No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

TRACEY L. BROWN,

Petitioner-Appellant,
v.

ATTORNEY GENERAL FOR THE STATE OF NEVADA; RONALD OLIVER,

Respondents-Appellees.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit Panel err in a federal habeas case where, following an *ex parte* contact during trial between multiple jurors and a key prosecution cooperating witness and her non-testifying friend one business day before the jury began deliberations, the friend vouched for the truthfulness of the cooperating prosecution witness and urged them to concentrate on certain prosecution evidence over other evidence, the Ninth Circuit Panel required the *defendant* to *prove prejudice* sufficient to grant a mistrial, rather than observing the *presumption of prejudice* and placing the burden on the *prosecution* to *rebut* that presumption and prove *lack of prejudice*, as required by the clearly established Supreme Court precedents of *Remmer v. United States,* 347 U.S. 227 (1954), *Mattox v. United States,* 146 U.S. 140 (1892), *Parker v. Gladden,* 385 U.S. 363 (1966) and their progeny*?*

2. Did the Ninth Circuit Panel err when it ruled in a federal habeas case that the Nevada Supreme Court's decision in *Meyer v. State,* 119 Nev. 554 (2003), which created the state court rule described above that eliminated the presumption of prejudice and shifted the burden of proof from the prosecution to the defense contrary to this Court's clearly established precedents, and which was used by the state court below to uphold the denial of two motions for a new trial, did not violate this Court's precedents in *Remmer I, supra, Mattox, supra, Parker, supra* and their progeny?

3. Are the issues set forth above important questions of federal law that have not been, but should be, settled by this Court?

TABLE OF CONTENTS

/ / /

TABLE OF AUTHORITIES

Cases **Page**

United States Constitution

Statutes and Rules

Other Authorities

I. PRAYER FOR RELIEF

Mr. Tracey L. Brown respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its published opinion denying his appeal of a district court decision denying his habeas corpus petition. The basis of this petition is that the Ninth Circuit's opinion is

(1) Contrary to the Due Process clause of the Fifth and Fourteenth Amendments to the United States Constitution and in conflict with the clearly established Supreme Court precedents of *Remmer v. United States,* 347 U.S. 227 (1954), *Mattox v. United States,* 146 U.S. 140 (1892), *Parker v. Gladden,* 385 U.S. 363 (1966) and their progeny by denying Mr. Brown the presumption of prejudice from his jury's *ex parte* contact with third parties (a prosecution witness and her friend) who made a deliberate attempt to influence the jury and placed the burden on the *defendant* to prove prejudice therefrom.

(2) Contrary to the same clearly established Supreme Court precedents cited above by holding that the Nevada Supreme Court's decision in *Meyer v. State,* which eliminated the presumption of prejudice and placed the burden of proving prejudice in virtually all cases of *ex parte* contacts between jurors and third parties on the *defendant.*

(3) In the alternative, by the decisions cited above, the state and federal courts below have decided an important question of federal law that has not been, but should be, settled by this Court.

II. OPINION BELOW

A three-judge panel of the two-judge panel of the Ninth Circuit issued a published opinion denying Mr. Brown's appeal of the district court's denial of his habeas corpus petition challenging his conviction and sentence for various robberies. *Brown v. Attorney General for the State of Nevada; Ronald Oliver,* No. 23-15594 (9th Cir. June 12, 2025), *Appendix B*. The Ninth Circuit subsequently denied Mr. Brown's petition for panel rehearing and rehearing en banc thus denying both petitions, in an Order that was final and unpublished. *Brown v. Attorney General for the State of Nevada; Ronald Oliver,* No. 23-15594 (9th Cir. December 12, 2025), *Appendix A.*

III. JURISDICTION

On June 12, 2025 A three-judge panel of the two-judge panel of the Ninth Circuit issued a published opinion denying Mr. Brown's appeal of the district court's denial of his habeas corpus petition challenging his conviction and sentence for various robberies. *Brown v. Attorney General for the State of Nevada; Ronald Oliver,* No. 23-15594 (9th Cir. June 12, 2025), *Appendix B*. This is the final judgment for which certiorari is sought. The Ninth Circuit subsequently denied Mr. Brown's petition for panel rehearing and rehearing en banc, in an Order that was final and unpublished, thus extending the time for filing this petition for writ of certiorari. *Brown v. Attorney General for the State of Nevada; Ronald Oliver,* No. 23-15594 (9th Cir. December

12, 2025), *Appendix A.*

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime… nor be deprived of life, liberty, or property, without due process of law….

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,…;to be confronted with the witnesses against him;….and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V. STATEMENT OF THE CASE

A. Jurisdiction of Courts of First Instance

The district court had jurisdiction pursuant to 28 U.S.C. § 2254. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

B. Facts Material to the Questions Presented

This is an appeal from the denial of a federal habeas petition. Mr. Tracey

Brown is serving multiple life sentences for the offenses described below.

Mr. Tracey Brown was convicted in Nevada state court of seven armed robberies of convenience stores, three with the assistance of co-defendant Taesha Gallon, who testified against him as the State's last witness under a cooperation agreement. Although the robberies all had surveillance videos, in all of them the bottom half of the robber's face was concealed by his shirt pulled up to below his eyes. Of the State's victim witnesses, three could not identify Mr. Brown as the robber in either photo lineups or at trial. Two more previously identified Mr. Brown as their robber in a photo lineup but could not identify him in court as he sat at the defense table. One more was unable to decide which of two photos in the photo lineup was the robber and could not identify Mr. Brown in court either. And while two witnesses identified Mr. Brown as their robber in court, one of them picked someone *other* than Mr. Brown in the photo lineup. Only one witness to one robbery other than co-defendant Gallon identified Mr. Brown as the masked robber of her store in both the photo lineup and in court.

Thus, before the final witness—Gallon—testified, *the State had zero witnesses who were able to identify Mr. Brown either in court or in the photo lineup in three robberies, and for two more of the seven, the victims could not identify him as the robber as he sat at the defense table*. And there was no physical evidence pointing to Mr. Brown (fingerprints, DNA, etc.). The surveillance videos of two of the seven robberies did show brief views of the robber's face as the shirt covering the lower half of his face slipped. Even if Gallon's testimony were believed by the

jury, that still left some of the seven robberies without any identification of Mr. Brown either by victim eyewitnesses or by Gallon.

Gallon only testified about the three robberies that she participated in herself and identified him as the masked robber in those. She testified against Mr. Brown, who was also her boyfriend at the time of the robberies and had allegedly cheated on her, in exchange for possible probation and greatly reduced charges (for which she had not yet been sentenced and could still be recharged for the much greater offenses if she did not live up to her plea agreement). She testified extremely reluctantly after being threatened by the prosecutor in the hearing of the entire courtroom if she did not. Her testimony was evasive, uncooperative, combative, vague and inconsistent about both various facts and her own guilt, and she claimed she couldn't remember important things. She even denied that she hoped to avoid prison in exchange for her testimony until she was shown her written plea deal on cross-examination which said just that.

Gallon was the final witness to testify in the trial.

Immediately after Gallon's testimony the court adjourned for the weekend, with the court giving the jury its usual and repeated instructions not to discuss the case or anything relating to it with each other or with anyone else or to listen to any person or subject matter relating to the case. Upon leaving the courtroom, up to eight jurors were in a 6-by-7-foot elevator when the door opened on Gallon and an unknown associate. The associate said, "oh that's the jury" and "yanked" Gallon into the elevator saying "oh it doesn't matter. We're not talking to them. We're just

talking to ourselves." One juror said it was okay for them to come in.

The following Monday, the bailiff reported to the court, and the trial court quoted in its ruling, that the first juror to report the incident said:

> "All *you guys [the jurors]* have to do is look at the video, and you'll see who it is. And then she turned to talk to Ms. Gallon, still rather loudly saying, It's okay. You told the truth. That's all you had to do. That's all anybody expected of you. You told the truth. So you did what you were supposed to do."[1]

(emphasis added). As quoted in the district court's report, the friend was talking *directly to the jurors*.

Although all eight jurors had a duty to report what happened to the trial court per its repeated instructions, only two of the eight jurors actually did so.

The trial court then called each of the jurors in to testify about the incident. The witness, Gallon, and her associate, who were known to and available to be called by the prosecution, were *not* called to testify. The jurors' relevant testimony is summarized as follows.

Juror No. 2 testified that the associate recognized that the elevator was full of jurors when the door opened, and after entering the elevator the associate said:

> "all they have to do is watch the videotape, and they'll know who did it. You told the truth, and that's all that matters, and we're not talking to them. We are taking amongst each other."

When she got out of the elevator, Juror No. 2 said to one of the other jurors, "Oh, my God, what do we do now?" This juror reported what happened to the bailiff who reported it to the Judge.

[1]Versions testified to by jurors varied slightly.

Juror No. 4 testified that when the elevator door opened, the witness herself said "oh, that's the jury," and her friend said "oh, it doesn't matter, we're not talking to them, we're just talking to ourselves, and *yanks* her here in the elevator, and it closes the third floor." (emphasis added) While the elevator descended, Juror No. 4 testified that the friend said:

> "[Y]ou should just *tell them* [the jurors surrounding them] to look at the tapes, just look at the tapes. That says everything."

(emphasis added). Juror No. 4 also testified that "everyone [of the jurors] discussed it [the incident in the elevator] out there," and that they asked "are we okay? Is it okay? Should we report it?"[2] She noted that another juror had a shocked look on his face. This juror also reported the incident to the trial Judge, but only after Juror No. 2 had already done so, and only after all the jurors had been called into court to testify about it.

Juror No. 13 testified that the associate talked about the case, and about "why she [the witness] said what she said," and added that she was talking loudly enough for everyone in the elevator to hear her and "it seemed like it was done purposely." He didn't recall the specifics of what she said however. He thought it was a weird situation. He may have heard another juror say, "what do we do now."

Other jurors also noted that impact on the jurors in the elevator. Juror No. 3 "had a shocked look on his face." Juror No. 9 said the jurors as a whole were shocked.

[2] Again, all eight of the relevant jurors had an independent duty to report the incident to the Judge, as per his repeated instructions to them.

Some of the other jurors either did not recall the incident or only recalled the two women discussing the witness' hair or hat.

All of the jurors that the incident would not affect their verdict.

The intent of the speaker to influence the jury was clear, and the trial judge agreed with that assessment on the record. *Appendix E.* In essence, the associate vouched for the veracity of the State's highly inconsistent, reluctant, cooperating witness, who testified against her allegedly cheating co-defendant boyfriend in exchange for dropped charges and possible probation on charges on which she was not yet sentenced, where the identity of the robber was the central issue and hinged in large part on her testimony, and focused the juror's attention on the surveillance videos, which were just one piece of evidence among many—and diverted their attention away from the lack of eyewitness identification by robbery victims in most of the robberies, the lack of physical evidence, the conflicting identifications in photo lineups, etc.

Defense counsel asked for a mistrial due to jury misconduct and the fact that the *ex parte* contact in the elevator would influence and prejudice the jury, as well as the fact that the defense could not cross-examine Gallon and her unknown associate (although the prosecution could have called them to testify at the hearing but chose not to do so). He cited law that extrinsic influence such as direct third-party communication with a sitting jury was by its nature prejudicial. Counsel also argued that some jurors might not have remembered the whole matter when questioned but, having had it brought to their attention by being questioned by the

court, might remember more later. The trial Judge noted ***that "the standard is a new trial must be granted unless it appears beyond a reasonable doubt that no prejudice has resulted."*** *Appendix F* (emphasis added). The trial Judge expressly found both that there was a "***deliberate attempt to influence the jury,***" *Appendix E,* and that ***there was jury misconduct***. (emphasis added). Under federal habeas law, these findings are presumed to be correct. 28 U.S.C. § 2254(e)(1).

The prosecutor initially argued that the matter was not prejudicial, but later ***conceded*** the opposite:

> What occurred in the elevator, ***with the exception of Juror No. 2, was not the type that would rise to the level of prejudice that would, I believe, give this Court any doubt that the verdict that the jury renders will be reliable. I do believe that based upon the statements by Juror No. 2, the first juror who came to talk with us, it would be wise to remove her from the jury.*** (emphasis added)

The trial judge appeared to accept the prosecution's first argument that there was not sufficient prejudice based mostly on all the jurors being questioned and saying that it would not impact their verdict.

Defense counsel argued that at a minimum three of the jurors (Nos. 2, 4 and 13) should be dismissed based on the comments made by Gallon's associate. The trial judge responded that she would only allow *two* jurors to be dismissed because there were only two alternates, saying:

> Now, ***with respect to Juror No. 2***, Ms. Beltran, who remember[s] things differently from the other jurors, I would give the defense the option of making her an alternative and calling Ms. Diaz-Ortiz, the first alternate, to take her place…..
>
> I think that ***with the other jurorS… [NOTE: PLURAL]. I just don't think that—I can say I think beyond a reasonable doubt that that's not—is not prejudicial.*** (emphasis added)

The trial judge did, however, offer to dismiss ***any two*** of the three jurors requested by the defense—*specifically offering to dismiss Juror 13*.

Thus, the prosecutor thought that Juror 2 was prejudiced and would have affected the outcome of the case. And the trial court implicitly, by singling out Juror 2 and explicitly offering to remove her from the jury, thought so too.

The trial judge denied the motion for mistrial, based on all the jurors saying that the incident would not impact their verdict, and later saying that the jury could have convicted Mr. Brown without Gallon's testimony.

Faced with the Morton's Fork of dismissing some but not all of the three jurors that he thought were tainted and should be dismissed or keeping all of them—two equally bad options--defense counsel said that "if those are the only options," we'll keep all three.

Thus, at a minimum, because of the impossible choice given to defense counsel, Juror No. 2 *actually remained on the jury that convicted Mr. Brown on all counts*. Even one tainted juror deprives a defendant of due process. *Parker v. Gladden,* 87 S. Ct. 468, 470-471 (1966) ("The State suggests that no prejudice was shown that no harm could have resulted because 10 members of the jury testified that they had not heard the bailiff's statements and that Oregon law permits a verdict of guilty by 10 affirmative votes…. Finally, *one* of the jurors testified that she was prejudiced by the statements…. In any event, petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors.") (emphasis added, citation omitted);*Dyer v. Calderon,* 151 F.3d 970, 973 (9th Cir. 1998 (en banc), *cert.*

denied, 525 U.S. 1033 (1998). Or as the Ninth Circuit put it in *Mach v. Stewart,* 137 F.3d 630, 633 (9th Cir. 1997), "[e]ven if only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury") (citing cases). *See also Turner v. Louisiana,* 379 U.S. 466, 472 (1965).

At the end of the trial, defense counsel filed a written motion for a new trial, raising the same issue. The trial court again denied the motion.

The Relevant Subsequent History of This Case

Both parties and all the courts below agreed that juror misconduct had occurred. The trial Judge ruled that the proper standard was that a "mistrial must be granted unless it appeared beyond a reasonable doubt that no prejudice had resulted" from what the trial Judge found was the witness's friend's "deliberate attempt to influence the jury." However, the trial Judge denied the oral and later written motions for a mistrial because it found no prejudice due to (1) all the jurors saying they were not influenced, and (2) the Judge believed that the jury could have convicted Mr. Brown without the incident.

On direct appeal the Nevada Supreme Court simply stated that "[t]o obtain a new trial for juror misconduct, [Mr.] Brown had to show that juror misconduct occurred and that the misconduct was prejudicial" citing *Meyer v. State,* 118 Nev. 554, 563-64, 80 P.3d 447, 453, 455 (2003). *Appendix D* (emphasis added). *Meyer* is the Nevada Supreme Court's own test for juror misconduct in the case of *ex parte* contacts, which has no presumption of prejudice and places the burden on the *defendant* to prove prejudice. It held that the defendant here had not proved

sufficient prejudice to establish that the trial court abused its discretion in denying a new trial.

Mr. Brown then filed a federal habeas petition in district court. The district court ruled that the Nevada Supreme Court's test to evaluate juror misconduct in *Meyer v. State* was not contrary to, or involved an unreasonable application of, clearly established federal law, citing *Von Tobel v. Beneditti,* 975 F.3d 849, 851-856 (9th Cir. 2020), which held essentially that this Court's jurisprudence was not sufficiently precise to require the presumption of prejudice and preclude reversing the burden of proof from the prosecution to the defendant—a conclusion with which Petitioner strongly disagrees.

This appeal followed.

