposure to **any** extrinsic influence establishes a reasonable likelihood that the information affected the verdict and **prejudice is assumed**." Meyers, supra at 455 (emphasis added). Nevada takes a slightly different approach at this current time and adopts the position of the other circuit courts that examine the nature of the extrinsic influence in determining whether such influence is presumptively prejudicial. Id.

Non-Verbal Communication by Members of the Minkler Family

It is well settled first amendment case law that some non-verbal communication is considered speech. The reason is that communication doesn't have to be verbal in order to make an impact on another person. The intentional stares at Ms. Esparza and some of the other jurors by multiple members of the Minkler family were done, according to what Ms. Esparza felt, in an effort to entice them to rule in their favor. The Minkler family would be considered a third party to this case and **the non-verbal communication was an attempt by this third party to influence the jury process**. The only way we would know whether it happened to other jurors,

the impact it had and whether it influenced their decision in anyway is to have an evidentiary hearing.

C. JUROR MISCONDUCT DURING VOIR DIRE

Karen Rice's Failure to Disclose Prejudicial Information During Voir Dire

The State jumps all over the fact that the undersigned used the words "counsel's understanding," in talking about this allegation in Harlan's first motion. Yes, those words were used because as the undersigned mentioned, the transcripts of the trial have understandably not been completed yet, so there is no way to know for sure if anyone talked to Ms. Rice about whether she had any family members who were a victim of crime and how that may have impacted her. This fact can be moved beyond an "understanding" upon looking at the transcripts and/or through questioning of Ms. Rice at an evidentiary hearing. It will be at this point that Harlan will or will not be able to tie the facts to the rule outlined in Brioady V. State, 133 Nev. 285 (2017).

III. AN EVIDENTIARY HEARING IS WARRANTED.

In the alternative to a ruling on this motion, we ask the court for an evidentiary hearing. In Bowman, supra, at 206, the district court held a hearing and determined that the district attorney would have their investigator contact the jurors that conducted the independent experiments for a future evidentiary hearing regarding the prejudicial effect of their independent experiments. Also, in Maestas , supra, at 275, the district court conducted an evidentiary hearing when one of the jurors approached the defense counsel because she was having second thoughts about her verdict and wanted to help Maestas. Ten jurors....testified during the hearing, and an eleventh juror provided a voluntary statement but did not testify. Id. Allegations of juror misconduct implicate grave interests. U.S. v. Montes, 628 F.3d 1183 (9th Cir., 2011). The Supreme Court has stressed that the remedy for such allegations is a hearing at which "the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or

not it was prejudicial." Dutkel, 192 F.3d at 899 (internal quotation marks omitted). Upon an allegation of juror misconduct in this circuit, trial courts should ordinarily hold an evidentiary hearing at which the court hears admissible juror testimony and determines "the precise nature of the extraneous information." Bagnariol, 665 F.2d at 885.

CONCLUSION

We ask the court based upon all the facts and law provided, not only in this motion but also are previous motion, to grant Mr. Harlan a mistrial. Doing so would be prevent a great injustice to this young man who should have had a hung jury as opposed to being convicted improperly of a crime he did not commit. In the alternative, we ask for an evidentiary hearing on this matter.

DATED this 3 day of OCTOBER 2019.

RICHARD HARRIS LAW FIRM, LLP.

K. RYAN HELMICK, ESQ.
Nevada State Bar No. 12769
801 South Fourth Street
Las Vegas, Nevada 89101
Phone (702) 333-3333
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October 2019, I served a true and correct copy of the foregoing **RESONSE TO STATE'S OPPOSITION TO HARLAN'S SUPPLEMENTAL BRIEFING FOR MOTION FOR NEW TRIAL** addressed to the following counsel of record at the following address(es), as follows:

X E-MAIL on October 3 2019, by emailing the address below:

Giancarlo Pesci
CLARK COUNTY DISTRICT ATTORNEY'S OFFICE
200 E. Lewis Ave.
Las Vegas, NV 89155
giancarlo.pesci@clarkcountyda.com

An employee at RICHARD HARRIS LAW FIRM

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

KODY HARLAN, #5124517, aka Kody W. Harlan,

Defendant.