VI. REASONS SUPPORTING ALLOWANCE OF THE WRIT

A. Overview

Longstanding and clearly established Supreme Court precedent holds that "***any*** private communication, contact, ***or*** tampering, directly or indirectly, with a juror during trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial," and "the burden rests heavily upon the Government to establish…that such contact with the juror was harmless." In this case, this Court's command was violated by both the Nevada Supreme Court and the Ninth Circuit Panel (hereafter "the Panel") in its published Opinion.

First, in 2003, the Nevada Supreme Court established its own test for dealing with juror misconduct relating to such improper *ex parte* contacts, which eschewed

any presumptions and placed the burden on the *defendant* to prove prejudice to obtain a mistrial. The court gave no reason for why its test was the *opposite* of this Court's precedents. On direct appeal in this case, the state court applied that test.

Second, the Ninth Circuit Panel held that the Nevada court's test did not violate established Supreme Court precedent—which was error. The Panel also created a *new* test for evaluating juror misconduct resulting from improper *ex parte* contacts. That new test, a hybrid between this Court's precedents described above and ordinary harmless error analysis, is not employed by any other Circuit. It seeks to divide juror misconduct into three categories, with the category determining whether this Court's precedents will or will not be followed—something this Court never mentioned or condoned. The categories are:

1. "Prosaic" errors which are so insignificant as to be deemed harmless on their face. The Panel gave as an example witnesses and jurors passing in the hall.

2. "Egregious" errors to which this Court's presumption of prejudice and the prosecutorial burden of proof *will* be applied. The use of such categories to decide whether or not to obey the Supreme Court is novel, as is the Panel's decision of what to label "egregious." The Panel defined "egregious" errors as those "which infect the entire trial process" and defy harmless-error analysis. It included errors such as the denial of counsel and judges who are not impartial—which this Court has ruled are *structural* defects requiring *automatic* reversal of the conviction. Yet, by placing them in its "egregious" category, the Panel gives such structural defects the benefit of a mere rebuttable presumption of prejudice. This too was error.

Moreover, the Panel included *jury tampering* in this category.

3. The Panel's third category was "trial errors," a well-established category that encompasses the vast majority or errors considered by appellate courts. The Panel states that *all* trial errors are subject to standard harmless error analysis without any presumptions and the burden of proof is on the defendant—a sweeping new exception to this Court's precedents. The Panel's third error was defining "jury tampering" as "an effort to influence the jury's verdict by threatening or offering inducements," and thus placed what happened in this case in this category, without the protection of this Court's precedents. Moreover, by defining jury tampering in this way, the Panel's new test has the effect of virtually eliminating the application of this Court's holdings in the vast majority or juror misconduct cases involving *ex parte* contacts between jurors and third parties.

The Panel's new three-part test and the Nevada court's test both violate this Court's clearly established precedents. And the Panel's new three-category test creates splits of authority both within the Ninth Circuit and between the Circuits. These are important questions of federal law that either have already been settled by this Court contrary to the Panel's decision, or that *only* this Court can settle.

B. The Ninth Circuit Panel Erred By Requiring The *Defendant* To Prove Prejudice Sufficient To Grant A Mistrial, Rather Than Observing The *Presumption of Prejudice* And Placing The Burden On The P*rosecution* To Rebut That Presumption And Prove *Lack Of Prejudice*, As Required By The Clearly Established Supreme Court Precedents Of *Remmer v. United States,* 347 U.S. 227 (1954), *Mattox v. United States,* 146 U.S. 140 (1892), *Parker v. Gladden,* 385 U.S. 363 (1966) And Their Progeny.

The Supreme Court's Clearly Established Precedents

In *Remmer v. United States,* 347 U.S. 227 (1955) (*Remmer I*), during trial an unnamed person told a juror, who later became the foreperson, that he could profit by bringing in a verdict favorable to the petitioner. The juror reported the incident to the Judge, who informed the prosecutors and the FBI. The FBI did an investigation and determined that the remark was made in jest, and nothing further was done. The defendant was convicted, and the defense learned of the incident only after trial by reading about it in the newspaper. The defense then sought a new trial on that basis. The trial court denied the motion.

This Court held that "[i]n a criminal case, ***any*** *private communication, contact*, ***or*** *tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is…presumptively prejudicial*…." *Id.* at 229 (emphasis added). While the presumption is not conclusive, the "burden rests heavily upon the Government" to establish that the contact was harmless to the defendant. *Id.* This Court cited *Mattox v. United States,* 146 U.S. 140 (1892) and *Wheaton v. United States,* 133 F.2d 522, 527 (8th Cir. 1943) in support.

In *Mattox,* during jury deliberations the bailiff made remarks about the defendant having killed other people before and how he would be tried again, and an unnamed person read a newspaper article about the case to the jurors in the jury room. This Court found those communications to the jury to be ***jury tampering,*** reversed the judgment and remanded the case for a new trial. *Mattox,* at 142-144.

In doing so, this Court held that

> separation of the jury in such a way as to expose them to *tampering* may be reason for a new trial, *variously held as absolute, or prima*

> *facie, and* ***subject to rebuttal by the prosecution***; or contingent on proof indicating that a tampering really took place…. Private communications, possibly prejudicial, *between jurors and third persons*, *or witnesses*, or the officer in charge, *are absolutely forbidden, and invalidate the verdict, at least* ***unless their harmlessness is made to appear.***"

Id. at 149-150 (emphasis added).

Notably, in *Mattox,* this Court made the distinction between juror affidavits concerning *facts* about improper contacts which were admissible, and whether those facts *influenced* their verdict, which were inadmissible. In the case at bar, the trial court and appellate courts based their decisions largely on the jurors' statements that the improper incident in the elevator would not influence their verdicts.

The *Mattox* and *Remmer I* rule was reaffirmed by the Supreme Court in *Parker v. Gladden*, 385 U.S. 363, 365 (1966). There, the Supreme Court granted habeas relief and a new trial even though *ten* members of the jury testified that they had not heard the prejudicial remarks by the bailiff, declaring that all "the evidence against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of right of confrontation, cross-examination and counsel." *Id.* at 364. In *Parker*, this Court found that the bailiff's expressions were "private talk." *Id.* And this Court also found that "the unauthorized conduct of the bailiff 'involves such a probability that prejudice will result that it is deemed inherently lacking in due process.'" *Id.* at 365.

These Supreme Court precedents are clearly established and have never been overruled. They were the focus of the briefing by the parties below, with the State arguing that there is a *circuit split* regarding when prejudice is to be *automatically*

presumed—something which this Court may be concerned with—and Petitioner arguing to the contrary. To the extent that various circuits have toyed with the *Remmer* approach—and "circuit precedent does not constitute 'clearly established Federal law as determined by the Supreme Court,'" nor can the Circuits "refine or sharpen" Supreme Court jurisprudence, *Parker v. Matthews,* 567 U.S. 37, 48 (2012), *Lopez v. Smith,* 574 U.S. 1, 4 (2014)--the differences are generally irrelevant to the case at bar.[3]

This Court has referred to its *Remmer* line of precedents in at least two other cases. In *Smith v. Phillips,* 455 U.S. 209 (1982), a juror applied by mail to be an investigator with the district attorney's office during trial. *Id.* at 212 & n. 3. Neither the prosecutor nor anyone else contacted the juror about that or anything else related to the trial. This Court held that "the remedy for allegations of juror partiality is a hearing in which the *defendant* has the opportunity to prove actual bias." *Id.* at 215 (emphasis added). This Court then cited to *Remmer* for the proposition that a hearing on the bias issue was required. *Id.* This Court then

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[3] For example, the Ninth Circuit in *Godoy v. Spearman,* 861 F.3d 956 (9th Cir. 2017) (en banc) says that an initial step not referenced in this Court's precedents requires a defendant to show a "tendency" or "credible risk" of prejudice to invoke the presumption of prejudice and place the heavy burden to prove lack of prejudice on the prosecution, adding that the defendant's burden at this initial step constitutes a "low threshold" and "is not onerous," and the presumption can arise "even when we do not know what actually transpired, or whether the incidents that may have occurred were harmful or harmless." *Id. Godoy,* at 966-968 (citing *Remmer I, Mattox, Parker* and other cases). That simple first step was more than met in the case at bar as a juror reported the contact which nobody disputed, and the trial court ruled that it involved a "deliberate attempt to influence the jury."

discussed other cases involving *implied* juror bias. *Id.* at 215-216. In the end, it held that because such hearings on juror partiality were required and essential in federal court, they must be sufficient in state court on habeas review. *Id.* at 218.

Below, the State argued that *Smith* essentially overruled the *Remmer/Mattox* rule that *any ex parte* contact about the case on trial was presumptively prejudicial with the burden of proving lack of prejudice on the prosecution, and that this Court really intended the presumptions and burdens of proof to depend on the specific facts of each case. But that is not true. If this Court had intended such a result, it would have said so.

Rather, the difference between the result in *Smith* and the *Remmer/Mattox* line of cases is due to the fact that courts have uniformly distinguished between different types of juror misconduct. One is where the juror fails to follow court admonitions not to discuss the case before deliberations, accesses media reports, conducts independent research or investigation, has discussions with non-jurors, bases his doubts on evidence not admitted, discusses sentencing or the defendant's failure to testify, decides on the basis of bias or prejudice, lied during voir dire, or has incompetence issues like intoxication. The second involves attempts to influence the jury's decision through improper contacts with jurors, or threats, or bribery. *See, e.g., Meyer* at 561; *United States v. Dermen,* 143 F.4th 1148, 1172 (10th Cir. 2025) (describing the types as involving juror bias versus improper juror contacts). Different evidence is admissible in these categories. *Meyer,* at 562.

Smith did not involve any third-party contact, or any attempt to sway any

jurors, by the prosecutor or anyone else, *at all*. That is why the *Remmer/Mattox* presumption did not apply in *Smith. Remmer* was cited solely on the issue of whether a hearing was required.

In *United States v. Olano,* 507 U.S. 725 (1993), the trial court permitted the alternate jurors to attend jury deliberations, instructing them that they should not participate. Following his conviction, the defendant argued that the alternates' presence violated Federal Rule of Criminal Procedure 24© and was inherently prejudicial and reversible *per se* under the plain error standard of Rule 52(b). The State below argued, again, that this stood for the proposition that not "all third-party contact with jurors is presumptively prejudicial" under *Remmer* and *Mattox,* but that it depends on the degree of the conduct in question.

Again, that is not correct. There was *no* third-party contact in *Olano.* Plus the appellant waived the argument both by pleading guilty and by agreeing that the alternate jurors could sit in on the deliberations, so the case was decided under a plain error standard. Moreover, the case was decided under the Federal Rules of Criminal Procedure, with the court deciding that while the presence of the non-participating alternate jurors during deliberations was "a deviation from Rule 24(c)," it did not affect the defendant's substantial rights within the meaning of Rule 52(b). Under Rule 52(b), the government bears the burden or persuasion with respect to prejudice—unless the defendant waiver it, as he did in *Olano. Id.* at 734. *Olano* cited *Remmer, Mattox* and *Parker* not to overrule or limit them, but to note the requirement of a hearing on the issue of prejudice, and to contrast the jury

privacy issue under the federal rules with the external influence cases at issue in the *Remmer/Mattox/Parker* line of cases. No case could be more different than the case at bar.

At a minimum, the Ninth Circuit is not the place to decide whether *Smith* and/or *Olano* silently overruled *Mattox, Remmer* and *Parker.*

The Opinion In The Case At Bar

In the Opinion in this case, the Panel created a novel new test based on a flawed new framework for evaluating juror misconduct in the form of *ex parte* contacts between jurors and third parties. This new test sought to combine a test created by the Nevada Supreme Court which Petitioner submits was directly contrary to the Supreme Court precedent set forth above because it reversed the burden of proof for proving prejudice resulting from the contacts from the prosecution to the defendant, with a portion of a misquoted excerpt from *Brecht v. Abrahamson,* 507 U.S. 619 (1993). To counsel's knowledge the Panel's approach is unique among the approaches of the various circuits, and rests on distinctions that do not exist in this Court's jurisprudence on this issue. Moreover, it led to a *result* that was contrary to that compelled by this Court's precedents.

Instead of correctly applying *Remmer, Mattox* and *Parker* by their own terms—which hold that "***any*** *private communication, contact*, ***or*** *tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is…presumptively prejudicial*" and that "the burden rests heavily upon the Government to establish that the contact was harmless to the defendant," *Remmer*,

347 U.S. at 229 (emphasis added), the Panel referred to the characterization of certain types of error in a single paragraph in *Brecht v. Abrahamson,* 507 U.S. 619, 629-630 (1993). There, this Court referred to "trial error" which is subject to harmless error analysis, and "structural error," which require automatic reversal of the conviction, and allowed in a second paragraph that some types of errors may simply be wholly insignificant (which the Panel decided to call "prosaic errors." *Appendix B*.

The Panel stated that "we must first classify the type of constitutional error that may have occurred….That classification sill supply the clearly established Supreme Court precedent governing our review. Only then may be decide whether the state court applied the law or determined the facts unreasonably under § 2254(d)." *Appendix* B at 12, citing *Brecht, supra.* Here is how the Panel proceeded.

"Prosaic Errors." The Panel said that on "one end of the spectrum are what it called "prosaic errors" which are 'so unimportant and insignificant' to be 'deemed harmless.'" *Appendix B* at 13 (quoting *Brecht* at 1075). It gave as examples cases involving silent alternate jurors in deliberations, and witnesses and jury members passing in the hall or crowded together in an elevator without speaking.

"Egregious Errors." The Panel then said

> On the other end of the spectrum are *egregious errors*, which "infect the entire trial process" and defy harmless-error review…. For example, jury tampering—"an effort to influence the jury's verdict by threatening or offering inducements"—is egregious. *[United States v.] Duktel,* 192 F.3d [893,] 895 [(9th Cir. 1999)]….Egregious errors raise a *presumption of prejudice, but not a conclusive one*. *Remmer,* 347 U.S. at 229, 74. S. Ct. 450. The defendant's remedy is a *hearing where the prosecution must establish the misconduct was harmless*…..

Appendix B at 13 (citations omitted, emphasis added).

The Panel then gives examples of "egregious errors"—a term the Panel seems to have made up which appears only in a different context in *Brecht* and never in the *Remmer/Mattox/Parker* line of cases----among which it includes what the Supreme Court calls "structural" defects or errors--denial of counsel and judges who are not impartial.[4] This is simply wrong for two separate reasons.

First, this Court in *Brecht actually* said that these are *structural* defects that *always* require *automatic* reversal of the conviction, yet the Panel gives them the benefit of a mere presumption that the prosecution can rebut. *Brecht,* 507 U.S. at 629-630; *Arizona v. Fulminante,* 499 U.S. 279, 309 (1991); *Gideon v. Wainwright,* 372 U.S. 225 (1963); *Tumey v. Ohio,* 273 U.S. 510 (1927). Thus, the Panel recharacterized *structural* errors which require automatic reversal of convictions into "egregious errors" that only create a rebuttable presumption of prejudice, contrary to this Court's precedents.

Second, among the examples of "egregious errors" the Panel included "jury tampering," defining it as "an effort to influence the jury's verdict by threatening or offering inducements," citing to *United States v. Duktel,* 192 F.3d 893, 895 (9th Cir. 1999). *Appendix B* at 13. Jury tampering is particularly relevant to the case at bar because that is what occurred here, as will be discussed below. In *Duktel,* the juror

[4] In *Brecht,* the term "egregious" appears only in the context of "reserving the 'possibility that in an unusual case, a deliberate and especially egregious error of the trial type' or error 'combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.'" *Brecht* at 638 n. 9, 654.

actually *was* offered a bribe *and* had his three-year-old daughter impliedly threatened. The *Dutkel* court made the following statement:

> The government argues that the categorical directive of *Remmer* has been undermined by subsequent cases which empower the district court to shift the burden of showing prejudice to the defendant. The cases on which the government relies do nothing of the sort, as none involved jury tampering as that term is normally understood: an effort to influence the jury's verdict by threatening or offering inducements to one or more of the jurors.

Id. Thus, *Dutkel* did not say that bribes and threats were the *only* forms of jury tampering; those were what were involved in that case. And although the Panel in this case failed to mention it, *Dutkel* was *disapproved* by the *en banc* Ninth Circuit in *Godoy v. Spearman,* 861 F.3d 956 (9th Cir. 2017) (en banc), where the court held that in spite of what it called *Dutkel's* ***dictum*** on jury tampering, the presumption also arises in other contexts including "possibly prejudicial" ex parte contacts, and thus "[t]o the extent cases such as *Dutkel…* suggested otherwise, they are **disapproved."** *Id.* at 968 n. 6 (emphasis in original) (citing *Mattox*). Indeed, the Ninth Circuit has expressly held that *Dutkel* does not list all the means of jury tampering, nor does it list all the forms of *ex parte* contact that give rise to the presumption of prejudice. *United States v. Rutherford,* 371 F.3d 634, 643 n. 6 (9tth Cir. 2004).

And it is simply not true that "jury tampering is normally understood" to include only bribes or threats. For example, "jury tampering" is defined to refer to (1) "improper communications with a juror with the purpose of influencing the juror's deliberative process via private communication or contact regarding matters

directly related to the case being tried;"[5] (2) "the crime of attempting to influence a jury through other means than the evidence presented in court, such as conversations about the case outside the court;"[6] and (3) "the crime of unduly attempting to influence the composition or decisions of a jury during the course of a trial," and can be done in many ways, including through unauthorized contact to introduce prohibited outside information.[7] Similarly,

> Jury tampering refers to the illegal act of attempting to influence a jury outside of the legal arguments and evidence presented in the courtroom. This can involve direct or indirect actions aimed at jurors to affect their impartiality, decision-making, or deliberations in a case. Acts of jury tampering can range from bribing, threatening, or providing jurors with prohibited information to more subtle forms of influence that seek to sway a juror's opinion unlawfully…. The definition is broad and covers any attempt to influence the jury's impartial deliberation process.[8]

Most importantly, *this Court,* in *Mattox,* said:

> separation of the jury in such a way as to expose them to *tampering* may be reason for a new trial, *variously held as absolute, or prima facie, and subject to rebuttal by the prosecution*; or contingent on proof indicating that a *tampering* really took place…. Private communications, possibly prejudicial, *between jurors and third persons, or witnesses*, or the officer in charge, *are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear*."

Mattox, 146 U.S. at 149-250.

In short, the Panel also erred by impermissibly narrowing the definition of

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[5]https://www.law.cornell.edu/wex/jury_tampering

[6] https://definitions.uslegal.com/j/jury-tampering

[7] https://en.wikipedia.org/wiki/Jury_tampering.

[8] https://legal.com/glossary/j/jury-tampering.

"jury tampering" contrary to both its ordinary meaning and that required by this Court's precedent in *Mattox.* The *effect* of this error will be discussed in the section below on the panel's discussion of "trial errors.'

"Trial Errors." Finally. the Panel discussed the category of "trial errors," which it said are "quantitatively assessed in the context of other evidence presented" to determine whether the extrinsic information had a substantial and injurious effect or influence in determining the jury's verdict, citing *Brecht.* The Panel decided this is where the incident in the elevator fit—more than "prosaic" error because the jurors invited the witness and her friend into the elevator, promised not to tell anyone, allowed them to openly converse, and "most" of them failed to report it to the court. As the Panel simply chided the jurors as: "not ideal." *Appendix B* at 14. But the Panel also found it was not 'jury tampering"—and therefore not what the Panel decided to label "egregious error"-- because *it was not jury tampering as the jurors were not bribed or threatened, citing Dutkel, supra,* and because the comments regarding Gallon's testimony and the videos were about things the jurors had already seen and they were presumed to ignore such statements. *Appendix B* at 14.

Again, "jury tampering" encompasses *exactly* what happened in the case at bar, not just bribes and threats, making the Panel's ruling erroneous as a matter of law. More important for the purpose of this Petition, what happened in the elevator was jury tampering under this Court's precedent in *Mattox, supra* at 149-150 as quoted above. And recall what the prosecution witness's friend did—she vouched for

the prosecution witness, Gallon, moments after she got off the witness stand as the prosecution's final witness (and the final witness in the trial). Gallon had just finished testifying against her co-defendant, her boyfriend who she claimed had cheated on her, pursuant to a plea agreement which offered her greatly reduced charges and a chance for probation for her role in multiple armed robberies (although she denied that she had a chance to avoid prison until she was shown her written plea agreement on cross-examination). Her testimony had been evasive, uncooperative, combative, vague and inconsistent about facts and her own guilt. She only testified after being threatened by the prosecutor in the hearing of the entire courtroom if she did not. And what was her testimony about? The identify of Mr. Brown as the robber of the masked man in the surveillance videos, some of which had not other witness who could identify him, which was the central issue at trial. The friend also emphasized to the jurors that the videos were conclusive on the issue of identity, as opposed to the victim witness testimony, the majority of whom could not identify Mr. Brown as their robber at trial and many of whom gave inconsistent or erroneous identifications on the earlier photo lineups, or the other hotly contests issues at trial, such as the suggestiveness of the photo lineup and whether the clothes the robber wore in the videos (which were not especially distinctive and not the same in all of them) were actually Mr. Brown's.

Thus, by redefining "jury tampering" as *solely* bribing or threatening jurors (based on the disapproved *Dutkel* case and contrary to the Ninth Circuit's own valid precedent in *Rutherford, supra*), and holding that what happened here was not part

of its newly-created category of "egregious" errors raising a presumption of prejudice for the prosecutor to rebut, but a mere trial error, and ignoring this Court's binding precedent in the *Remmer* line of cases that *ex parte* contacts *OR* jury tampering created a presumption of prejudice placing the burden of proving no prejudice on the prosecution, the Panel played a shell game that deprived Mr. Brown of the benefit of the due process protections to which this Court's precedents entitled him.

Finally, having found what happened in this case to be merely "trial error," the Panel concluded that the *Brecht* harmless error standard applied rather than this Court's presumption of prejudice and burden of proof, requiring the *defendant*, Mr. Brown, to show actual prejudice from the trial error, which it characterized as a "stringent standard" entitled to "deep deference" to the credibility of a juror's "declaration of impartiality" and ability to disregard inadmissible evidence. *Appendix B.* at 15.

At this point Petitioner submits that the Panel violated clearly established Supreme Court precedents including *Remmer, Mattox* and *Parker* by denying the defendant, Mr. Brown, the presumption of prejudice from the *ex parte* contact in the elevator (which in reality involved jury tampering), and by placing on him the burden of proving that he was prejudiced by that contact. In addition, Petitioner submits that the Panel violated those same clearly established Supreme Court precedents by creating a novel new test based on a flawed new framework for evaluating juror misconduct in the form of *ex parte* contacts between jurors and

third parties. The Opinion is a complicated one, however, and additional ways in which the Opinion violates Supreme Court precedent will be discussed below.

C. The Ninth Circuit Panel Erred When It Ruled That The Nevada Supreme Court's Decision In *Meyer v. State* Did Not Violate This Court's Preceents In *Remmer I, Supra, Mattox, Supra* and *Parker, Supra And Their Progeny*

The confusion over the application of this Court's precedents in this case stems from the earlier state case, *Meyer v. State,* 119 Nev. 554 (2003). In *Meyer,* the Nevada Supreme Court created its own test for how to analyze the effect of jury tampering or juror misconduct including third party contacts with jurors. The Nevada court developed the following rule:

> Before a defendant can prevail on a motion for a new trial based on 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…. Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict.

Meyer, 119 Nev. at 563. The court went on state that

> in some cases, an extraneous influence, such as, is ***jury tampering is so egregious that prejudice is sufficient to warrant a new trial is presumed.*** 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. In contrast, other circuit courts look to the nature of the extrinsic influence in determining whether the influence presents a particular likelihood of affecting the verdict.

Id. at 563-564 (emphasis added). *Meyer* cited cases from the Fifth and *Ninth* circuits presuming that *any ex parte* contacts ae presumed prejudicial (more about the Ninth Circuit cases later), and from the First, Eighth and District of Columbia Circuits presuming that only certain contacts are presumed prejudicial. *Meyer,* 119

Nev. at 564 n. 24, 25. Although the United States Supreme Court's precedents make no distinction based on the nature of the extrinsic influence, placing the initial *rebuttable presumption* and burden of proof on the prosecution, the Nevada Supreme Court in *Meyer* threw its lot with the circuits that look to the nature of the extrinsic contacts. *Id.* at 563-565.

But even *Meyer* holds that "some types of extrinsic influences are, by their very nature, more likely to be prejudicial," specifically including "[d]irect third-party communications with a sitting juror relating to an element of the crime charged or exposure to significant extraneous information concerning the defendant or the charged crime" because the very "nature of the extrinsic information alone established a reasonable probability that the extrinsic contact affected the verdict." *Meyer,* 119 Nev. at 564-565. In the case at bar, that describes the identity of the defendant in the surveillance videos, Mr. Tracey Brown, and the veracity of the State's cooperating co-defendant witness identifying him as the robber, whose testimony was vouched for by the friend in the elevator.

The *Meyer* court never explained why it adopted its test or explained why it rejected the United States Supreme Court's precedents in *Remmer, Mattox* and *Parker.* The state court was *aware* of this Court's jurisprudence, as it cited *Remmer I* in a footnote, even quoting its holding that "[A]ny private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is…presumptively prejudicial." *Meyer,* 119 Nev. at 565 n. 26. And it discussed both in the body and in footnotes the split among some of the

various circuits as to how this Court's jurisprudence was applied. It just didn't explain why it chose not to follow it. And because the Nevada Supreme Court held that the defendant in that case had proved prejudice, the case was remanded for a new trial—and the state court's new test was not appealed to the United States Supreme Court.

When thirteen years later the Nevada Supreme Court decided the case at bar, it ignored the trial court's stated standard and placed the burden of showing prejudice from juror misconduct on the defendant, Mr. Brown, with a citation to *Meyer* and no other discussion, and simply found no abuse of discretion by the trial court in not finding that he had met that burden.

The federal district court that heard Mr. Brown's subsequent habeas case simply and briefly relied on the Ninth Circuit case of *Von Tobel v. Benedetti,* 975 F.3d 849 (9th Cir. 2020), which found that the Nevada Supreme Court's test in *Meyer* was not contrary to, or an unreasonable application of, clearly established federal law. *Appendix C* at 5.

Von Tobel is a classic example of a case where bad facts make bad law. *Von Tobel* was an appeal from a district court's denial of a federal habeas petition from a 2005 Nevada state court conviction on 25 counts of sexual and other physical abuse of three children. The only direct evidence of the abuse was the testimony of the children. During the trial, before jury deliberations, one juror spoke briefly with his neighbor, a police officer, telling the officer "I don't know how you put up with this stuff that you have to do with." He added that he was having a tough time with the

trial because "stuff that's going on here that just makes me sick. Matter of fact, I have a hard time sleepin' with it as a result of it." The police officer neighbor told the juror about an unrelated case in a different jurisdiction where "a kid got killed in a gang something or other" and some people had already "plead out [and were] serving time while others were waiting to go to Court." The officer/neighbor added something to the effect of "if they're here, they're here for a reason" or that "[he] wouldn't be here if he didn't do something." *Von Tobel, supra* at 852.

On direct appeal, the Nevada Supreme Court in *Von Tobel*, while agreeing that jury misconduct occurred, applied a slightly revised version of its new 2003 test of *Meyer v. State.* Under that test,

> [A] motion for a new trial based on allegations of juror misconduct has the burden to show that (1) the misconduct occurred and (2) the misconduct prejudiced the defendant…. When the misconduct is egregious, the Nevada Supreme Court applies a conclusive presumption of prejudice without any showing of prejudice….When the misconduct is not egregious, the defendant must prove prejudice by showing that, in reviewing the trial as a whole, there was "a reasonable probability or likelihood that the juror misconduct affected the verdict."

Id. at 853 (page citations to *Meyer* omitted).

The court accepted that juror misconduct had in fact occurred. The *Von Tobel* Panel then addressed the petitioner's argument that the *Meyer* test violated the *Mattox/Remmer I/Parker* line of Supreme Court clearly established authority for evaluating a juror's contact with an outside party because it placed a more onerous burden on him to prove prejudice and did not presume that the juror's contact with his neighbor was prejudicial. The Panel decided that the *Meyer* burden on the

defendant and the *Mattox-Remmer I* burden were "similar enough" that the former was not "clearly contrary" to the latter and that the juror contact with his neighbor was "not egregious." *Id.* The gist of the reasoning was that in *Godoy v. Spearman,* 861 F.3d 956 (9th Cir. 2017) (en banc), the Ninth Circuit accepted *the parties'* characterization of what it called the "*Mattox* and *Remmer* framework" to govern Godoy's claim in that case:

> When *a defendant* alleges improper contact between a juror and an outside party, the court asks at step one whether the contact was "possibly prejudicial."... If so, the contact is "deemed presumptively prejudicial" and the court moves to step two, where the "burden rests heavily upon the [state] to establish" the contact was actually "harmless."... If the state does not prove harmlessness, the court sets aside the verdict. When the presumption arises but the prejudicial effect of the contact is unclear, the trial court must hold a "hearing" to "determine the circumstances [of the contact], the impact thereof upon the juror, and whether or not it was prejudicial."

Godoy, at 964 (emphasis added). The en banc Ninth Circuit placed the burden of showing an improper contact creating a *possibility* of prejudice on the *defendant* ("the only burden [the defendant] needed to carry; once he triggered the presumption, the burden shifted to the state to prove the contact was 'harmless')" But that is not an issue in the case at bar—the parties did not dispute that both the contact and juror misconduct occurred (here it was a juror that brought the *ex parte* contact to the trial court's attention), and the trial Judge held that the witness's friend deliberately intended to influence the jury.

The Ninth Circuit in *Godoy* also *reaffirmed* that Ninth Circuit *continues* to follow *Mattox* and *Remmer,* and that subsequent Supreme Court cases--which the State argued below limited or abrogated the *Remmer/Mattox/Parker* line of cases—

did nothing of the kind:

> *Smith [v. Phillips,* 455 U.S. 209 (1982)] did not, however, purport to abrogate these early decisions in any respect, and no Supreme Court authority has suggested it did. Consistent with the [Ninth Circuit's] treatment of the issue, our own case law continues to follow *Mattox* and *Remmer."*

Id. at 964 n.3 (citing cases).

Finally, the Panel in the case at bar ruled the *Meyer test* to be proper, placing the burden on the defendant to show prejudice, *Appendix B* at 15. The Panel cited *Von Tobel* to hold that it did not violate Supreme Court precedents. *Id.* Oddly, though, the Panel more broadly asked whether *Meyer* violated the "clearly established Supreme Court precedent" of *Brecht*—the general harmless error test for habeas cases. It did so by applying its novel new approach of placing the burden of showing prejudice on the defendant for all trial errors and on the prosecution for the Panel's category of "egregious" errors—into which the Panel mixed structural errors. The Panel further erred by failing to consider either that:

1. What occurred in the elevator was *jury tampering*—which even the Panel categorized as an "egregious" category of error placing the burden of proving lack of prejudice on the prosecution. Although it did not use the "egregious" categorization created by the Panel in this case, this Court in *Remmer I* also held that jury tampering was presumptively prejudicial. *Remmer,* 347 U.S. at 229.

AND/OR

2. In *Remmer I,* this Court stated that "any private communication, contact, ***OR*** tampering, directly or indirectly, with a juror during a trial about the

matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." So in this Court's jurisprudence, the private communication or contact, even if not amounting to "jury tampering," still required the presumption of prejudice and the burden to be placed on the prosecution to prove lack of prejudice.