CASE NO. C-18-333318-2

DEPT. NO. III

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered pleas of not guilty to the crimes of MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165), ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380) and ACCESSORY TO MURDER WITH USE OF A DEADLY WEAPON (Category C Felony – NRS 195.030, 195.040, 200.010, 200.030) and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON, COUNT 2 – ROBBERY WITH USE OF A DEADLY WEAPON, and COUNT 3 – ACCESSORY TO MURDER WITH USE OF A DEADLY WEAPON, thereafter, on the 10th day of December, 2019, the Defendant was present in court for sentencing with his counsel, K. RYAN HELMICK, Esq., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said crimes as set forth in the jury's verdict and, in addition to the $25.00 Administrative Assessment Fee, $150.00 DNA Analysis fee, including testing to determine genetic markers, $250.00 Indigent Defense Civil Assessment Fee, $3.00 DNA Collection Fee, and a $250.00 Fine, the Defendant is SENTENCED as follows:

Jury Trial
☐ Dismissed (during trial)
☐ Acquittal
☐ Guilty Plea with Sent. (during trial)
☑ Conviction

COUNT 1 - LIFE in the Nevada Department of Corrections (NDC) with a minimum parole eligibility of TWENTY (20) YEARS; plus a CONSECUTIVE term of a MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS for the deadly weapon enhancement;

COUNT 2 – a MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department of Corrections (NDC); plus a CONSECUTIVE term of a MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS for the deadly weapon enhancement; CONCURRENT to Count 1;

COUNT 3 – a MINIMUM of EIGHTEEN (18) MONTHS and a MAXIMUM of SIXTY (60) MONTHS; CONCURRENT to Count 1; with FIVE HUNDRED FORTY-NINE (549) DAYS credit for time served.

DATED this 10th day of December, 2019.

DOUGLAS W. HERNDON
DISTRICT JUDGE

slr

K. RYAN HELMICK, ESQ.
Nevada State Bar No. 12769
RICHARD HARRIS LAW FIRM
801 South Fourth Street
Las Vegas, Nevada 89101
Phone (702) 333-3333
Fax (702) 444-4466

EIGHTH JUDICIAL DISTRICT COURT

FOR THE DISTRICT OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

KODY HARLAN,

Defendant.

Case No: C-18-333318-2

Dept: 3

NOTICE OF APPEAL

NOTICE is hereby given that Defendant, KODY HARLAN, hereby appeals to the Supreme Court of the State of Nevada from the verdict and procedure of July 29, 2019 through August 7, 2019. Additionally, Mr. Harlan appeals the District Court's denial of his Motion for a New Trial as well as the District Courts ruling on the limitations set upon the evidentiary hearing for the Motion for a New Trial, both hearings taking place on October 10, 2019 and on November 25, 2019. Lastly, Mr. Harlan appeals his sentencing that took place on December 10, 2019.

DATED this 23 day of December, 2019.

By: _____
K. RYAN HELMICK, ESQ.
Nevada State Bar No. 12769
RICHARD HARRIS LAW FIRM

801 South Fourth Street
Las Vegas, Nevada 89101
Phone (702) 333-3333
Fax (702) 444-4466

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of December 2019. I served a true and correct copy of the foregoing document entitled **NOTICE OF APPEAL** to those listed below by sending a copy via electronic mail and/or U.S. mail to and/or via hand delivery:

SUPREME COURT CLERK
Supreme Court Building
201 S. Carson Street
Carson City, Nevada 89701

CLARK COUNTY DISTRICT ATTORNEY
giancarlo.pesci@clarkcountyda.com
Sarah.Overly@clarkcountyda.com

By:

An employee of Richard Harris Law Firm

RICHARD HARRIS LAW FIRM
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Electronically Filed
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Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. JAIDEN CARUSO & KODY HARLAN, Defendants.	CASE NOS. C-18-333318-1 C-18-333318-2 DEPT. III

BEFORE THE HONORABLE DOUGLAS W. HERNDON,
DISTRICT COURT JUDGE

MONDAY, JULY 29, 2019

TRANSCRIPT OF PROCEEDINGS
JURY TRIAL - DAY 1

APPEARANCES:

For the State:	GIANCARLO PESCI, ESQ. SARAH E. OVERLY, ESQ. Chief Deputy District Attorneys
For the Defendant Jaiden Caruso:	MACE J. YAMPOLSKY, ESQ. JASON R. MARGOLIS, ESQ.
Kody Harlan:	RYAN K. HELMICK, ESQ.