Another very important thing that neither the *Von Tobel* Panel nor the Panel in the case at bar mentioned is that Ninth Circuit case law is split down the middle on whether the Nevada Supreme Court's test is consistent with this Court's *Remmer/Mattox/Parker* line of clearly established precedents. In addition to the *en banc* Ninth Circuit's holding in *Godoy* that this Circuit continues to follow this Court's precedent on this matter, the Ninth Circuit in *Major v. McDaniel,* 436 Fed. Appx. 805 (9th Cir. 2011) expressly rejected the *Meyer* standard as contrary to *Remmer* and *Mattox.*[9]

In *Caliendo v. Warden of California Men's Colony,* 365 F.3d 691 (9th Cir. 2004), the Ninth Circuit held that when the *ex parte* contact is *de minimus* the defendant must show that it *could have* influenced the verdict (which it called a "low threshold"), at which point prejudice is presumed and the prosecution has the burden of making a "strong contrary showing" of prejudice, and ruled that failure to place the burden of proof on the prosecution violated "the bright line *Mattox* rule"

[9] *McDaniel* also found the contact in that case "possibility prejudicial" simply because the communication with the non-juror was "substantive"—which vouching for the truthfulness of the prosecution's star witness and referring to the video evidence surely are in this case. Oddly, Ninth Circuit Judge Bea was on both the *McDaniel* Panel and the Panel in the case at bar.

and *Remmer.*

Another line of Ninth Circuit cases that is contrary to the Panel's decision in the case at bar is *United States v. Keating,* 147 F.3d 895 (9th Cir. 1998), which placed the burden on the prosecution to prove lack of prejudice where the jurors in defendant Charles Keating's highly publicized federal trial learned that the defendant had previously been convicted in an equally highly publicized state court trial on related fraud charges. The *Keating* court held that "[t]he government has the burden of showing beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict" in deciding whether to grant a new trial.[10] *Id.* at 902. Moreover, the *Keating* court held that "[o]ur inquiry is objective rather than subjective; we need not ascertain whether the extrinsic evidence *actually* influenced any specific juror." *Id.* at 901-902 (emphasis in original) (citing cases). Not only has *Keating,* like the *en banc* ruling in *Godoy,* never been overruled, there are numerous Ninth Circuit cases that have subsequently followed the *Keating* test. *See, e.g., United States v. Mill,* 280 F.3d 915, 921 (9th Cir. 2002) (burden to prove lack of prejudice on state, juror's statements that they could ignore the prejudicial statements not improper to consider but neither enough to show lack of prejudice nor controlling); *Rico v. Ducart,* 624 Fed. Appx. 533, 534 (9th Cir. 2015) (habeas appeal stating: "The state court cited the correct federal standard: that '[t]he government has the burden of showing beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict" citing *Keating*); *United States v.*

[10] This is the standard that the state trial court in this case said was applicable; only on direct appeal to the Nevada Supreme Court did the *Meyer* test come into play.

Rasmussen, 203 F.3d 833 (1999) (burden on prosecution, objective test applies); *United States v. Montes,* 628 F.3d 1183, 1187 (9th Cir. 2011) (objective test applies).

And in *United States v. Tarango,* 837 F.3d 936, 945-946 (9th Cir. 2016), the Ninth Circuit said:

> In criminal trials, well-entrenched Supreme Court authority "absolutely" forbids "external causes tending to disturb the [jury's] exercise of deliberate and unbiased judgment…at least until their harmlessness is made to appear." *Mattox v. United States,* 146 U.S. 140, 149-150…. We have held that ***Mattox*** **established a bright-line rule:** ***any*** external contact with a juror is subject to a presumption that the contact prejudiced the jury's verdict, but the government may overcome that presumption by showing that the contact was harmless.

Tarango, 837 F.3d at 945 (parallel citation to *Mattox* and citation to *Caliendo, supra* omitted) (emphasis added). The Ninth Circuit then went on to quote the *Remmer* language creating the presumption and putting the burden on the prosecution to rebut it in the case of any "private communication, contact, or tampering, directly or indirectly with a juror during a trial." *Id.* at 945-946. *See also Catlin v. Broomfield,* 124 F.4th 702 (9th Cir. 2024) (presumption of prejudice applies to jury tampering).

The Panel's decision conflicts not just with other Ninth Circuit cases, but with the decisions of other Circuits as well. In fact, it is axiomatic, in that the Panel created an entirely new test depending on categories that no other Circuit uses, and which categorically declares that all *ex parte* contacts between jurors and third parties are *never* subject to the presumption of prejudice and rebuttal by the prosecutor—unless they rise to the level of the Panel's erroneous definition of "jury tampering." While some Circuits have criticized the *Remmer* line of cases, and some have toyed with the details (e.g. adding the "not burdensome" and "low threshold"

first step that the defendant must take to show that the contact *possibly* be prejudicial), none have gone so far as the Panel in this case—and alterations to the *Remmer* line of precedents, if any, are for this Court alone to make. A few examples should suffice. *See, e.g., United States v. Millsap,* 115 F.4th 861 (8th Cir. 2024); *United States v. Scull,* 321 F.3d 1270, 1280 (10th Cir. 2003); *Carruther v. Commissioner, Alabama Dept. of Corrections,* 93 F.4th 1338 (11th Cir. 2024); *United States v. Johnson,* 162 F.4th 931 (8th Cir. 2025).

In short, the Ninth Circuit Panel in the case at bar erred in holding that the Nevada Supreme Court's *Meyer* test, refusing the presumption of prejudice and placing the burden on the defendant to prove prejudice in the case of juror misconduct stemming from *ex parte* contacts between jurors and third parties during trial, is *not* contrary to, or an unreasonable interpretation of, binding Supreme Court precedents. At a minimum, given the confusion and splits both within the Ninth Circuit and between the circuits that the *Meyer* test has given birth to, whether Nevada's *Meyer* test, and the Ninth Circuit's decision upholding it, are valid, are important federal questions that has not been, but should be, settled by this Court.

VII. CONCLUSION

For the foregoing reasons, petitioner Tracey L. Brown respectfully requests that this petition for writ of certiorari be granted.

Dated: February 19, 2026

Respectfully submitted,

/s/ Mark D. Eibert
MARK D. EIBERT
Counsel for Petitioner TRACEY L. BROWN

APPENDIX A

TRACEY BROWN V. ATTORNEY GENERAL FOR THE STATE OF NEVADA

ORDER DENYING PANEL REHEARING AND

REHEARING EN BANC

DECEMBER 12, 2025

FILED

DEC 12 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TRACEY L. BROWN, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF NEVADA; RONALD OLIVER, Respondents-Appellees.	No. 23-15594 D.C. No. 2:19-cv-02000-JAD-DJA District of Nevada, Las Vegas ORDER

Before: BEA and DE ALBA, Circuit Judges, and BROWN,* District Judge.

The panel unanimously voted to deny the petition for panel rehearing. Judge de Alba has voted to deny the petition for rehearing en banc, and Judge Bea and Judge Brown so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40. Accordingly, Appellant's petition for panel rehearing and rehearing en banc (Dkt. No. 49) is **DENIED**.

* The Honorable Jeffrey Vincent Brown, United States District Judge for the Southern District of Texas, sitting by designation.

APPENDIX B

TRACEY BROWN V. ATTORNEY GENERAL FOR THE STATE OF NEVADA
140 F.4th 1069 (9th Cir. June 12, 2025)
PUBLISHED OPINION OF NINTH CIRCUIT PANEL IN THIS CASE

140 F.4th 1069
United States Court of Appeals, Ninth Circuit.

Tracey L. BROWN, Petitioner-Appellant,
v.
ATTORNEY GENERAL FOR the STATE OF NEVADA; Ronald Oliver, Respondents-Appellees.

No. 23-15594
|
Argued and Submitted May 14, 2025 San Francisco, California
|
Filed June 12, 2025

Synopsis

Background: Following affirmance on direct appeal of petitioner's state-court convictions for robbery, burglary, and kidnapping with use of a deadly weapon and sentence of life imprisonment with the possibility of parole after ten years, 133 Nev. 990, 405 P.3d 130, he filed petition for federal writ of habeas corpus relief. The United States District Court for the District of Nevada, Jennifer A. Dorsey, J., 2023 WL 2717316, denied the petition. Petitioner appealed and certificate of appealability was granted.

Holdings: The Court of Appeals, Jeffrey Vincent Brown, J., sitting by designation, held that:

[1] juror misconduct in sharing an elevator with State's witness, who was a codefendant who had agreed to testify pursuant to a plea agreement, and her friend during trial did not constitute just a prosaic error;

[2] juror misconduct did not constitute an egregious error;

[3] juror misconduct constituted a trial error;

[4] state trial court complied with clearly established precedent in responding to juror misconduct, and thus, federal habeas relief was not warranted; and

[5] Nevada Supreme Court's decision affirming defendant's conviction after concluding that, though juror misconduct occurred, defendant failed to show prejudice, did not ground itself in an unreasonable determination of the facts, and thus, federal habeas relief was not warranted.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (35)

[1] Habeas Corpus Review de novo

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k842 Review de novo

Court of Appeals reviews a district court's denial of habeas relief de novo.

[2] **Habeas Corpus** Review de novo

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k842 Review de novo

Allegations of juror misconduct and prejudice in habeas cases are reviewed de novo.

[3] **Habeas Corpus** Federal Review of State or Territorial Cases

Habeas Corpus Federal or constitutional questions

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k450.1 In general
197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 Federal or constitutional questions

Federal habeas relief is limited to two scenarios: where the adjudicated state claim (1) contradicts or unreasonably applies clearly established Supreme Court precedent, not circuit court precedent, or (2) is based on an unreasonable determination of the facts presented in the state court proceeding. 28 U.S.C.A. § 2254(d).

[4] **Habeas Corpus** State Determinations in Federal Court

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations
197k765 State Determinations in Federal Court
197k765.1 In general

In reviewing a district court's denial of habeas relief, the federal court reviews the last reasoned opinion of the highest-level state court. 28 U.S.C.A. § 2254(d).

[5] **Habeas Corpus** Federal or constitutional questions

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 Federal or constitutional questions

Under Antiterrorism and Effective Death Penalty Act (AEDPA) for federal habeas relief, a state court decision is contrary to Supreme Court precedent if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. 28 U.S.C.A. § 2254(d).

[6] **Habeas Corpus** Federal Review of State or Territorial Cases

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k450.1 In general

Federal habeas relief is unavailable if fairminded jurists could disagree on whether the state court was correct in its views and application of the Supreme Court's treatment of an issue of law. 28 U.S.C.A. § 2254(d).

[7] **Habeas Corpus** Issues and findings of fact; historical facts; credibility

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations
197k765 State Determinations in Federal Court
197k767 Issues and findings of fact; historical facts; credibility

Under Antiterrorism and Effective Death Penalty Act (AEDPA) for federal habeas relief, federal courts must give substantial deference to state courts' factual determinations. 28 U.S.C.A. § 2254(d).

[8] **Habeas Corpus** Particular issues and problems

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations
197k765 State Determinations in Federal Court
197k770 Particular issues and problems

Absent clear and convincing evidence, federal courts in federal habeas relief cases regarding alleged juror misconduct presume state court findings on the substance of an ex parte communication, the communications' effect on the juror, and juror credibility are correct. 28 U.S.C.A. § 2254(d).

[9] **Habeas Corpus** Particular issues and problems

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations
197k765 State Determinations in Federal Court
197k770 Particular issues and problems

Whether juror misconduct was prejudicial is a mixed question of federal law and fact reviewed de novo in a federal habeas relief case. 28 U.S.C.A. § 2254(d).

[10] **Constitutional Law** Judges
Constitutional Law Fair and impartial jury

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4617 Judges
92k4618 In general
92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)7 Jury
92k4754 Fair and impartial jury

Due process afforded by the Fifth and Fourteenth Amendments means a jury capable and willing to decide the case solely on evidence developed at

trial, and a trial judge who guards against prejudicial occurrences and determines their effect. U.S. Const. Amends. 5, 14.

[11] **Jury** Competence for Trial of Cause

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(2) Competence for Trial of Cause
230k33(2.10) In general

Sixth Amendment guarantees a criminal defendant a fair trial by a panel of impartial jurors who can lay aside their impressions or opinions and render a verdict based on the evidence presented in court. U.S. Const. Amend. 6.

1 Case that cites this headnote

[12] **Jury** Competence for Trial of Cause

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(2) Competence for Trial of Cause
230k33(2.10) In general

Presence of just one biased juror violates the Sixth Amendment. U.S. Const. Amend. 6.

[13] **Criminal Law** Prejudice to rights of party as ground of review

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1162 Prejudice to rights of party as ground of review

Federal Constitution does not require automatic reversal when constitutional error occurs.

[14] **Criminal Law** Prejudice to rights of party as ground of review

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1162 Prejudice to rights of party as ground of review

"Prosaic errors" are so unimportant and insignificant to be deemed harmless.

1 Case that cites this headnote

[15] **Criminal Law** Misconduct of or Affecting Jurors

110 Criminal Law
110XXI Motions for New Trial
110k924 Misconduct of or Affecting Jurors
110k925 In General
110k925(1) In general

Constitution does not require a new trial every time a juror has been placed in a potentially compromising situation because it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.

1 Case that cites this headnote

[16] **Criminal Law** Prejudice to rights of party as ground of review

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error

110k1162 Prejudice to rights of party as ground of review

"Egregious errors" infect the entire trial process and defy harmless-error review.

1 Case that cites this headnote

[17] **Criminal Law** Misconduct of or affecting jurors

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1163 Presumption as to Effect of Error; Burden
110k1163(6) Misconduct of or affecting jurors

Jury tampering, an effort to influence the jury's verdict by threatening or offering inducements, is egregious, thus warranting a presumption of prejudice.

[18] **Criminal Law** Presumption as to Effect of Error; Burden

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1163 Presumption as to Effect of Error; Burden
110k1163(1) In general

Egregious errors raise a presumption of prejudice, but not a conclusive one.

[19] **Criminal Law** Objections and disposition thereof

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k868 Objections and disposition thereof

Defendant's remedy for egregious errors is a hearing where the prosecution must establish the juror misconduct was harmless.

[20] **Criminal Law** Conduct of Trial in General

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.6 In general

"Trial errors" are quantitatively assessed in the context of other evidence presented.

[21] **Criminal Law** Conduct of Trial in General

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.6 In general

In reviewing trial errors, the reviewing court determines whether the extrinsic information the jury received had a substantial and injurious effect or influence in determining the jury's verdict; this approach focuses on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

[22] **Habeas Corpus** Conduct and deliberations of jury

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint

197II(B) Particular Defects and Authority for Detention in General
197k499 Conduct and deliberations of jury

Juror misconduct in sharing an elevator with State's witness, who was a codefendant who had agreed to testify pursuant to a plea agreement, and her friend during trial did not constitute just a "prosaic error," for purposes of federal habeas corpus review, in trial in state court for robbery, burglary, and kidnapping with use of a deadly weapon; jurors did not merely crowd together or shuffle by interested parties, rather they invited witness and her friend onto the elevator during trial, promised not to tell anyone about it, and allowed the women to openly converse, witness was the sole codefendant whose testimony the prosecution considered important enough to cut a deal for, witness was silent in the elevator but friend encouraged the jurors to believe her testimony and rely on the video evidence, and most jurors failed to report the incident as required by the court.

[23] Criminal Law 👉 Communications by or with jurors

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1174 Conduct and Deliberations of Jury
110k1174(5) Communications by or with jurors

Brief commentary from a stranger about evidence jurors had already seen does not infect the entire trial process, as would constitute an egregious error.

[24] Habeas Corpus 👉 Conduct and deliberations of jury

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k499 Conduct and deliberations of jury

Juror misconduct in sharing an elevator with State's witness, who was a codefendant who had agreed to testify pursuant to a plea agreement, and her friend during trial did not constitute an "egregious error," for purposes of federal habeas corpus review, during trial in state court for robbery, burglary, and kidnapping with use of a deadly weapon; friend's statements regarding testimony of witness, who was the sole codefendant, emphasis on the surveillance videos, and comment about a head covering concerned facts which were duplicative of witness's testimony, and jurors were presumed to ignore the statements, and neither witness nor her friend bribed or threatened any jurors thus no tampering occurred.

[25] Habeas Corpus 👉 Conduct and deliberations of jury

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k499 Conduct and deliberations of jury

Juror misconduct in sharing an elevator with State's witness, who was a codefendant who had agreed to testify pursuant to a plea agreement, and her friend during trial constituted a "trial error," for purposes of federal habeas corpus review, in trial in state court for robbery, burglary, and kidnapping with use of a deadly weapon; the juror misconduct, committed before the close of evidence and days before deliberations, was simply an error in the trial process itself, and some jurors merely heard a few comments they should not have. 28 U.S.C.A. § 2254(d).

[26] **Habeas Corpus** Errors or irregularities; prejudice

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k442 Errors or irregularities; prejudice

On federal habeas review of a trial error in state court, the inquiry is whether the trial error had a substantial and injurious effect or influence on the verdict, and relief is proper only if the court has grave doubt about whether the error had that effect. 28 U.S.C.A. § 2254(d).

2 Cases that cite this headnote

[27] **Habeas Corpus** Errors or irregularities; prejudice

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k442 Errors or irregularities; prejudice

On federal habeas review of a trial court error in state court, the defendant must show the trial error resulted in actual prejudice; this stringent standard recognizes the presumption of finality and legality that attaches to state convictions and that most constitutional errors are harmless. 28 U.S.C.A. § 2254(d).