RECORDED BY: JILL JACOBY, COURT RECORDER

TRANSCRIBED BY: MANGELSON TRANSCRIBING

Las Vegas, Nevada, Monday, July 29, 2019

[Trial began at 10:11 a.m.]

[Outside the presence of the prospective jury]

THE COURT: Okay. We'll be on the record in 333318. Mr. Harlan, Mr. Caruso, their Counsel are present, States' Counsel is present.

What do we have before we get our jurors up here?

MR. PESCI: So, Judge, Giancarlo Pesci on behalf of the State. I don't see the victim's family quite yet, so we don't have any family members in here yet. I'm not sure the individuals who are here, who they're with.

THE COURT: Okay. So who are all these folks?

UNKNOWN SPEAKER: We're all with Caruso, Your Honor.

MR. PESCI: Okay.

THE COURT: Okay. I thought we didn't have family members. That's what we just went through.

MR. YAMPOLSKY: We don't, Your Honor.

THE COURT: Okay. Well they just said they're with Mr. Caruso.

MR. HELMICK: Mace.

THE COURT: Mace?

MR. YAMPOLSKY: What?

THE COURT: They just said they're with Mr. Caruso.

MR. YAMPOLSKY: Oh. I asked him, he said no.

THE COURT: Okay. So I'll tell you what, I need you guys to step outside right now because I'm going to have to figure out where I'm going to put all my jurors, okay? So why don't you guys step outside.

MR. PESCI: And while that's happening, Your Honor, we're checking to see about the victim's family, to see if they're outside for that equation, figuring out seats.

UNKNOWN SPEAKER: Yeah, they told us to come on in.

MR. YAMPOLSKY: No, that's fine. It's just for seating purposes. You didn't do anything wrong.

UNKNOWN SPEAKER: Okay.

THE COURT: Okay. So let me think about the whole family thing for a second.

But what else do we have before we get started with our jury?

MR. PESCI: So there's a few other things, Judge. There's some fingerprint reports that I provided via e-mail on Friday.

THE COURT: Okay.

MR. PESCI: I asked Defense -- Counsel asked me about the pending reports a while back, so I asked the homicide detective. He indicated there were not any DNA or fingerprint reports. Come to find out, apparently there are fingerprint reports.

THE COURT: Okay.

MR. PESCI: So on Friday, those were sent to us and then we immediately sent them off to the Defense. Those -- there are

two reports that we received. What I'm told is that there's a third report; that one of the two that has been sent is kind of a precursor to the third.

The status is that the reviewers -- or the technical reviewers hadn't signed off on it, so they've been sitting there for a long time and not done, so I wanted to make a record of that. Obviously, we understand that that's late but we wanted to get that to them as soon as possible. So they have two of the three; we're hoping to get the third today.

THE COURT: Okay.

MR. PESCI: Secondarily, there is a witness in this case named Traceo, T-R-A-C-E-O, Meadows, common spelling last name, who is a juvenile, who has been charged in relation to these events; not in the murder itself, but for cleaning up or moving the body afterwards.

THE COURT: Okay.

MR. PESCI: But it was handled in the juvenile justice system. A negotiation was reached, as I understand it, with our Juvenile Division, to stay the charges associated with this case because Traceo has other juvenile charges. So there's an agreement to testify that is associated with that deal that was worked out.

When I met with the witness and his attorney, I think it was on Thursday, the attorney told me that -- because I did have a copy of the Agreement to Testify, so I wanted to get a copy of it.

And he said well that's actually under seal with the Juvenile Court and we have to petition the court to get any records from Juvenile Court.

THE COURT: Okay.

MR. PESCI: So the very next day, because that was late Thursday afternoon, we asked our Juvenile Division to do that and then later that day we got a copy of the Agreement to Testify and immediately sent it over to Defense Counsel, so they have a copy of that.

We obviously don't need to get into it now but at some point prior to that witness, I think we need to have a ruling by the Court as far as what can and cannot be gone into with that witness. The State's position is that clearly the fact that he's on probation and he has an Agreement to Testify, it is appropriate.

THE COURT: Okay.

MR. PESCI: But as far as his other juvenile history, it's technically not a conviction because they're adjudications, not convictions --

THE COURT: Okay.

MR. PESCI: -- and so I don't think it's appropriate under the statute but obviously we don't have to decide that now, but I wanted to put it on your radar.

THE COURT: Okay.

MR. PESCI: Lastly --

THE COURT: What was he on probation for?

MR. PESCI: I don't recall, I apologize. And in fact his attorneys did not remember offhand and he, the attorney, was going to need to go through his records.

MR. YAMPOLSKY: And who was the attorney?

MR. PESCI: JD Evans.

THE COURT: So was his probation some part of the negotiation to stay adjudication for his accessory charges and --

MR. PESCI: As I understand it, yes.

THE COURT: Okay.

MR. PESCI: His other charges, he pled on those; he got sentenced on those other charges.

THE COURT: Okay.

MR. PESCI: The accessory is stayed --

THE COURT: Okay.

MR. PESCI: -- kind of held in advance pending him pleading, so.

THE COURT: So it's kind of a global thing for some current things that he's on probation for and the staying of this, and an agreement to testify?

MR. PESCI: Correct.

THE COURT: Okay.

MR. PESCI: So I -- you know, State's position is I think it is appropriate that if he's on probation, that he has an agreement to testify, I just -- I honestly also don't know the particulars of his other cases, I only them tied to this case.

THE COURT: Okay.

MR. PESCI: So I don't have any records in that regard, and I don't think I can get them without a court order from juvie.

THE COURT: Okay.

MR. PESCI: Lastly, we announced already, we said 25 to 30 witnesses. We've tried to pare it down. In that regard we have Snapchat, a representative from Snapchat coming in from out of state. But we wanted to bring it up with Defense Counsel and see what their position is -- because we have the authentication paperwork, our intent is to utilize that as a business record.

But as far as people actually asking specifics about Snapchat, what they're telling us -- Snapchat, their Counsel in New York City is that they don't answer those questions.

THE COURT: Okay.

MR. PESCI: They don't get into specifics about well this is a reply to a chat that got sent. They can do very basics as far as when it was sent --

THE COURT: Okay.

MR. PESCI: -- but not that. So I -- we're trying to ask in essence what their position is as far as whether they're looking for a representative from Snapchat because our intent is to just introduce here is the Snapchat information as far as the account --

THE COURT: Okay.

MR. PESCI: -- and then they, Snapchat, already authenticated, which Defense Counsel has, business records that

these are the videos and photographs associated with this particular account.

THE COURT: Okay. All right.

Okay. So let's start with the fingerprint reports from the Defense standpoint.

MR. HELMICK: Yes. I mean, we received -- everything's accurate that Mr. Pesci said.

THE COURT: Okay. And I get that the first two were, I mean, just kind of vanilla in terms of what they have and then the third one is the one that's actually going to have some substantive information in it, which you understand to be inculpatory as to --

MR. PESCI: As to Mr. Caruso.

THE COURT: As to Mr. Caruso, okay.

MR. PESCI: So the information that I have, which is not a finalized report, which is why they won't give it to me. I haven't seen it.

THE COURT: Okay.

MR. PESCI: I literally don't have it because it's not finalized. Is that I believe they've said that there's a nozzle of a kitchen sink spray --

THE COURT: Okay.

MR. PESCI: -- that has Mr. Caruso's fingerprints on it.

THE COURT: Okay.