1 Case that cites this headnote

[28] **Habeas Corpus** Errors or irregularities; prejudice

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k442 Errors or irregularities; prejudice

On federal habeas review of a trial court error in state court, the reviewing court does not summarily ask whether adequate evidence supports the verdict despite the error; rather, it quantitatively assesses the error in the context of the whole case. 28 U.S.C.A. § 2254(d).

1 Case that cites this headnote

[29] **Habeas Corpus** Presumptive accuracy of state determination, and rebuttal of presumption

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations
197k765 State Determinations in Federal Court
197k768 Presumptive accuracy of state determination, and rebuttal of presumption

On federal habeas review of a trial court error in state court, the state court's historical fact findings are presumed correct. 28 U.S.C.A. § 2254(d).

[30] **Habeas Corpus** Conduct and deliberations of jury

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k499 Conduct and deliberations of jury

On federal habeas review of a trial court error in state court, deep deference is given to findings on the substance of an ex parte contact, its effect on a juror, and the credibility of a juror's declaration of impartiality. 28 U.S.C.A. § 2254(d).

[31] **Criminal Law** Custody and conduct of jury

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.15 Custody and conduct of jury

Court presumes the jury will disregard inadmissible evidence after proper instruction from the court.

[32] **Criminal Law** Misconduct of or Affecting Jurors

110 Criminal Law
110XXI Motions for New Trial
110k924 Misconduct of or Affecting Jurors
110k925 In General
110k925(1) In general

To prevail on motion for new trial based on juror misconduct under Nevada law, the defendant must establish juror misconduct occurred and was prejudicial.

[33] **Criminal Law** Presumptions and burden of proof as to misconduct of or affecting jurors

110 Criminal Law
110XXI Motions for New Trial
110k948 Application for New Trial
110k956 Affidavits and Other Proofs in General
110k956(12) Presumptions and burden of proof as to misconduct of or affecting jurors

Under Nevada law, while a court presumes prejudice sufficient to warrant a new trial for egregious juror misconduct, a defendant bears the burden to show that milder misconduct that resulted in trial error probably affected the verdict.

[34] **Habeas Corpus** Conduct and deliberations of jury

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k499 Conduct and deliberations of jury

State trial court complied with clearly established precedent in responding to juror misconduct that amounted to trial error in jurors sharing an elevator with State's witness, who was a codefendant who had agreed to testify pursuant to a plea agreement, and her friend during

state trial for robbery, burglary, and kidnapping with use of a deadly weapon, and thus, federal habeas relief was not warranted for the trial error; the trial court held a hearing where defendant could show prejudice and denied defendant a new trial after evaluating the error, as developed at the hearing, in the context of the issues and evidence presented at trial. 28 U.S.C.A. § 2254(d)(1).

remembered only the head-covering comment, that the information was vague, cumulative of the surveillance videos, and not relevant to a material issue, and that all jurors stated the misconduct would not affect their deliberations and were properly admonished by the trial court, was supported by the record. 28 U.S.C.A. § 2254(d)(2).

[35] Habeas Corpus Review; Post-Conviction Relief and New Trial

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k500 Review; Post-Conviction Relief and New Trial
197k500.1 In general

Nevada Supreme Court's decision affirming defendant's conviction for robbery, burglary, and kidnapping with use of a deadly weapon after concluding that, though juror misconduct occurred when jurors shared an elevator with State's witness, who was a codefendant who had agreed to testify pursuant to a plea agreement, and her friend during trial, defendant failed to show prejudice, did not ground itself in an unreasonable determination of the facts, and thus, federal habeas relief was not warranted for the trial error; Supreme Court's summary of the facts, that most jurors did not remember what was said or

Appeal from the United States District Court for the District of Nevada Jennifer A. Dorsey, District Judge, Presiding, D.C. No. 2:19-cv-02000-JAD-DJA

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Before: Carlos T. Bea and Ana de Alba, Circuit Judges, and Jeffrey Vincent Brown,* District Judge.

OPINION

BROWN, District Judge:

***1073** Defendant-Appellant Tracey Brown appeals the denial of his petition for writ of

habeas corpus under 28 U.S.C. § 2254. The issue is whether juror misconduct, in the form of an *ex parte* contact among a witness for the prosecution, her friend, and several jurors, deprived Brown of due process and a fair trial. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a) and (c), and we affirm.

I.

From July 18–24, 2011, eight convenience-store robberies occurred in Las Vegas. In each instance, employees allege a black man with a half-covered face robbed them at gunpoint for cash and cigarettes, made them lie down, and fled the scene by car. A woman joined him in three of the robberies.

Brown was arrested for the robberies, and the State of Nevada charged him with 20 counts, including robbery, burglary, and kidnapping with use of a deadly weapon. Four victims identified Brown as the male assailant in a photo lineup. Seven victims identified the assailants in surveillance videos. At trial, eight victims testified. Two identified Brown in the courtroom as the male assailant. Two described Brown's eyes as distinctive. Surveillance videos revealing the assailants' uncovered faces were shown to the jury and admitted as evidence. Brown's girlfriend and co-defendant, Teshae Gallon, testified as the prosecution's final witness pursuant to a plea agreement. Gallon admitted to committing three of the robberies with Brown. She identified him in the courtroom and testified to his guilt in those three robberies.

After Gallon's testimony, the court released the jury for the weekend and told them not to discuss the case with outside parties. Eight jurors rode the elevator out of the courthouse. The door opened mid-ride to Gallon and her friend, who both recognized the jurors. They got on the elevator and had a brief but loud conversation between themselves.

Two jurors reported the *ex parte* contact with Gallon and her friend, and the court held a hearing to determine the conversation's substance, who heard it, and whether it would affect juror impartiality moving forward. Each juror was questioned individually. Their recollections varied. Several remembered the following: Gallon said, "Oh, that's the jury" when the doors opened; a juror told them it was okay to get on; the women entered reluctantly; and the friend told Gallon, "It doesn't matter, we're talking amongst ourselves," while Gallon remained silent. Juror #2 reported the incident and remembered it with the most detail. She testified that after the women got on the elevator, the friend said all the jury had to do was "look at the ***1074** tapes and you'll see who it is" and that Gallon "told the truth." Juror #4 remembered Gallon's friend mentioning the video tapes. Six jurors recalled only that the friend talked about something Gallon wore on her head. The remaining jurors heard nothing, could not recall anything specific, or were not present. All jurors stated the incident would not affect their deliberations or verdict. The court found all jurors testified truthfully.

After the hearing, Brown moved for a mistrial. Everyone agreed juror misconduct had occurred, but the prosecution argued the misconduct did not prejudice Brown.[1] The

court agreed with the prosecution, finding that: (1) before the incident, the jury had already seen the surveillance videos referred to by the friend, (2) there was sufficient evidence to support the convictions apart from Gallon's testimony, and (3) most jurors heard nothing. Still, the trial court gave Brown a choice: keep the jury as-is or dismiss two jurors—Jurors #2 and #4—and swap in the alternates. Brown chose the former.

Trial continued. The court submitted the case to the jury with an instruction to disregard the conversation between Gallon and her friend. An hour later, the jury found Brown guilty on all counts. The court sentenced Brown to life with the possibility of parole after ten years.

Brown moved for a new trial by written motion. The court denied the request, citing Brown's "strategic decision not to use the alternates" that left the allegedly prejudiced jurors on the panel. The Nevada Supreme Court affirmed his convictions on direct appeal, relying on *Meyer v. State*, 119 Nev. 554, 80 P.3d 447 (2003), to conclude that though juror misconduct had occurred, Brown failed to show prejudice.

After exhausting his state habeas petitions, Brown filed a petition for writ of habeas corpus in federal court under 28 U.S.C. § 2254. The district court denied the petition, and he appealed. We granted a certificate of appealability on the issue of whether juror misconduct deprived Brown of due process and a fair trial.

II.

[1] **[2]** **[3]** **[4]** We review a district court's denial of habeas relief de novo. *Caliendo v. Warden of Cal. Men's Colony*, 365 F.3d 691, 694 (9th Cir. 2004). Allegations of juror misconduct and prejudice in habeas cases are also reviewed de novo. *Id.* Congress limits federal habeas relief to two scenarios: where the adjudicated state claim (1) contradicts or unreasonably applies "clearly established" Supreme Court precedent—not circuit court precedent—or (2) is based on an unreasonable determination of the facts presented in the state court proceeding. 28 U.S.C. § 2254(d); *Shoop v. Twyford*, 596 U.S. 811, 818–19, 142 S.Ct. 2037, 213 L.Ed.2d 318 (2022). In doing so, the federal court reviews the "last reasoned opinion" of the highest-level state court. *Williams v. Johnson*, 840 F.3d 1006, 1009, 1011 (9th Cir. 2016).

[5] **[6]** **[7]** **[8]** **[9]** Under § 2254(d)'s first prong,

> A state court decision is contrary to Supreme Court precedent if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme
> ***1075** Court has on a set of

materially indistinguishable facts.

Von Tobel v. Benedetti, 975 F.3d 849, 854 (9th Cir. 2020) (cleaned up) (quoting *Williams v. Taylor*, 529 U.S. 362, 412–13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). In other words, federal habeas relief is unavailable if "fairminded jurists could disagree" on whether the state court was correct in its views and application of the Supreme Court's treatment of an issue of law. *Harrington v. Richter*, 562 U.S. 86, 101, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (citation omitted). And under the second prong, federal courts must give substantial deference to state courts' factual determinations. 28 U.S.C. §§ 2254(d)(2), (e)(1). Absent clear and convincing evidence, federal courts presume state court findings on the substance of an *ex parte* communication, the communications' effect on the juror, and juror credibility are correct. *Rushen v. Spain*, 464 U.S. 114, 120, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983); *Patton v. Yount*, 467 U.S. 1025, 1036, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). But whether juror misconduct was prejudicial is a mixed question of federal law and fact reviewed de novo. *Dickson v. Sullivan*, 849 F.2d 403, 405–06 (9th Cir. 1988).

III.

A.

[10] **[11]** **[12]** Brown argues that juror misconduct violated his Fifth, Sixth, and Fourteenth Amendment rights. Due process afforded by the Fifth and Fourteenth Amendments "means a jury capable and willing to decide the case solely on evidence" developed at trial, and a trial judge who guards against prejudicial occurrences and determines their effect. *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). The Sixth Amendment guarantees a criminal defendant a fair trial by a panel of impartial jurors who can "lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). The presence of just one biased juror violates the Sixth Amendment. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc).

[13] Because the Constitution does not require automatic reversal when constitutional error occurs, we must first classify the type of constitutional error that may have occurred. *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). That classification will supply the clearly established Supreme Court precedent governing our review. Only then may we decide whether the state court applied the law or determined the facts unreasonably under § 2254(d). Because the parties disagree at every juncture, we take each question in turn.

First, classifying the error below. Everyone agrees some level of juror misconduct happened here. But how severe was it? As

we explain below, misconduct such as this—an unplanned encounter among a witness, an interested third party, and jurors during the trial—is neither "prosaic" nor "egregious" but falls squarely within the middle-ground of "trial error." To understand why requires explanation of each category of misconduct.

[14] **[15]** On one end of the spectrum are prosaic errors which are "so unimportant and insignificant" to be "deemed harmless." *Brecht*, 507 U.S. at 630, 113 S.Ct. 1710 (citation omitted). Indeed, the Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation because it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Rushen*, 464 U.S. at 118, 104 S.Ct. 453 (cleaned up) ***1076** (citation omitted); *see, e.g.*, *id.* at 121, 104 S.Ct. 453 (juror's *ex parte* contact with judge not concerning "any fact in controversy or law applicable to the case"); *United States v. Dutkel*, 192 F.3d 893, 895 (9th Cir. 1999) (silent alternate jurors in deliberations, juror's job application with prosecutor, and juror's friends' encouragement to convict defendant); *Godoy v. Spearman*, 861 F.3d 956, 967 (9th Cir. 2017) ("chance contacts between witnesses and jury members" like "passing in the hall or crowded together in an elevator" (citation omitted)).

[16] **[17]** **[18]** **[19]** On the other end of the spectrum are egregious errors, which "infect the entire trial process" and defy harmless-error review. *Brecht*, 507 U.S. at 629–30, 113 S.Ct. 1710; *Arizona v. Fulminante*, 499 U.S. 279, 290, 308–11, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (coerced confessions, denial of counsel, and partial judges are among the "structural defects" that "transcend the criminal process"). For example, jury tampering—"an effort to influence the jury's verdict by threatening or offering inducements"—is egregious. *Dutkel*, 192 F.3d at 895; *see, e.g.*, *Parker v. Gladden*, 385 U.S. 363, 363–65, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966) (bailiff telling jurors defendant was wicked and guilty); *Turner*, 379 U.S. at 473, 85 S.Ct. 546 (deputies' continuous association with jurors before testifying); *Remmer v. United States*, 347 U.S. 227, 228–29, 74 S.Ct. 450, 98 L.Ed. 654 (1954) (bribing juror to find defendant not guilty). Egregious errors raise a presumption of prejudice, but not a conclusive one. *Remmer*, 347 U.S. at 229, 74 S.Ct. 450. The defendant's remedy is a hearing where the prosecution must establish the misconduct was harmless. *Id.* at 229–30, 74 S.Ct. 450.

[20] **[21]** Somewhere in the middle are "trial errors." *Brecht*, 507 U.S. at 629, 113 S.Ct. 1710; *see, e.g.*, *Fulminante*, 499 U.S. at 307–08, 111 S.Ct. 1246 (improper comments, erroneous admission of evidence, restriction on cross examination, charge error). Trial errors are "quantitatively assessed in the context of other evidence presented." *Brecht*, 507 U.S. at 629, 113 S.Ct. 1710 (citation omitted). The reviewing court determines whether the extrinsic information the jury received had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710 (citation omitted). This approach "focus[es] on the underlying fairness of the trial rather than on

the virtually inevitable presence of immaterial error." *Fulminante*, 499 U.S. at 308, 111 S.Ct. 1246 (citation omitted).

Brown complains of (1) jurors sharing an elevator with the witness and her friend, (2) several jurors' failure to report it, (3) Brown's inability to cross-examine the friend, and (4) the jurors with the most detailed memories remaining on the panel that convicted him. He argues this amounts to jury tampering—egregious misconduct that should have raised a presumption of prejudice and required the government to show harmlessness. The government responds that only innocuous, prosaic misconduct occurred and it was Brown's burden to show prejudice. Neither is quite right.

[22] What happened goes beyond prosaic misconduct. The jurors did not merely crowd together or shuffle by interested parties. *See* *Godoy*, 861 F.3d at 967. They invited a witness and her friend onto the elevator during trial, promised not to tell anyone about it, and allowed the women to openly converse. And not just any witness—Gallon was the sole co-defendant whose testimony the prosecution considered important enough to cut a deal for. Gallon was silent in the elevator, but the friend encouraged the jurors to believe Gallon and rely on the video evidence. Most jurors failed to report the incident as required by the court. Not ideal.

***1077** **[23]** **[24]** But it is not egregious either. Brief commentary from a stranger about evidence jurors had already seen does not "infect the entire trial process." *Brecht*, 507 U.S. at 629–30, 113 S.Ct. 1710. The friend's statements regarding Gallon's testimony, emphasis on the videos, and comment about a head covering concerned facts which were duplicative of Gallon's testimony; jurors are presumed to ignore such statements. *See* *Rushen*, 464 U.S. at 121, 104 S.Ct. 453; *Dutkel*, 192 F.3d at 895 (presuming "jurors will disregard the advice of friends and ignore other *ex parte* contacts"). Neither Gallon nor her friend bribed or threatened any juror; in other words, no tampering occurred. *See* *Dutkel*, 192 F.3d at 895.

[25] Thus, this type of error is best classified as trial error. The juror misconduct, committed before the close of evidence and days before deliberations, is simply an error in the trial process itself. Put simply, some jurors heard a few comments they should not have. Accordingly, the trial court could determine the harm, if any, resulting from this trial error only after (1) conducting a hearing and (2) evaluating the error alongside the issues and other evidence presented at trial. *Compare* *Smith*, 455 U.S. at 215, 102 S.Ct. 940 ("[T]he remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."), *and* *Fulminante*, 499 U.S. at 307–08, 111 S.Ct. 1246 (analyzing error of the "trial" type alongside the admissible evidence), *with* *United States v. Brande*, 329 F.3d 1173, 1176 (9th Cir. 2003) (no hearing required for prosaic misconduct).