MR. PESCI: And I've indicated that, you know, we've got video already so, you know, to me it's nothing earth shattering,

right?

THE COURT: And you're not seeking to use anything about that fingerprint since you don't even have any reports yet.

MR. PESCI: Correct. I don't think I --

THE COURT: Okay.

MR. PESCI: -- can, but --

THE COURT: Okay.

MR. PESCI: -- they obviously have a right to know about it.

THE COURT: Sure.

MR. PESCI: And as soon as I get the finalized one, I'll get it to them. However, even though I'm not seeking to, we are going to object if there's some sort of argument made in the -- you know, contrary to those facts --

THE COURT: Okay.

MR. PESCI: -- that are established in those reports.

THE COURT: Okay.

MR. PESCI: And so --

THE COURT: All right.

MR. PESCI: -- as soon as I get them.

The other thing I was told is that the spray can -- because I know that Counsel is curious about the spray can, I believe it's inconclusive as far as fingerprints.

THE COURT: Spray like a paint can?

MR. PESCI: Yes, spray paint.

THE COURT: Okay.

MR. PESCI: But that's just them relaying to me over the phone without me seeing the report.

THE COURT: Okay. All right.

MR. PESCI: And now I've been updated there are seven people from Mr. Minkler's family. They've also indicated they're very willing to accommodate whatever the Court says to who can or cannot be in here.

THE COURT: Okay. Thank you.

MR. PESCI: Thank you.

THE COURT: All right. Ryan?

MR. HELMICK: In regard to the Snapchat stuff, I don't have any objection with what I -- with what Mr. Pesci appears to be proposing. I mean, I think --

THE COURT: Which is to introduce the documents --

MR. HELMICK: Right.

THE COURT: -- with the authentication papers without bringing in a witness from out of state.

MR. HELMICK: Yeah, I'm okay with that.

THE COURT: All right. Mr. Yampolsky.

MR. YAMPOLSKY: I don't have a problem with that either.

THE COURT: Okay. So --

MR. PESCI: Based on that then I'm going to tell the representative that they don't have to bring somebody out.

THE COURT: Okay. So the Snapchat information, the

documents, and authentication will be admitted without the need for the out of state witness.

And then as to Mr. Meadows, the juvenile, I would agree -- I mean, this is just my impression from what I'm hearing right now but I'll listen to whatever argument, if anybody needs time to think about it.

But I would agree that anything that was involved in his negotiation that involved this case and agreement to testify is appropriate for questioning on cross-examination. So if he had, you know, five juvenile charges and these were dismissed and he pled to this one and he got put on probation and he agrees to testify and the accessory gets stayed or whatever, all of that is open for inquiry.

If he has a prior juvenile record prior to that, I agree that yes, those aren't convictions because they're juvenile issues. And absent some showing of something really particular and special, that would not normally be admissible.

MR. YAMPOLSKY: Your Honor, just -- and I don't know what the convictions are; however, if they involve moral turpitude, I would ask to go into it.

THE COURT: Well that's what we were going to get to is somebody needs to ascertain that record and get it for me. Now maybe Mr. Evans has it, maybe not. Maybe you guys need to do an order to get that for me to look at *en camera*.

MR. PESCI: We'll try to do that.

THE COURT: Okay. All right.

Anything further from any of the parties before we get started?

MR. HELMICK: No, Your Honor.

MR. PESCI: Not from the State, Your Honor.

MR. YAMPOLSKY: No, Your Honor.

THE COURT: Okay. All right. So I think there are five people that had come in the courtroom for Mr. Caruso and you're saying you have seven potentially for --

MS. OVERLY: Yes, Your Honor, I believe one of them is an advocate out of Henderson as well, so they indicated that they were fine with switching out seats with only limiting it to two or four people, whatever the Court's pleasure.

THE COURT: Okay. Then probably what I'll go ahead and do is just limit it to four people on each side because I have to be able to, you know, balance the family's interest and having some family members here to watch, which I understand. And I don't think case law says -- I just have to open the courtroom to 30 supporters and therefore not be able to pick a jury. They have to -- I think even the Supreme Court would recognize in terms of allowing public access on parties to be balanced with the need to get my jurors in here.

So even though we were going to bring in 65, which takes up the whole courtroom, we'll go back to what we were saying earlier now. So we're going to bring in 54, and we'll leave each of

the back rows for family members. So if you guys will switch over to that side.

MR. YAMPOLSKY: Your --

THE COURT: Yeah, go ahead.

MR. YAMPOLSKY: You'd previously said 57.

THE COURT: Yeah, because I was thinking we would have more room. But now that I'm going to need to get eight family members in here, I need to kind of back it back down to 54.

So it'll be 24 over here and then the first two rows behind the prosecution table is about 16, so that's 40. And then the first two rows over here is 14, so that'll be 54. And then the back row on my right will be family members for Mr. Minkler. Back row on the left will be Mr. Caruso's family members.

MR. PESCI: Judge, can I make a suggestion.

THE COURT: Okay.

MR. PESCI: Would it be okay with Your Honor, if for both sides the four seats are rotatable --

THE COURT: Sure.

MR. PESCI: -- within the families.

THE COURT: Yeah.

MR. PESCI: So that way -- their families are going to be told everybody can be in here, just not at the same, so that no one later on can even argue that anybody was --

THE COURT: Actually --

MR. PESCI: -- excluded.

THE COURT: -- we can do this. I mean, I got enough seats now. So all five of Mr. Caruso's can sit in the very back row. And it looks like we should have seven that can sit over here if they went to on that side as well.

What I need you to make sure you do, if you would, on -- Mr. Yampolsky and Mr. Pesci and then I'll ask the marshal as well, to let them know there's going to be jurors sitting right in front of them. And if I get any inkling that anybody's conversing loudly or saying things and causing a problem, then not only are they going to be kicked out for trial but they're going to be looking at sanctions from the Court, okay?

MR. PESCI: We've spoken to them and we will again, with your permission, please?

THE COURT: Okay.

MR. PESCI: And then can I tell that seven, in case some more comes that they got to rotate through that seven?

THE COURT: Yeah, yeah.

MR. PESCI: Perfect.

THE COURT: We'll leave those seven seats and those 1, 2, 3, 4, 5, 6, 7 over here, so people can come -- I mean, if some of them want to leave and some others want to take their place, that's fine, I just got seven and seven.

MR. PESCI: And then if someone comes for Mr. Harlan, we can work with those seats as well, Your Honor.

THE COURT: Yeah.

MR. PESCI: Okay. Thank you.

THE COURT: Okay. All right.

MR. PESCI: Is it okay if we go talk to them?

THE COURT: Yeah, please.

And then you go ahead and go get our jurors.

THE MARSHAL: Yes, Your Honor.

THE COURT: 54. Thank you.

[Pause in Proceedings]

[Bench conference transcribed as follows.]

THE COURT: So are they pursuing penalty phase or waiving penalty phase?

MR. YAMPOLSKY: No, we're going to waive -- we're going to have you do it.

THE COURT: Okay. Have you guys --

MR. HELMICK: Waive.

THE COURT: -- signed off on the forms or anything.

MR. YAMPOLSKY: I may have --

MR. HELMICK: No, we have not, but he might have a copy, Giancarlo.

MR. YAMPOLSKY: Yeah.

THE COURT: Okay.

MR. YAMPOLSKY: But we talked -- I mean, I got an e-mail over the weekend and said I thought I told you but yeah, I talked to my guy --

THE COURT: Okay.

MR. YAMPOLSKY: -- and we're fine about that.

MR. HELMICK: We just got to sign it and give it to you.

THE COURT: Yeah. I'll see -- I may have the form but if not, I'm sure he does --

MR. HELMICK: Okay.

THE COURT: So I'll get it. I just wanted to make sure I wasn't talking to the jury about it.

[End of bench conference.]

[Pause in proceedings]

THE COURT: Okay. So while we're waiting for our jurors to get up here, we will be back on the record. I do have now a signed stipulation order that has been signed off on by Mr. Yampolsky, Mr. Helmick, and Mr. Pesci, as well as Mr. Caruso, and Mr. Harlan, is that correct?