[26] **[27]** Because the jury misconduct below is trial error, we can answer the second question: *Brecht* dictates the court's review

of the Nevada Supreme Court's decision. *See* *Brecht*, 507 U.S. at 623, 638, 113 S.Ct. 1710 (providing the standard the state habeas petitioner must satisfy to set aside conviction for federal constitutional error of the "trial type"). *Brecht*'s inquiry is whether the trial error had a "substantial and injurious effect or influence" on the verdict, and relief is proper only if the court has "grave doubt" about whether the error had that effect. *Id.* at 623, 113 S.Ct. 1710 (citation omitted); *Davis v. Ayala*, 576 U.S. 257, 267–68, 135 S.Ct. 2187, 192 L.Ed.2d 323 (2015) (citation omitted). The defendant must show the trial error resulted in "actual prejudice." *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710. This stringent standard recognizes "the presumption of finality and legality that attaches to" state convictions and that most constitutional errors are harmless. *Id.* at 633, 113 S.Ct. 1710 (citation omitted); *Fulminante*, 499 U.S. at 306, 111 S.Ct. 1246.

[28] **[29]** **[30]** **[31]** The reviewing court does not summarily ask whether adequate evidence supports the verdict despite the error; rather, it "quantitatively assesse[s]" the error in the context of the whole case. *Fulminante*, 499 U.S. at 307–08, 111 S.Ct. 1246. The state court's historical fact findings are presumed correct. *Rushen*, 464 U.S. at 120, 104 S.Ct. 453. Deep deference is given to findings on the substance of an *ex parte* contact, its effect on a juror, and the credibility of a juror's declaration of impartiality. *Id.*; *Patton*, 467 U.S. at 1036, 104 S.Ct. 2885. The court presumes the jury will disregard inadmissible evidence after proper instruction from the court. *Greer v. Miller*, 483 U.S. 756, 766 n.8, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987).

B.

Having determined that *Brecht* is the appropriate test for this "trial error," we now address whether the Nevada Supreme Court's decision (1) breaks with *Brecht*, the clearly established Supreme Court precedent on this issue, or (2) was based on an unreasonable determination of the ***1078** facts considering the record. 28 U.S.C. § 2254(d).

[32] **[33]** Congress permits habeas relief when a state court breaks with well-settled Supreme Court precedent. *Id.* § 2254(d)(1). Thus, the narrow question before us under the first prong is whether the Nevada Supreme Court's application of *Meyer* violates *Brecht*. The Nevada Supreme Court denied Brown a new trial because he failed to show the juror misconduct prejudiced him. To prevail on a motion for new trial under *Meyer*, the defendant must establish juror misconduct occurred and was prejudicial. *Meyer*, 80 P.3d at 455. While the court presumes prejudice for egregious misconduct, the defendant bears the burden to show that milder misconduct probably affected the verdict. *Id.* at 455–56.

[34] Whether *Meyer* violates clearly established Supreme Court precedent is a question we have already answered. *Von Tobel*, 975 F.3d at 855 (holding *Meyer* does not

violate § 2254). Indeed, *Meyer* mirrors *Brecht*, as both place the burden to show prejudice for non-egregious errors, *i.e.*, trial error, on the defendant. Accordingly, the trial court complied with clearly established precedent when it (1) held a hearing where Brown could show prejudice and (2) denied Brown a new trial after evaluating the error, as developed at the hearing, in the context of the issues and evidence presented at trial. *See* *Smith*, 455 U.S. at 215, 102 S.Ct. 940; *Fulminante*, 499 U.S. at 307–08, 111 S.Ct. 1246. Relief is not warranted under § 2254(d)(1).

[35] Nor was the Nevada Supreme Court's decision the product of an unreasonable determination of facts based on the record before it. 28 U.S.C. § 2254(d)(2). The trial court made detailed findings, and the Nevada Supreme Court referred to and relied on them. This court presumes the trial court's factual findings are correct, and Brown has not offered clear and convincing evidence suggesting otherwise.

First, what happened on the elevator. The court found the following facts were corroborated: (1) the women hesitated to board the elevator, which held eight jurors; (2) a juror told them it was okay to get on; (3) the friend said she and Gallon were just talking amongst themselves; (4) the friend commented on something Gallon had worn on her head; and (5) only the friend discussed the case, not Gallon. The jurors did not discuss specifics with one another—only that they had been in the elevator with Gallon and her friend. Because the court found "[o]nly one juror recalled the statement about truthfulness and telling the jurors to look at the video," it was "reluctant" to accept Juror #2's uncorroborated statements as true. But even if true, the court found the friend was "[n]ot discussing something [new or] excluded from evidence," instead "commenting on something that was in the video that everybody else could've seen."[2] The ***1079** court found Gallon did not intend to interact with the jurors and that it was more the friend "getting in the middle of it."

Next, how the incident affected the jury. The court found the jurors felt uncomfortable in the elevator with Gallon and her friend, who was present in the courtroom at trial, and they "knew something wrong had happened." The court found, however, the conversation's "impact was pretty innocuous" and "didn't really impact them that much."

Lastly, credibility. The court presumed all jurors would testify truthfully and believed every juror who said the incident would not affect their deliberations or verdict. The court found Juror #2, who remembered the most troubling comments, "very credible" and "somebody who had a good -- very detailed memory." The court noted, however, that Juror #2's memory of the comments on Gallon's truthfulness and the importance of videos was uncorroborated and questioned whether she heard the conversation better or had unintentionally embellished her memory.

The court ultimately found the misconduct would not have an impact "beyond a reasonable doubt." The comment about Gallon's head covering—the only corroborated substantive remark—was not so "prejudicial ... that it really

add[ed] anything." The court found the "other evidence that didn't relate to Ms. Gallon, all of the testimony of the witnesses and the victims in the case and the surveillance videos that were shown" sufficient to support the verdict, so the prosecution "didn't even really need to call" Gallon.

The Nevada Supreme Court's summary of these facts—that most jurors did not remember what was said or remembered only the head-covering comment; that the information was vague, cumulative of the surveillance videos, and not relevant to a material issue; and that all jurors stated the misconduct would not affect their deliberations and were properly admonished by the court—is indeed supported by the trial court record. And Brown has failed to offer evidence sufficient to show the juror misconduct prejudiced him. Relief is not warranted under § 2254(d)(2).

Because the Nevada Supreme Court's decision affirming Brown's conviction neither breaks with clearly established Supreme Court precedent nor grounds itself in an unreasonable determination of the facts, habeas relief is not warranted.

AFFIRMED.

Opinion by Judge Brown

All Citations

140 F.4th 1069, 2025 Daily Journal D.A.R. 4947

Footnotes

* The Honorable Jeffrey Vincent Brown, United States District Judge for the Southern District of Texas, sitting by designation.

1 Brown makes much of the prosecution's initial statement that the incident prejudiced Juror #2 against Brown and it would be "wise to remove her from the jury." Trial counsel's legal conclusions, however, are not entitled to any deference from this court. And, in any case, the prosecution affirmed its position that the incident did not prejudice Brown several times throughout the trial record.

2 At oral argument, Brown advanced a different reading of Juror #13's testimony than that found by the trial court. He argues three jurors were too tainted to remain on the panel—Juror #2, who recalled the friend emphasizing the video tapes and Gallon's credibility; Juror #4, who recalled only the former; and Juror #13, who agreed when asked if the friend had been "talking about the case" and thought she did so "purposely." In doing so, Brown maintains the trial court's offer to replace two jurors with alternates was insufficient. We cannot agree as to Juror #13. At the hearing, Brown prompted Juror #13 to recall details or agree that the friend discussed

veracity and specific evidence. Time and time again, Juror #13 confirmed he recalled nothing specific. His testimony that the friend spoke loudly and purposefully without remembering "exactly what was said" is insufficient to render him prejudiced. Indeed, Juror #13 can hardly be prejudiced by a conversation he "didn't really focus" on and had "forgot[ten] happened" until questioned. Assuming arguendo that removing Jurors #2 and #4 would have been the better part of wisdom, it was Brown's choice to keep them on the panel.

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APPENDIX C

TRACEY BROWN
V.
THE STATE OF NEVADA

DISTRICT COURT ORDER DENYING HABEAS PETITION

MARCH 29, 2023

2023 WL 2717316
Only the Westlaw citation
is currently available.
United States District Court, D. Nevada.

Tracey L. BROWN, Petitioner
v.
The STATE OF NEVADA,[1]
et al., Respondents

Case No. 2:19-cv-02000-JAD-DJA
|
Signed March 29, 2023

Attorneys and Law Firms

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Order Denying Petition for Habeas Relief, Denying Certificate of Appealability, and Closing Case

[ECF No. 22]

United States District Judge Jennifer A. Dorsey

***1** Tracey L. Brown's 28 U.S.C. § 2254 habeas corpus petition challenges his convictions arising from eight armed robberies in Las Vegas, Nevada, in July 2011.[2] Brown claims that juror misconduct, an impermissibly suggestive photographic lineup, and ineffective assistance of trial and appellate counsel violated his Fifth, Sixth, and Fourteenth Amendment rights. Because I conclude that his claims lack merit, I deny the petition and close this case.

Procedural History

In March 2015, a jury convicted Brown of 20 criminal counts including robbery, burglary, and kidnapping with use of a deadly weapon, all related to the armed robberies of convenience stores.[3] The state district court sentenced him under the large habitual-criminal statute to an aggregate term of 20 years to life in prison.[4] Judgment of conviction was entered in February 2016,[5] and an amended one in February 2017 removed the aggregate total of 20 years to life,[6] so Brown's sentences amount to life with the possibility of parole after ten years.[7] The Supreme Court of Nevada affirmed Brown's convictions in November 2017, and the Nevada Court of Appeals affirmed the denial of his state postconviction habeas corpus petition in October 2019.[8]

Brown dispatched his federal habeas petition for filing in November 2019.[9] I granted his motion for counsel, and he filed a counseled amended petition that following June.[10] After a dismissal motion,[11] four claims remain, which have all been fully briefed on their merits:[12]

> Ground 1. Jury misconduct deprived Brown of his Fifth, Sixth, and Fourteenth Amendment rights;

Ground 2. An improperly suggestive photographic lineup and resulting unreliable identifications violated Brown's Fifth, Sixth, and Fourteenth Amendment rights;

Ground 3. Brown was deprived of his Fifth, Sixth, and Fourteenth Amendment rights due to ineffective assistance of trial counsel; and

Ground 4. The ineffective assistance of appellate counsel resulted in violations of the same rights.

Facts underlying Brown's convictions[13]

A. Robberies on July 18 and 19, 2011

Robert Stout testified that he was working at Terrible's North Rancho on July 18, 2011.[14] About 4:30 a.m., a man came in with a shirt covering half his face; he was holding a gun and told Stout to empty the register into a bag. He filled another bag with cigarettes, including Kools, directed Stout to lie down on the floor, and left. Stout got up to call 911 and noticed that, while the bags of cigarettes were gone, the bag of money was still on the counter. He identified Tracey Brown in the surveillance video.

***2** The next day, Dale Kluge was working at the AM/PM North Rancho when a man came in about 2:45 a.m. and told Kluge this was a robbery.[15] The man pointed something at Kluge that he had under his shirt. Kluge pushed it away; it felt like a gun. The man walked Kluge to the register, emptied the money into a bag and then put cigarettes and cigars in the bag. He directed Kluge to lie down and left. Kluge was unable to identify Brown from a photo lineup; he identified surveillance video of the incident.

B. July 22, 2011, robberies

Chanell Croston testified that she was working at Terrible's North Rainbow on the night of July 22, 2011, when it was robbed by a black male and a black female.[16] The pair had come into the store about an hour earlier asking for directions. About 2 a.m., Croston was standing outside smoking a cigarette when the male approached her, pressed something covered by a gray shirt that felt like a gun into her side and led her back into the store. He directed her to open the register and put the money in a bag. The female came into the store and took cigarettes, including Kools. Both robbers had their faces covered up to below their noses. The male brought Croston to the back room and told her to lie down. Once she heard the front doors, she called 911. She pointed out the robbers in the surveillance video. She later identified Brown and his girlfriend Teshae Gallon from photo lineups, and she identified Brown at trial. Croston observed that Brown's eyes were distinctive. A fingerprint lifted from a Kools pack was later identified as Gallon's.[17]

Sharon Uddin testified that she was working at 7-Eleven West Charleston when a man came in about 2:30 a.m.[18] His shirt partially covered his face, the hood of his sweatshirt was pulled up, and he was pointing a covered gun at her. He directed her to open the register. Uddin's husband, David Jimenez, came in from the back cooler and started yelling at the robber. The robber ran out of the store. Uddin identified

Brown in court. As she was recounting the incident to police, she recalled that a woman had come into the store and then left just before the man entered the store. She was unable to identify Brown in a photo lineup. At trial, she pointed out Brown and Gallon in the surveillance video. Jimenez testified that he ran out of the store after the man and saw him drive away in a Chevy Cavalier.[19]

C. July 24, 2011, robbery

Joseph Uperti was working at Sinclair's Smoke Ranch on July 24, 2011.[20] About 2:30 a.m., a black man came in with his shirt halfway over his face, told Uperti he had a gun, and demanded that Uperti empty the register. After the man left, Uperti called the police. The prosecution showed the surveillance video. Uperti later identified Brown from a photo lineup "immediately" because his eyes stood out.

Analysis

A. Standards of review under the Antiterrorism and Effective Death Penalty Act

Federal habeas relief is governed by the Antiterrorism and Effective Death Penalty Act, also known as "AEDPA." If a state court has adjudicated a habeas corpus claim on its merits, a federal district court may only grant habeas relief with respect to that claim if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[21] A state court acts contrary to clearly established federal law if it applies a rule contradicting the relevant holdings or reaches a different conclusion on materially indistinguishable facts.[22] And a state court unreasonably applies clearly established federal law if it engages in an objectively unreasonable application of the correct governing legal rule to the facts at hand.[23] Section 2254 does not, however, "require state courts to *extend*" Supreme Court precedent "to a new context where it should apply" or "license federal courts to treat the failure to do so as error."[24] The "objectively unreasonable" standard is difficult to satisfy;[25] "even 'clear error' will not suffice."[26]

***3** Under AEDPA, the bar is high,[27] and federal habeas relief may only be granted if "there is no possibility [that] fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents."[28] As "a condition for obtaining habeas relief," a petitioner must show that the state-court decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement."[29] "[S]o long as 'fairminded jurists could disagree' on the correctness of the state court's decision," habeas relief under Section 2254(d) is precluded.[30] AEDPA "thus imposes a 'highly deferential standard for evaluating state-court ruling,' ... and 'demands that state-court decisions be given the benefit of the doubt.' "[31]

If a federal district court finds that the state court committed an error under § 2254, the district court must then review the claim *de novo*.[32] The petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to habeas relief,[33] but state-court factual findings are presumed correct unless rebutted by clear and convincing evidence.[34]

B. Adjudicating Brown's claims

1. Ground 1 fails because Brown was not prejudiced by misconduct in the jurors' presence.

Brown argues in ground 1 that prejudicial juror misconduct violated his constitutional rights.[35] The Sixth Amendment guarantees a criminal defendant the right to a trial "by an impartial jury."[36] "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation," but it does mean "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."[37] "[T]he remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."[38]

Teshae Gallon, originally Brown's co-defendant, testified that she pleaded guilty to reduced charges with the possibility of parole, and she agreed to testify against her boyfriend, Brown.[39] She drove Brown's car on July 22, 2011, when they committed three robberies. At trial, she identified herself and Brown in surveillance videos from the convenience stores depicting the robberies.

The next court day after Gallon testified, the state district judge had the marshal tell the parties outside the presence of the jury that a juror had come to him that morning.[40] The juror said that, on the prior Friday, jurors were riding down in the elevator in the courthouse at the end of the day when Gallon and a friend who had accompanied her to court got on the elevator:

> Ms. Gallon's friend started speaking loudly in front of the jury saying, All you guys have to do is look at the video, and you'll see who it is. And then she turned to talk to Ms. Gallon, still rather loudly saying, It's okay. You told the truth. That's all you had to do. That's all anybody expected of you. You told the truth. So you did what you were supposed to do.[41]

***4** Gallon didn't say anything. There were about eight jurors on the elevator.

The state district judge, the prosecutor, and the defense questioned all jurors and alternates individually about the incident. Several jurors had not been in the elevator. The juror who first approached the marshal about the incident related that the elevator doors opened, Gallon said "oh that's the jury."[42] Her friend "yanked" her into the elevator and said "Oh it doesn't matter. We're not talking about to them. We're just talking to ourselves." Speaking loudly, she said something like "you should just tell them to look at the tapes, just look at the tapes. That says everything."[43] The incident was short, and the juror didn't think it was a big deal and told

the court it would not affect her deliberations in any way.

A second juror testified that Gallon and her friend got on the elevator, and the friend began talking in what he thought was an intentionally loud voice.[44] He didn't recall exactly what was said, just that it was about the trial. He said that he had forgotten that it happened until the court asked him. Another juror told the court that Gallon hesitated about getting in the elevator when she saw the jury, and someone in the elevator told her it was ok because they only had a couple of floors to go down.[45] Gallon and her friend had their backs turned away from the jurors and were conversing. He didn't really hear what they were talking about. Another juror said she saw the two women get in the elevator.[46] The juror was texting her kids and not paying attention to anything else. She recalled the women were talking loudly about their hair or why one of them wore something on her head.

The defense moved for a mistrial.[47] The court and the parties agreed that misconduct occurred, but the prosecution argued that nothing prejudicial took place. The court agreed, reasoning that the jury had seen the surveillance videos for themselves, sufficient evidence supported the convictions without Gallon's testimony, and most of the jurors didn't hear the exchange at all. The court told the defense that it could decide whether to replace the juror who remembered Gallon's friend as having said something about Gallon having told the truth and that all the jury had to do was look at the tapes with an alternate who had not been present in the elevator. Just prior to closing arguments, the defense informed the court that it had decided not to replace the juror.[48]

The Ninth Circuit recently explained in *Von Tobel v. Benedetti* that Nevada's test to evaluate juror misconduct is not contrary to, nor does it involve an unreasonable application of, clearly established federal law:

> The test for allegations of juror misconduct in Nevada comes from *Meyer v. State*[ ]. Under it, a motion for a new trial based on allegations of juror misconduct has the burden to show that (1) the misconduct occurred and (2) the misconduct prejudiced the defendant. When the misconduct is egregious, the Nevada Supreme Court applies a conclusive presumption of prejudice without any showing of prejudice. When the misconduct is not egregious, the defendant must prove prejudice by showing that, in reviewing the trial as a whole, there was "a reasonable probability or likelihood that the juror misconduct affected the verdict."
>
> ***5** * * *
>
> Von Tobel[, the defendant] contends that *Meyer* is contrary to [clearly established federal law] because it placed a more onerous burden on him to show prejudice. Von Tobel misreads *Meyer*. *Meyer* only requires the petitioner to show "a reasonable probability or likelihood that the juror misconduct affected the verdict" in order to prevail on a motion for a new trial. [Thus] a defendant's burden under *Meyer* falls within the range allowed by Supreme Court precedent. There is no clearly established Supreme Court precedent which holds that

> a defendant's burden to show that a contact was "possibly prejudicial" is less onerous than "a reasonable probability or likelihood that the juror misconduct affected the verdict," or "a probability sufficient to undermine confidence in the outcome."[49]

On direct appeal, the Supreme Court of Nevada agreed that misconduct occurred but held that Brown failed to show prejudice from it:

> Appellant Tracey Lewis Brown first argues that juror misconduct warranted a new trial. To obtain a new trial for juror misconduct, Brown had to show that juror misconduct occurred and that the misconduct was prejudicial. We review the district court's denial of such a motion for an abuse of discretion and its conclusions regarding the prejudicial effect of any misconduct de novo. While the attempt by a witness's friend to discuss the witness's testimony in an elevator with several jurors in it constituted misconduct, Brown did not show prejudice. The record shows that there was not a reasonable probability that the misconduct affected the verdict where most of the jurors either did not remember what was said or remembered only that the friend talked about what the witness was wearing on her head; the information was vague, cumulative of the surveillance video evidence of the crimes, and not relevant to any material issue; and, when canvassed, all of the jurors stated that the misconduct would not affect their deliberations in any way and were appropriately admonished. Accordingly, Brown has failed to show that the district court abused its discretion by denying his motion for a new trial.[50]

Brown has not shown that the Supreme Court of Nevada's decision that there was not a reasonable probability that the admitted misconduct affected the verdict was contrary to, or involved an unreasonable application of, clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.[51] It seems clear that Gallon's friend was vouching for Gallon's truthfulness in the elevator. But, for the most part, the jurors didn't even hear her statements. The convenience-store surveillance videos were sufficient evidence without Gallon's testimony, who proved a reluctant witness in any event. Finally, the state district court gave the defense the option of replacing the one juror who had heard the statements the most clearly with an alternate who had not been in the elevator. I deny federal habeas relief on ground 1.

2. Ground 2 fails because the photographic lineup was not unduly suggestive.

***6** Brown contends in ground 2 that the photographic lineup was impermissibly suggestive in violation of his Fourteenth Amendment due-process rights, and the lineup should have been suppressed.[52] To determine whether a challenged identification procedure is so impermissibly suggestive as to give rise to a substantial likelihood of mistaken identification, federal courts must examine the totality of the surrounding circumstances.[53] If the challenged procedure is not impermissibly suggestive, the inquiry into the due-process claim ends.[54]

To determine whether the identification was sufficiently reliable to warrant admission, the court weighs the indicia of reliability against the "corrupting effect of the suggestive identification procedure itself."[55] Factors to consider in evaluating the reliability of both in-court and out-of-court identifications include: (1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the subject; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.[56]

The photo lineup here showed six black males.[57] Four appear to have either braided, cornrowed, or dreadlocked hair. The other two had hair that looked like it could have been recently braided or cornrowed. All of the subjects' mouths are closed, except for Brown, who has his lips somewhat parted. Four of the men appear to have a similar skin color, while two have noticeably lighter skin.

Detective Eric Stout testified that he created the photo lineup.[58] He said that he had prepared hundreds of lineups and had learned how to select photos on the job from other detectives. He explained that he inputs the race, gender, and age, and the computer generates pages of photos. He then selects photos; in this case he looked for men who looked similar to Brown, for example having similar facial hair. He said he tried to include subjects that had braided or cornrowed hair. Stout also pointed out that the photo-lineup witness instructions that the witnesses must read and sign advise witnesses not to pay attention to hairstyles because those are easily changed.[59] On cross-examination, Stout agreed that Brown was probably the darkest-skinned man in the lineup. He said it might just be the photo quality, and in Stout's view there were two other men in the line-up with similarly dark skin.

The Supreme Court of Nevada rejected Brown's photo-lineup claim on direct appeal:

> Brown argues that the photographic lineups presented to the witnesses were impermissibly suggestive because his photograph had the darkest skin tone and was the only one matching the suspect's hairstyle and with visible teeth. Noting that our review is limited because Brown has not provided a copy of the lineup and that we are constrained to the poor-quality image included in the State's appendix, *see* *Thomas v. State*, 83 P.3d 818, 822 & n.4 (Nev. 2004) (noting that appellant bears the duty of providing the "portions of the record essential to determination of issues raised in appellant's appeal"), we note that all of the individuals pictured appear to be black men; that the detective informed the witnesses that hairstyles are easily changed; and that, even if visible, Brown's teeth were not suggestive of the subject, as the lower portion of the suspect's face was covered in each robbery. As the individuals pictured matched the general description of the suspect, Brown has failed to show that the photographic lineup was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Thompson v. State*, 221 P.3d 708, 713 (Nev. 2009). Accordingly, Brown has not shown that the

district court erred in refusing to exclude the identifications.[60]

***7** Several victims examined the photo lineup about nine days after the robberies. Two of the convenience store clerks identified Brown from it, each mentioning at trial that Brown had distinctive eyes. As the Supreme Court of Nevada observed, Brown covered the lower part of his face during the robberies, so the fact that he was the only one showing teeth in the lineup didn't bear on the identifications. Some of the victims had described Brown's hair as cornrowed or braided. The hair of each subject in the lineup differed somewhat, but all could arguably fit the description victims gave to police. And the witnesses who looked at the lineups had to read and sign a section advising them not to pay attention to hairstyles because they are easily changed.

Brown thus fails to demonstrate the Supreme Court of Nevada's decision that the lineup was not impermissibly suggestive was contrary to, or involved an unreasonable application of, clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.[61] So I deny habeas relief on ground 2.

3. Grounds 3 and 4 fail because Marshal Triplett's testimony was not inconsistent, so trial counsel and appellate counsel were not ineffective when they didn't move to suppress the testimony or raise this issue on appeal.

Grounds 3 and 4 are both ineffective-assistance-of-counsel claims. Brown theorizes that he received ineffective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights because trial counsel failed to file a motion to suppress based upon the alleged inconsistent statements of Las Vegas Deputy City Marshal Matthew Triplett (ground 3) and appellate counsel failed to argue on appeal that Triplett's testimony was inconsistent (ground 4).[62]

The right to counsel embodied in the Sixth Amendment provides "the right to the effective assistance of counsel."[63] Counsel can "deprive a defendant of the right to effective assistance[ ] simply by failing to render 'adequate legal assistance[.]' "[64] In *Strickland v. Washington*, the United States Supreme Court held that an ineffective-assistance claim requires a petitioner to show that: (1) his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms in light of all of the circumstances of the particular case;[65] and (2) it is reasonably probable that, but for counsel's errors, the result of the proceeding would have been different.[66] A probability is a reasonable one when it is "sufficient to undermine confidence in the outcome."[67] Any review of the attorney's performance must be "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct so as to avoid the distorting effects of hindsight.[68]

When an ineffective-assistance-of-counsel claim is based on appellate counsel's actions, a petitioner must show "that [appellate] counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them"

and "that, but for his [appellate] counsel's unreasonable failure to file a merits brief, [petitioner] would have prevailed on his appeal."[69] "[T]o determine whether appellate counsel's failure to raise [certain] claims was objectively unreasonable and prejudicial, [the court] must first assess the merits of the underlying claims."[70]

***8** Brown argues that, in certain proceedings, Triplett testified that he initially stopped Gallon and Brown's vehicle because they did not have the headlights on at night—an ordinary traffic stop—yet, in other proceedings, Triplett testified that it was a felony stop because Triplett had information about the robbery earlier that evening and a description of the getaway car. Brown characterizes Triplett's testimony as a "flip-flop-flip."[71]

Marshal Triplett testified before the grand jury in September 2011 that on July 26, 2011, he saw a tan Chevy enter the freeway in Las Vegas around 1 a.m. with no headlights on.[72] He said the vehicle was not traveling in a reckless manner but was going faster than the normal flow of traffic. He first flashed his headlights to try to alert the driver that the headlights were not on. The driver did not respond in any way. Triplett activated his emergency lights to initiate a traffic stop. As he followed the Chevy down an off-ramp, the driver would slow almost to a stop and then when Triplett started to exit his patrol car the Chevy would start moving again. After he fully activated his siren, the car came to a full stop. Triplett exited his vehicle but stayed behind the door. The passenger started walking toward him rapidly. He wouldn't show Triplett his hands, so the officer raised his gun. The man suddenly spun around and fled. Triplett had the driver—later identified as Gallon—get out of the car, and he took her into custody. Backup arrived and caught up with the fleeing passenger—later identified as Brown.

One robbery was tried separately in federal court.[73] Triplett testified at that federal trial that the reason he stopped the Chevy was because the headlights were off.[74] He testified at Brown's state trial that on the night in question he saw the Chevy getting on the freeway with its lights off and going a little faster than the other cars around it.[75] Triplett flashed his headlights to alert the driver. When the driver did not turn on the lights, Triplett activated his emergency lights to conduct a traffic stop.

The Nevada Court of Appeals held that—while Brown argued that the officer testified in some proceedings that he stopped the car because the headlights were off and in other proceedings that he conducted a felony traffic stop—the record reflected that the officer testified consistently.[76] The state appellate court concluded that any motions filed by counsel would have been futile and that Brown failed to demonstrate that counsel was deficient or show resulting prejudice. The court rejected the claim of ineffective assistance of appellate counsel as meritless on the same basis.[77]

Brown urges that a state knowingly obtaining a conviction through use of false evidence or allowing unsolicited false evidence to go uncorrected violates the Fourteenth Amendment.[78] But Brown claims baselessly

that Triplett testified inconsistently about the traffic stop. The state-court record and the excerpt from the related federal case completely belie this claim. Brown presents nothing to show that Triplett testified inconsistently, let alone falsely. Trial counsel cannot have been ineffective for failing to file a motion to suppress just as appellate counsel cannot have been ineffective for failing to argue that the testimony was inconsistent. Failure to raise a futile or meritless argument does not constitute deficient performance.[79] Brown has not demonstrated that the Nevada Court of Appeals' decision was contrary to or involved an unreasonable application of *Strickland*.[80] Federal habeas relief is thus denied on both grounds 3 and 4.

C. A certificate of appealability is not warranted.

***9** The right to appeal from the district court's denial of a federal habeas petition requires a certificate of appealability. To obtain that certificate, the petitioner must make a "substantial showing of the denial of a constitutional right."[81] "Where a district court has rejected the constitutional claims on the merits," that showing "is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."[82] Because I have rejected Brown's constitutional claims on their merits, and he has not shown that this assessment of these claims is debatable or wrong, I find that a certificate of appealability is unwarranted for this case, and I decline to issue one.

Conclusion

IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus under 28 U.S.C. § 2254 **[ECF No. 22] is DENIED**, and because reasonable jurists would not find the decision to deny this petition to be debatable or wrong, a **certificate of appealability is DENIED**.

All Citations

Not Reported in Fed. Supp., 2023 WL 2717316

Footnotes

1 The state corrections department's inmate-locator page states that Brown is incarcerated at Southern Desert Correctional Center. Gabriela Najera is the current warden for that facility. At the end of this order, I direct the clerk to substitute Gabriela Najera as a respondent for Respondent State of Nevada. *See* Fed. R. Civ. P. 25(d).

2 ECF No. 22.

3 ECF No. 42-1, Exhibit 95 at 66–72. Exhibits referenced in this order are respondents' exhibits to their motion to dismiss, ECF No. 30, and are found at ECF Nos. 31–48, 63.

4 ECF No. 43-4, Exh. 109.

5 *Id.*

6 ECF No. 44-10, Exh. 135.

7 *Id.*

8 ECF No. 45-1, Exh. 145; ECF No. 48-12, Exh. 174.

9 ECF No. 11.

10 ECF Nos. 10, 22.

11 ECF No. 54 (order granting in part motion to dismiss).

12 *See* ECF Nos. 62, 66.

13 These facts are taken from the trial transcripts (ECF Nos. 38-2, 39-1, Exhs. 91, 92). I make no credibility findings or other factual findings regarding the truth or falsity of this summary of the evidence from the state court, and I do not summarize all material. My summary is merely a backdrop to my consideration of the issues. Any absence of mention of a specific piece of evidence or category of evidence does not mean that I overlooked it.

14 ECF No. 39-1, Exh. 92 at 48–58.

15 *Id.* at 212–34.

16 ECF No. 38-2, Exh. 91 at 40–59, 63–73.

17 ECF No. 39-1, Exh. 92 at 191–92.

18 *Id.* at 7–34.

19 *Id.* at 38.

20 *Id.* at 58–74.

21 28 U.S.C. § 2254(d).

22 *Price v. Vincent*, 538 U.S. 634, 640 (2003).

23 *White v. Woodall*, 572 U.S. 415, 424–26 (2014).

24 *Id.* at 1705–06 (emphasis in original).

25 *Metrish v. Lancaster*, 569 U.S. 351, 357–58 (2013).

26 *Wood v. McDonald*, 575 U.S. 312, 316 (2015) (per curiam) (citation omitted); *see also Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question ... is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.").

27 As the United States Supreme Court acknowledged in *Harrington v. Richter*, 562 U.S. 86, 102 (2011), "If this standard is difficult to meet, that is because it was meant to be."

28 *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

29 *Id.* at 103.

30 *Id.* at 101.

31 *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations omitted).

32 *Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) (en banc) ("[I]t is now clear both that we may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by considering de novo the constitutional issues raised.").

33 *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

34 28 U.S.C. § 2254(e)(1).