MR. PESCI: Yes, Your Honor.

MR. HELMICK: Yes, Your Honor.

MR. YAMPOLSKY: Yes, Your Honor.

THE COURT: Okay. And I know this has been in discussion for some time before just this morning, but the order is being filed this morning. But my understanding, gentlemen, is that you've all had a conversation with your attorneys about your right to proceed to a penalty phase, should you be convicted of first-degree murder, versus having the Court sit in judgment of the penalty instead of the jury, is that correct, Mr. Harlan?

DEFENDANT HARLAN: Yes, Your Honor.

THE COURT: And Mr. Caruso?

DEFENDANT CARUSO: Yes, Your Honor.

THE COURT: And do you feel like you've had ample opportunity to have those discussions with your attorney so that you understand the wisdom of those two options, Mr. Harlan?

DEFENDANT HARLAN: Yes, Your Honor.

THE COURT: Mr. Caruso?

DEFENDANT CARUSO: Yes, Your Honor.

THE COURT: And is it correct that you've signed off on this document waiving your right to the penalty phase hearing and instead having the Court sit in judgment, should you be convicted of first-degree murder, Mr. Harlan?

DEFENDANT HARLAN: Yes, Your Honor.

THE COURT: Mr. Caruso?

DEFENDANT CARUSO: Correct.

THE COURT: Okay. And you understand that, at least pursuant to the stipulation and order that I have, that it just lists that should you be convicted of first-degree murder, you're agreeing to waive the penalty hearing before the jury and instead have the Court sit in judgment of your sentence. There is no guarantee as to what that sentence will be, you understand that?

DEFENDANT HARLAN: Yes, Your Honor.

DEFENDANT CARUSO: Yes.

THE COURT: Okay. All right. We will go ahead and have that filed with the Court this morning.

MR. PESCI: And Judge, I've e-mailed Mr. Evans, Mr. Meadow's attorney and Ravi Bawa from our Juvie Department, trying to figure out how we can get the records for an *en camera* review.

THE COURT: Yeah, I honestly don't know the answer to that because I've never had to deal with that before.

MR. PESCI: Me neither, but I'm trying.

MR. HELMICK: Well I just did that least week and -- or two weeks with Leavitt for a trial and I literally just did what Your Honor said. I talked to the -- I called the Judge's JEA --

THE COURT: Okay.

MR. HELMICK: -- and I sent over --

THE COURT:

MR. HELMICK: I asked him to release the order *en camera* for *en camera* review and they did it within hours.

THE COURT: Okay.

MR. HELMICK: Yeah.

THE COURT: So why don't you just have your JEA -- or your secretary do that as well. Go ahead and prepare an order and we'll see if that works.

MR. PESCI: All right.

THE COURT: That just says that you're asking for the juvenile record of such and such to be released to the Court for *en camera* review, that he's going to be a witness in a trial and that part of his juvenile record is subject to testimony in the trial.

MR. PESCI: Working on it now.

[Pause in proceedings]

[In the presence of the prospective jury]

THE MARSHAL: Jurors are present.

THE COURT: Okay. So hold on, what'd you just do there? Officer?

THE MARSHAL: Yes, sir?

THE COURT: Who just ended up at the very end, seated over here on the right?

THE MARSHAL: I'm sorry, a miscalculation on my part. Those are the last two on the list.

THE COURT: Okay. Then I got to have you get everybody -- there's a reason we have to have them all in that order, so we know where everybody is in our kind of tracking, so --

THE MARSHAL: Yes, sir.

THE COURT: -- you're going to have to figure it out.

THE MARSHAL: Certainly.

THE COURT: So the 32nd juror at the end of that row should be Ms. Kim, Badge Number 503.

THE MARSHAL: It's corrected, sir.

THE COURT: Okay. Thank you.

All right. Good morning, Ladies and Gentlemen, how are you doing?

THE PROSPECTIVE JURORS: [Various responses].

THE COURT: Everybody's excited to be here for jury duty,