35 ECF No. 22 at 10–14.

36 U.S. Const. amend. VI; *see Duncan v. Louisiana*, 391 U.S. 145 (1966) (incorporating the Sixth Amendment right to trial by jury into the due-process clause of the Fourteenth Amendment).

37 *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

38 *Id.* at 215.

39 ECF No. 40-1, Exh. 93 at 79–109.

40 ECF No. 41-1, Exh. 94 at 4–15.

41 *Id.* at 4–5.

42 *Id.* at 28–33.

43 *Id.* at 29.

44 *Id.* at 15–21.

45 *Id.* at 33–37.

46 *Id.* at 38–41.

47 *See id.* at 84–86.

48 *Id.* at 140–141.

49 *Von Tobel v. Benedetti*, 975 F.3d 849, 851, 853–56 (9th Cir. 2020) (internal citations omitted) (quoting *Meyer v. State*, 80 P.3d 447, 455–56 (Nev. 2003)).

50 ECF No. 45-1, Exh. 145 at 2–3 (citing *Meyer v. State*, 80 P.3d 447, 453, 455 (Nev. 2003)) (internal citations omitted).

51 28 U.S.C. § 2254(d).

52 ECF No. 22 at 15–18. On appeal, the photographic lineup provided to the Supreme Court of Nevada was a poor copy. *See* Exh. 145 at 6–7.

53 *Simmons v. United States*, 390 U.S. 377, 384 (1968); *Stovall v. Denno*, 388 U.S. 293, 301–02 (1967); *United States v. Love*, 746 F.2d 477, 478 (9th Cir. 1984).

54 *See United States v. Davenport*, 753 F.2d 1460, 1463 and n.2 (9th Cir. 1985); *United States v. Love*, 746 F.2d at 478.

55 *Manson v. Brathwaite*, 432 U.S. 98, 113–14, (1977).

56 *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972); *U.S. v. Bagley*, 772 F.2d 482, 492 (9th Cir. 1985).

57 ECF Nos. 22-1, 23-1. Even considering the clear, color copy of the lineup that Brown provided to this court but that the Supreme Court of Nevada did not have for their review, I conclude that the lineup was not unduly suggestive and did not violate Brown's due process rights.

58 ECF No. 40-1, Exh. 93 at 17–65.

59 *See* ECF No. 23-1.

60 ECF No. 45-1, Exh. 145 at 6–7.

61 28 U.S.C. § 2254(d).

62 ECF No. 22 at 18–22.

63 *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

64 *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 335–36 (1980)).

65 *Strickland*, 466 U.S. at 690.

66 *Id.* at 694.

67 *Williams v. Taylor*, 529 U.S. 362, 390–91 (2000).

68 *Strickland*, 466 U.S. at 689.

69 *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

70 *Moormann v. Ryan*, 628 F.3d 1102, 1106 (9th Cir. 2010).

71 *Id.* at 22.

72 Exh. 10 at 9–11.

73 Case No. 2:11-cv-334-APG-GWF.

74 *See* ECF No. 24-1.

75 ECF No. 63-1, Exh. 181 at 92–105.

76 ECF No. 48-12, Exh. 174 at 3.

77 *Id.* at 5.

78 *Napue v. People of State of Illinois*, 360 U.S. 264, 269 (1959).

79 *See Kimmelman v. Morrison*, 477 U.S. 365 (1986); *Wilson v. Henry*, 185 F.3d 986, 991–92 (9th Cir. 1999) (counsel not ineffective where motion for new trial "would have been to no avail"); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) (finding no ineffective assistance where the motion that allegedly should have been made would have been futile).

80 *See* 28 U.S.C. § 2254(d).

81 28 U.S.C. § 2253(c).

82 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077–79 (9th Cir. 2000).

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APPENDIX D

TRACEY BROWN
V.
THE STATE OF NEVADA
STATE SUPREME COURT ORDER OF AFFIRMANCE ON DIRECT APPEAL
NOVEMBER 22, 2017

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRACEY LEWIS BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69841

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of six counts of burglary while in possession of a deadly weapon, two counts of burglary, six counts of robbery with use of a deadly weapon, robbery, attempted robbery, and three counts of conspiracy to commit robbery. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Tracey Lewis Brown first argues that juror misconduct warranted a new trial. To obtain a new trial for juror misconduct, Brown had to show that juror misconduct occurred and that the misconduct was prejudicial. *Meyer v. State*, 119 Nev. 554, 563-64, 80 P.3d 447, 453, 455 (2003). We review the district court's denial of such a motion for an abuse of discretion and its conclusions regarding the prejudicial effect of any misconduct de novo. *Id.* at 561-62, 80 P.3d at 453. While the attempt by a witness's friend to discuss the witness's testimony in an elevator with several jurors in it constituted misconduct, Brown did not show prejudice. The record shows that there was not a reasonable probability that the misconduct affected the verdict where most of the jurors either did not remember what was said or remembered only that the friend talked about what the witness was wearing on her head; the information was vague, cumulative of the surveillance video evidence of the crimes, and not relevant

17-40451

to any material issue; and, when canvassed, all of the jurors stated that the misconduct would not affect their deliberations in any way and were appropriately admonished. *See id.* at 561, 564, 566, 80 P.3d at 453, 455-56. Accordingly, Brown has failed to show that the district court abused its discretion by denying his motion for a new trial.

Second, Brown argues that admitting a recording of a 911 call made by an unavailable witness violated his right to confrontation. Statements made with the primary purpose of resolving an ongoing emergency, such as ending a threatening situation, are nontestimonial and fall beyond the scope of the Confrontation Clause. *Michigan v. Bryant*, 562 U.S. 344, 359, 361 (2011); *Harkins v. State*, 122 Nev. 974, 987-88, 143 P.3d 706, 714-15 (2006). As Brown has failed to provide a written transcript or audio recording of the 911 call, *cf. Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."), our review is limited to the district court's description of the call's contents, which shows that the dispatcher asked questions to meet an ongoing emergency, as the call was made immediately after the perpetrator left the store by a person still under considerable distress and the dispatcher first asked if the perpetrator had a gun to determine whether there was a continuing threat to responding officers and the public. Accordingly, Brown has failed to show that the district court erred in determining that the 911 call recording was nontestimonial. *See Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (reviewing Confrontation Clause claims de novo as questions of law).

Third, Brown argues that the district court abused its discretion in denying his motion to recuse or disqualify Judge Adair. Brown argues that Judge Adair told him that he would receive a harsh sentence in

an earlier proceeding unless he pleaded guilty and that Judge Adair's impartiality was accordingly suspect. Brown's uncorroborated, conclusory proffer of judicial bias is not supported with a factual basis to warrant recusal. Regardless, the statement of which Brown complains does not rise to the level of judicial bias. *See Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009). The district court therefore did not err in denying Brown's recusal motion. *See Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011) (reviewing judicial impartiality challenges de novo).

Fourth, Brown argues that the State's late disclosure of the investigating detective's disciplinary record violated *Brady v. Maryland*, 373 U.S. 83 (1963). We review de novo whether the State adequately disclosed exculpatory information under *Brady*. *Lay v. State*, 116 Nev. 1185, 1193, 14 P.3d 1256, 1262 (2000). Having reviewed the record, we note that the State disclosed the contested information before trial and conclude that the timing of its disclosure did not constitute reversible error because the disclosure was made at a time when the evidence was of value to Brown, who cross-examined the detective and argued on the disciplinary issue. *See Tennison v. City & Cnty. of San Francisco*, 570 F.3d 1078, 1093 (9th Cir. 2009). We therefore conclude that Brown has failed to demonstrate a *Brady* violation.

Fifth, Brown argues that the district court abused its discretion in denying his motions to suppress evidence arising from a pretextual traffic stop and an invalid search warrant. Brown's contentions lack merit. The city marshal who performed the traffic stop testified that he did so because the car's headlights were off while driving at night, which violated NRS 484D.100(1). As the stop was supported by probable cause, Brown's claim that the stop was a pretext for investigating a nearby robbery and thus

warrants relief fails. *See Gama v. State*, 112 Nev. 833, 836-37, 920 P.2d 1010, 1012-13 (1996) (rejecting suppression claim based on pretextual traffic stop where vehicle stop was supported by probable cause and thus reasonable). Further, the record belies Brown's contention that the marshal heard the report of the robbery over his radio.

Brown's challenges to the search warrant's validity also fail on this record. First, the record shows that Brown was read his *Miranda* rights after his arrest, the passage of two days does not per se erode the validity of the *Miranda* admonishment, Brown identifies no other factual circumstances suggesting that his waiver was not knowing and voluntary, and Brown's contention that the police were required to re-Mirandize him before each interrogation lacks merit. *See Koger v. State*, 117 Nev. 138, 141-43, 17 P.3d 428, 430-32 (2001) (reviewing totality of circumstances in assessing *Miranda* waiver and noting that gaps of multiple days do not per se invalidate waiver). Second, the record belies Brown's claim that his girlfriend did not tell the police that he lived with her. Third, the probable cause supporting the search warrant had not become stale because it was reasonable to presume that searching the residence would yield the clothing that the suspect could be seen wearing in surveillance video footage when the residence was Brown's, Brown was incarcerated and unable to destroy or remove the clothing, the suspect in the video footage appeared to be Brown, and Brown's accomplice confessed to their involvement in the crimes charged. *See Garrettson v. State*, 114 Nev. 1064, 1069, 967 P.2d 428, 431 (1998). Accordingly, Brown has failed to show that the district court erred in denying his suppression motions. *See State v. Beckman*, 129 Nev. 481, 486, 305 P.3d 912, 916 (2013) (reviewing conclusions of law regarding suppression issues de novo).

Sixth, Brown argues that evidence of the traffic stop was an uncharged bad act that was improperly admitted. Brown's discussion of the eighth robbery that was charged federally is misplaced, as that robbery was not discussed at trial. And to the extent that being involved in a traffic stop may constitute a bad act within the meaning of NRS 48.045(2), it did not involve Brown's bad act here, as his accomplice was driving. Brown has therefore failed to show that the district court erred in this regard.

Seventh, Brown argues that the presentation of inadmissible evidence tainted his grand jury proceedings and that the district court should have granted his pretrial habeas petition. Even if the marshal's grand jury testimony regarding Brown's flight from the traffic stop was inadmissible, the State presented sufficient legal evidence to establish probable cause and thus to sustain the grand jury indictment by presenting store-clerk testimony that seven convenience stores were robbed, surveillance video and/or still photographs showing the suspect, and several identifications by store clerks that Brown was the suspect. *See Dettloff v. State*, 120 Nev. 588, 595-96, 97 P.3d 586, 590-91 (2004) (observing that jury's conviction beyond a reasonable doubt cured any irregularities in grand jury proceedings after concluding that evidence supported grand jury's determination of probable cause). Accordingly, the district court did not err in denying pretrial habeas relief.

Eighth, Brown argues that the photographic lineups presented to the witnesses were impermissibly suggestive because his photograph had the darkest skin tone and was the only one matching the suspect's hairstyle and with visible teeth. Noting that our review is limited because Brown has not provided a copy of the lineup and that we are constrained to the poor-quality image included in the State's appendix, *see Thomas v. State*, 120

Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) (noting that appellant bears the duty of providing the "portions of the record essential to determination of issues raised in appellant's appeal"), we note that all of the individuals pictured appear to be black men; that the detective informed the witnesses that hairstyles are easily changed; and that, even if visible, Brown's teeth were not suggestive of the suspect, as the lower portion of the suspect's face was covered in each robbery. As the individuals pictured matched the general description of the suspect, Brown has failed to show that the photographic lineup was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Thompson v. State*, 125 Nev. 807, 813-14, 221 P.3d 708, 713 (2009) (internal quotation marks omitted). Accordingly, Brown has not shown that the district court erred in refusing to exclude the identifications.

Lastly, Brown argues that cumulative error warrants relief. As Brown has failed to identify any instances of error, there is no error to cumulate, and this claim fails.

Having considered Brown's contentions and concluded that relief is not warranted, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.

Gibbons, J.

Pickering, J.

cc: Hon. Valerie Adair, District Judge
The Law Office of Dan M. Winder, P.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APPENDIX E

STATE OF NEVADA
V.
TRACEY LEWIS BROWN

TRIAL COURT'S FACTUAL FINDING THAT THERE WAS A DELIBERATE ATTEMPT BY THE CO-DEFENDANT WITNESS'S FRIEND TO INFLUENCE THE JURY IN THE ELEVATOR

SEPTEMBER 24, 2015

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. TRACEY LEWIS BROWN, Defendant.	CASE NO. C276549 DEPT. NO. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

THURSDAY, SEPTEMBER 24, 2015

RECORDER'S TRANSCRIPT RE:
DEFENDANT'S OBJECTION TO PSI AND NOTICE OF HEARING

APPEARANCES:

For the State: ALICIA A. ALBRITTON, ESQ.
Deputy District Attorney

For the Defendant: SCOTT C. DORMAN, ESQ.

RECORDED BY: SUSAN SCHOFIELD, COURT RECORDER

Hawkes' telephone number.

Your Honor told the jurors if any misconduct occurs report it immediately. Nothing happens Friday, nothing happens Saturday, nothing happens Sunday. When Juror No. 2 goes up and says well I'm reporting this, everybody kind of starts getting in line it seems like. But still, of the jurors on there, only two actually reported it, Juror No. 2 and Juror No. 4, after it was apparent that the Court was being made aware of this.

So, Judge, you've got a contact with jurors that was improper, illegal, or whatever you want to call it. Once that was done, you've got to look at, you know, what type of contact. It appeared to one of the jurors that it was a deliberate attempt to influence.

THE COURT: Right, and let's be clear here. The deliberate attempt was made by the co-defendant/witness's, former co-defendant/witness's friend.

MR. DORMAN: Correct. A person we never even had a chance to, you know, if it had been Ms. Gallon talking at least the jurors could have said well Mr. Dorman made Ms. Gallon, you know --

THE COURT: Come back?

MR. DORMAN: Yeah. And so -- and you don't have any reporting of it. It's this extrinsic -- you've got, I believe in my opinion, a juror's doing misconduct, you've got misconduct, extrinsic nature, by these third parties, it's not reported to the Court for over, I think I figured it up, 63 some hours perhaps.

And, Your Honor, Mr. Brown's looking at a lot of time in this case and, Judge, we're just asking for a fair trial, one that we can't look back -- and before I do summation on that, Judge, and we tell jurors report this stuff immediately. That's what you told the jurors, report this stuff immediately.

APPENDIX F

STATE OF NEVADA
VS.
TRACEY LEWIS BROWN

TRIAL COURT RULING ON THE STANDARD BEING A NEW TRIAL MUST BE GRANTED UNLESS IT APPEARS BEYOND A REASONABLE DOUBT THAT NO PREJUDICE HAS RESULTED FROM THE EX PARTE COMMUNICATION ATTEMPTING TO INFLUENCE THE JURY

MARCH 23, 2015

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA, Plaintiff, vs. TRACEY LEWIS BROWN, Defendant.	)	CASE NO. C276549-1 DEPT NO. XXI **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

JURY TRIAL - DAY 6

MONDAY, MARCH 23, 2015

APPEARANCES:

For the State: MEGAN S. THOMSON, ESQ.
ALICIA A. ALBRITTON, ESQ.
Chief Deputy District Attorneys

For the Defendant: DAN M. WINDER, ESQ.
SCOTT DORMAN, ESQ.

RECORDED BY: DEBRA WINN, COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

what's occurred, and I'm not saying they intentionally did anything, but the fact that this happened, my client can't have a fair trial, and we don't get a chance to cross-examine Ms. Gallon's friend. There is confrontation issues, you know, et cetera.

Thank you, Your Honor.

THE COURT: Ms. Thomson --

I mean, the standard is -- I don't know. I think the impact was pretty innocuous because, I mean, at some point you've got to believe people are telling the truth. I think the jurors pretty much -- I think they, A, knew something wrong had happened --

MR. WINDER: Right.

THE COURT: -- and, B, it didn't really impact them that much.

MR. WINDER: Well, and, Your Honor, I think just --

THE COURT: Well, the standard though is a new trial must be granted unless it appears beyond a reasonable doubt that no prejudice has resulted.

MR. WINDER: Yes, Your Honor. And they talk about on page 4 that --

THE COURT: Of that letter?

MR. WINDER: -- some types of extrinsic influence are by their nature more prejudicial, such as the direct third-party communication with a sitting juror, and that's what